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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. V.

CALIFORNIA—CONSPIRACY.

THE GILBERT BOOK COMPANY.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.



CERTIFICATES OF APPROVAL.

[CARRIERS.]

The subject of Carriers was edited by JAMES SCHOULER, Esq., one of the final editors of Federal Decisions, and, therefore, the rejected cases were not submitted to any other editor.

[CHAMPERTY AND MAINTENANCE. CHURCHES AND BENEVOLENT ASSOCIATIONS.]

BOSTON, MASS., May 28, 1884.

I hereby certify that the cases under "Champerty and Maintenance" and "Churches and Benevolent Associations," submitted to me by the general editor of "Federal Decisions," and as not appearing important enough to be printed in full under those heads, appear to me to have been thrown out, after being digested, with good discretion. Nor do I think them important enough to be printed in full under any head.

MELVILLE M. BIGELOW.*

[CITIZENS AND ALIENS. CONSIGNOR AND CONSIGNEE.]

BOSTON, MASS., May 28, 1884.

I hereby certify that the cases under "Citizens and Aliens" and "Consignor and Consignee," submitted to me by the general editor of "Federal Decisions," and as not appearing important enough to be printed in full under those heads, appear to me to have been thrown out, after being digested, with good discretion.

JAMES SCHOULER.†

* Author of works on Bills and Notes, Fraud, Estoppel, Elements of Equity, Elements of the Law of Torts, Leading Cases on the Law of Torts, English Procedure, etc.

† Author of treatises on Domestic Relations, Personal Property, Bailments, Executors and Administrators, and a History of the United States under the Constitution.

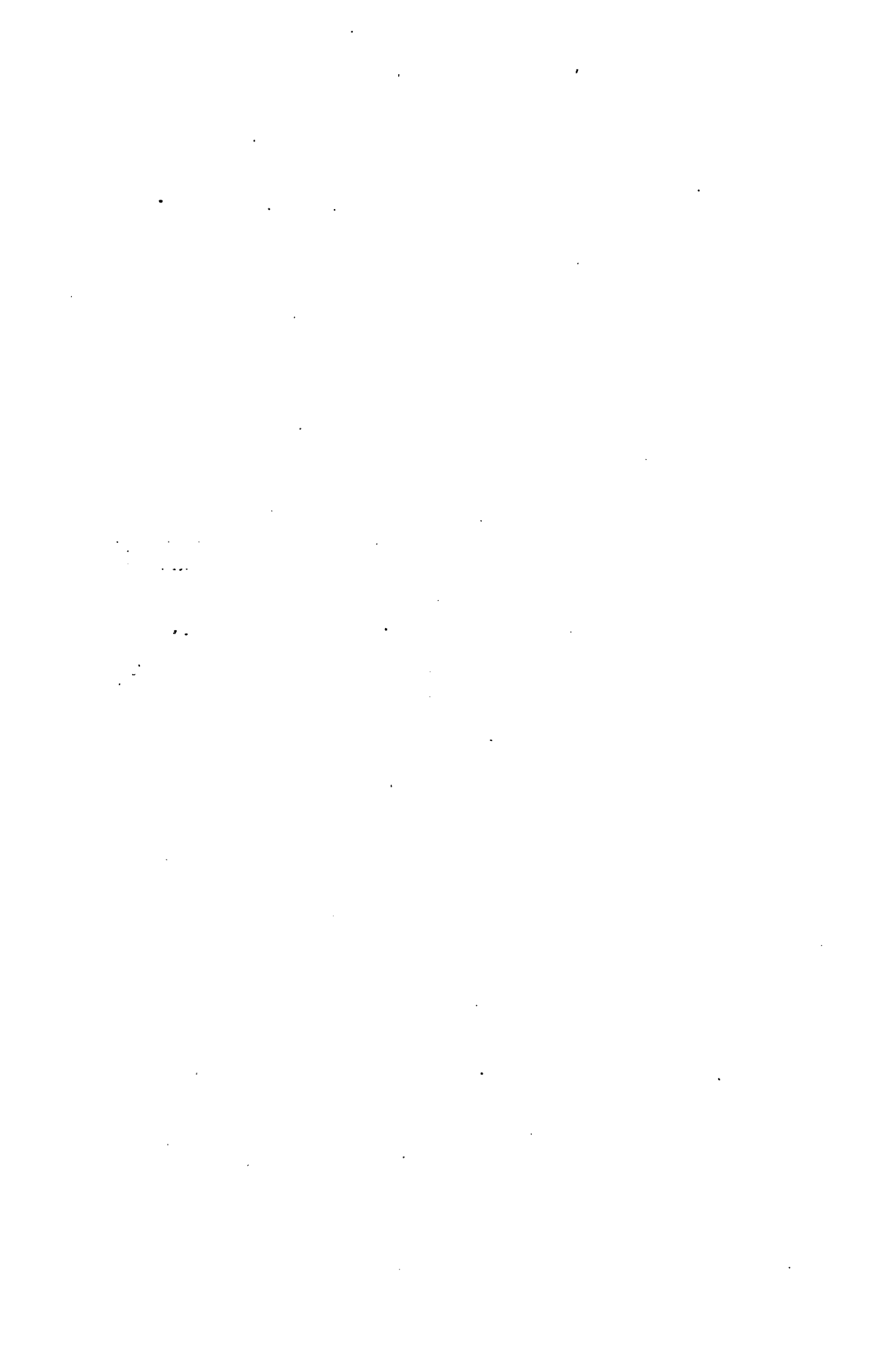


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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall.....	Marsh.
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Black	Black.	Mason	Mason.
Blatchford.....	Blatch.	Montana Territory	Mont. T'y.
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Curtis	Curt.	Story	Story.
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Dallas	Dal.	Taney	Taney.
Daveis.....	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court	Wall. C. C.
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Flippin	Flip.	Washington.....	Wash.
Gallison	Gall.	Washington Territory.....	Wash. T'y.
Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods.....	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

CALIFORNIA.

See STATES.

CALIFORNIA LAND TITLES.

See LAND.

CANAL COMPANIES.

§ 1. Prior to 1847, the state of Indiana, under various statutes, had constructed and operated a canal. In 1847 the canal was conveyed to trustees for the benefit of creditors. On a proceeding by the creditors the property was sold under a decree of court in 1875, and the intervening petitioner in this case became the purchaser of a part. In 1872 the defendant railway company took possession of a part of the tow-path of that portion purchased by the petitioner, upon which it constructed its railroad, without authority from the state, or the board of trustees, so far as anything is shown in the case. The railway company made a mortgage of its property, and in 1877 the property was sold under a decree of foreclosure on the petition of the plaintiffs in this case. The intervening petitioner claimed that the state held an absolute title in the land, and the petition was referred to a master to ascertain what compensation he was entitled to for that portion of the property used by the railway company. Long before the rights of the creditors were sought to be enforced the canal had been abandoned as such, and had ceased to be used as such for several years. *Held*, in view of the legislation of the state, that the state acquired an absolute title to the property, and that the title was not lost because the canal was abandoned; that the petitioner by his purchase under the proceeding by the creditors acquired title, and was entitled to compensation. *Mason v. Lake Erie, etc., R'y Co.*, * 1 Fed. R., 712; 9 Biss., 242.

§ 2. The bill in this case contains the following allegations: That, prior to the year 1784, the appellant, and those under whom he claims, held title to, and were in possession of, certain tracts of land on the shore of the River Potomac where the said river was innavigable; that these lands, being situated on that part of the river called the Little Falls, were susceptible of being improved by applying the water of the said river to manufacturing purposes, and were, prior to the year 1784, intended by the proprietors to be so improved; that when the charter of the Potomac Company was granted, it was known that such improvement was intended. And that the charter expressly secured the rights of such proprietors by the thirteenth section of the act incorporating that company in the year 1784; that in the year 1825 the Chesapeake & Ohio Canal Company obtained a charter, by which, and the proceedings under it, this company obtained a surrender from the Potomac Company of all its chartered rights, privileges and property, and now holds the same in the same manner and to the same effect as they were before held by the Potomac Company; that in the year 1793 the Potomac Company made a condemnation, under its charter, of a portion of these lands for a canal, and made a canal through the same, which was so constructed as to admit more water than was necessary for navigation, which surplus water was wasted on the lands of the complainant at four sluice gates and three waste dams, and continued to be so wasted at such places during the continuance of the works of the said company.

The specific relief prayed is, that the complainant be allowed to use the surplus water now admitted into the canal and feeder, which, he avers, is abundantly sufficient both for naviga-

tion and manufacturing purposes. And, if found insufficient, then to be allowed to have the works enlarged, upon equitable terms, to admit a sufficient supply of water for both purposes. *Held*, that the relief sought could not be granted under the following section of the charter: "Whereas some of the places through which it may be necessary to conduct the said canals, may be convenient for erecting mills, forges or other water-works, and the persons, possessors of such situations, may design to improve the same; and it is the intention of this act not to interfere with private property, but for the purpose of improving and perfecting the said navigation: Be it enacted, that the water, or any part thereof, conveyed through any canal or cut made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the same shall be led be first had. And the said president and directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer both the purposes of navigation and water-works aforesaid, to enter into reasonable agreements with the proprietors of such situation concerning the just proportion of the expenses of making large canals or cuts capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water-works as aforesaid." *Binney v. Chesapeake & Ohio Canal Co.*,* 8 Pet., 201.

§ 3. The statute of Virginia under which the Chesapeake & Ohio Canal Company was incorporated contained a provision exempting the canal and its works from taxation. This provision was adopted, so far as the company had property in the District of Columbia, by the act of congress of March 3, 1825 (4 Stat., 110), which authorized the construction of the canal in the District. *Held*, that a sale of the property for taxes in 1864 was void. *Markall v. Chesapeake, etc., Canal Co.*, 4 Otto, 808.

§ 4. From a review of the legislation of Kentucky and the joint resolution of congress of 1860, the court arrives at the conclusion that the Louisville & Portland Canal Company is still in existence; that it had power to sue and to control its revenues so far as might be necessary for the purposes contemplated by law. *United States v. Louisville & Portland Canal Co.*,* 1 Cent. L. J., 101.

CANCELLATION.

See EQUITY.

CAPIAS.

See WRITS.

CAPTURE.

See WAR.

CAPTURED AND ABANDONED PROPERTY.

See WAR.

CARGO.

See CARRIERS: MARITIME LAW.

CARONDELET.

See CORPORATIONS.

CARRIERS.*

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I. COMMON CARRIERS IN GENERAL.

1. *Who are Common Carriers.*

SUMMARY — *Owners of steam-tugs or tow-boats are not*, §§ 1, 2.

§ 1. Owners of a steam-tug or tow-boat, engaged in towing vessels from point to point, are not liable as common carriers, but are only bound as ordinary bailees for hire, to exercise ordinary care and diligence. *The Neaffie*, §§ 3-7.

§ 2. Owners of scows which are engaged in transporting dirt, and are moved by means of tugs, held, not liable as common carriers, but only as ordinary bailees; especially where the employment to transport for others is only occasional and not as a public vocation. *Bell v. Pidgeon*, §§ 8-10.

[NOTES.—See §§ 11-20.]

THE NEAFFIE.

(Circuit Court for Louisiana: 1 Abbott, 465-469. 1870.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The case was this: On May 28, 1866, the steam-tug *Neaffie* undertook to tow a flat or barge laden with hay from Jefferson City to the flat-boat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by *The Neaffie* sunk. The damage sustained by the sinking of the flat is agreed to be \$3,150. The libelants charge that the sinking of the flat was in consequence of the collision, and that the collision was brought about by the carelessness of Cook, the master of *The Neaffie*; and in argument they allege that *The Neaffie* was a common carrier, and responsible for all damages to the flat not occasioned by the act of God or the public enemy. The claimants answer, that when *The Neaffie* approached the flat for the purpose of towing down to the flat-boat wharf, they found her in a leaky condition, and refused to take her in tow except at the risk of her owners, to which the captain and part-owner of the flat assented. They deny any carelessness on the part of the master of *The Neaffie*, and deny that there was any collision whereby the flat was damaged; or that the sink-

*Edited by JAMES SCROULER, Esq., of Boston, Massachusetts.

ing of the flat was the consequence of any damage received by her collision with the other flat lying at the wharf. They allege that the slight impingement of the one flat against the other was caused by a sudden eddy or boil in that part of the river. In the view I have taken of this case, these are the only facts alleged on either side which it is necessary to recite.

§ 3. *Tow-boat not liable on facts, unless as common carrier; ordinary care and diligence here shown.*

The naked fact that the flat of the libelants, while in tow of The Neaffie, did impinge upon the flat made fast to the wharf, and that in a very short time thereafter she sunk, raises a presumption of mismanagement and negligence on the part of the captain of the steam-tug, and fixes a liability for damages sustained upon her owners, unless contrary proof is adduced showing ordinary care and diligence. I have searched the testimony in this case in vain to find any act of carelessness or negligence on the part of the captain of The Neaffie. On the contrary, the proof shows, to state the result in the mildest form, reasonable care and diligence. No witness speaks of any act done or omitted showing want of skill or care on the part of The Neaffie. Under this state of facts The Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier.

§ 4. *Business of tow-boat in present case.*

The business of The Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

§ 5. *What is a common carrier.*

A common carrier is often defined to be, "One who undertakes for hire to transport the goods of such as choose to employ him from point to point." This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." Was The Neaffie a common carrier under either of these definitions?

§ 6. *Steam-tug which tows boats and cargoes not a common carrier.*

Chief Justice Marshall, in *Boyce v. Anderson*, 2 Pet., 150, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers. Can it be said that the tug-boats plying in the harbor of New Orleans undertake to transport the goods found on the water craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case. The tug-boats plying in New Orleans harbor do not receive the property into their custody,

nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow-boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow-boats are not common carriers has been held in the following cases: *Caton v. Rumney*, 13 Wend., 387; *Alexander v. Greene*, 3 Hill, 9; *Wells v. Steam Navigation Co.*, 2 Comst., 204; *Pennsylvania, Del. & M. Nav. Co. v. Dandridge*, 8 Gill & J., 248; *Leonard v. Hendrickson*, 18 Penn. St., 40. In *Vanderslice v. The Superior*, Mr. Justice Kane held a steam tow-boat liable as a common carrier; but when the case came before the circuit court, Mr. Justice Grier said he could not assent to the doctrine. I am aware that a contrary doctrine has been applied by the supreme court of Louisiana to steam-tugs towing between the city of New Orleans and the mouth of the Mississippi river. These tow-boats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold tow-boats not to be common carriers.

§ 7. *Tow-boat liable only for ordinary diligence and care.*

Holding, then, that *The Neaffie* was not a common carrier, and that she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of *The Neaffie*, it follows that the libel must be dismissed at the costs of libellant. The cross-libel of claimants, not being supported by any proof, is also dismissed.

Libels dismissed.

BELL v. PIDGEON.

(District Court for New York: 5 Federal Reporter, 634-633. 1831.)

Opinion by BENEDICT, D. J.

STATEMENT OF FACTS.— This action is brought to recover the value of a quantity of chalk lost while being transported through the East river upon a vessel called *Scow No. 1*, owned by the defendant. The occupation of the defendant is that of a dock and bridge builder. In his business he had occasion to transport dirt and stones, and for that purpose he owned and used several scows — flats constructed solely to carry rough matter upon their decks, and moved by means of tugs. The defendant employed these scows for the most part in his own business, but he sometimes chartered a scow to other parties by the day or the month. He was not in the carrying trade, and was not in the habit of transporting any cargo except his own. His scows, when employed by him, were used solely to transport his own articles in his own business; when chartered to others, any transporting done by means of them was done at the expense of the charterer. In the present instance the libellant applied to the defendant to carry for him a quantity of chalk from along-side the ship *Ruby*, in the North river, to Newtown creek, at so much per ton. The employment was accepted, and, in pursuance thereof, about two hundred tons of chalk were thereafter laden on *Scow No. 1*, to be transported on the deck thereof through the East river to Newtown creek. The method of loading the chalk upon deck was in accordance with the understanding of the parties, and no fault is shown

either in regard to the quantity of chalk taken on board the scow, or in regard to the method of stowing it. When loaded the scow was taken in tow by a tug belonging to the defendant, and proceeded on her way to Newtown creek. While passing up the river three large sound steamers were met about off Grand street, coming down the stream nearly abreast. The tug, with the scow upon a hawser astern, was about in the middle of the river, going at half speed. As the steamers approached, the tug blew her whistle several times, and when they came nearer the pilot waved his hat to call their attention; he also stopped his engine. One of the steamers passed the scow to port, and two on the starboard. On passing they went so near and at such speed as to create a swell, which broke over the scow and caused her to roll so that she dumped all the chalk into the river. There was room for the steamers to have passed at a greater distance, and they might have reduced their speed, in either of which cases the swell would not have been dangerous.

In addition to these facts the libellant claims to have shown that the hatch covers on the scow were insecurely fastened, and by reason thereof when the swell struck the scow the covers were washed off the hatches, and so a quantity of water was allowed to go into the hold, which by its presence increased the rolling of the scow and was the immediate cause of the loss of the chalk. But I am unable to find such a state of facts. The hatch covers were washed off by the swell and water went below; but the evidence will not justify the conclusion that the water taken in through the hatches conduced in any considerable degree to the loss of the chalk. There is no good reason to doubt that the chalk would have been lost all the same if the hatch covers had not been washed off. Neither am I able to conclude that there was any negligence in the management of the tug. She was where she had a right to be; was moving at half speed; did all that she could to warn the steamers, and all that she could to mitigate the effect of the swell which the steamers raised.

§ 8. *Question, whether, in the absence of negligence, defendant is liable; i. e., whether he is a common carrier.*

The case, therefore, presents the question whether, in the absence of any negligence on the part of the defendant or his agents, he is liable for the chalk lost in the manner described. If the relation of the defendant to this cargo was that of a common carrier, his liability cannot well be disputed; for he made an unqualified contract to safely transport and deliver the cargo in question.

§ 9. — *common carrier's liability under such circumstances stated.*

The non-performance by a common carrier of his contract can only be excused by showing that the loss arose from the act of God or of the public enemy. The swell that overwhelmed the defendant's scow was not the effect of storm or tempest; it was not an act of nature — it was the act of man; namely, of those who were navigating the steamers, and who by their method of navigation raised a swell at this point that it was not possible for the scow to resist. Damage so caused seems to be strictly analogous to damage caused by collision resulting from faulty navigation. In the case of collision a vessel is by negligence driven against another vessel. Here, a vessel by faulty navigation drives the water in an irresistible manner upon another vessel, and so causes damage. If such a swell as struck this scow was a necessary incident of navigation in the East river, by such boats as the sound steamers, the case might be different; but upon the evidence before me — none of which, however, comes from the passing steamers — it must be found that the creating of the dangerous

swell which caused this loss could have been avoided by reasonable care on the part of the steamers. The damage in question, therefore, was caused by the negligence of man, and not by the act of God. As no negligence on the part of the defendant or his agents has been shown, the damage in question might no doubt be held to have arisen from a peril of the seas, within the meaning of the ordinary exception of a bill of lading. But the defendant's contract contained no exception. It was an unqualified contract to transport and deliver; and, if it was made by the defendant in the capacity of a common carrier, his responsibility was that which the law, upon grounds of public policy, has attached to every common carrier, namely, that of an insurer against all loss or damage, unless caused by act of God or of the public enemy. The decision of the case turns, therefore, as I view it, upon the question whether the defendant was transporting this chalk in the capacity of a common carrier. "To constitute one a common carrier, he must make that a regular and constant business; or, at all events, he must for the time hold himself ready to carry for all persons indefinitely who choose to employ him." Redfield on Carriers, 15.

The case of *Lyon v. Mells*, 5 East, 428, is the strongest case that I have noticed in support of the plaintiff's contention; but in that case the point whether the defendant was a common carrier or not was not precisely decided. The point actually decided related to a notice limiting defendant's liability; and it does not seem to have appeared in that case, as it does here, that it was no part of the defendant's business to transport the goods of others. In that case, it was the opinion of Brett, J., that the defendant could not be held liable as a common carrier, and he says the defendant therein carried on business like any other owner of ships or vessels, which is by no means this case. In the present case the defendant did not hold himself out as ready to transport the goods of others. The proof is that he did no more than to use his scows in his own business, or to let them to others to be used in their business.

§ 10. *Upon facts, employment of scow and tug held not to be that of common carrier.*

Upon the facts of this case, I am, therefore, of the opinion that the defendant's occupation was not that of a common carrier, and that his relation to the chalk in question was simply that of bailee for hire. This being so, in the absence of negligence he is not liable for the loss in question, unless it be also held here, as was held in *Nugent v. Smith*, 3 Asp. M. L. C., 87, that every ship-owner who carries goods on board his ship for hire, is, in the absence of express stipulation to the contrary, by reason of his acceptance of the goods, liable as an insurer, except as against the act of God or the public enemy. The same position was taken by Brett, J., in the *Liver Alkali Works v. Johnson*, 2 Asp. M. L. C., 337, but it does not seem to have been the opinion of the court in that case; and upon the appeal in *Nugent v. Smith* it was distinctly, and I think successfully, challenged by the chief justice. 3 Asp. M. L. C., 198. No American case that I know of has so extended the rule applicable to common carriers; and I think it will be found impossible to apply so rigorous a rule to the transportation business of this country. Upon these grounds I am of opinion that the libel must be dismissed.

§ 11. *Who are carriers.*—Express company, engaged in carrying money, goods and parcels from one locality, held to be a common carrier, though employing other public conveyances. *Bank of Kentucky v. Adams Express Co.*, 8 Otto, 174 (§§ 149-98). See §§ 1481, 1482.

§ 12. A sleeping car company, *semble*, is not liable either as innkeeper or common carrier. *Blum v. Southern Pullman, etc., Co.*, 1 Flip., 500 (§§ 1427-30). See §§ 1345, 1346.

§ 13. Carriers are not necessarily common carriers for all purposes. The authorized employment may be limited. Carriers of goods are not necessarily carriers of passengers, and *vice versa*. A steamboat may transport passengers or merchandise, or both; but its owners are not by necessary implication common carriers of money or bank bills. The true nature and extent of the employment as held out to the public affords the test. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story 16 (§§ 63-83). See § 47.

§ 14. Nor is one a common carrier except where he receives or is entitled to receive recompense. *Ibid*.

§ 15. Railroads are not bound to transport as common carriers of money; though they may incur such liability by their methods of business. *Kuter v. Michigan Central R.*, 1 Biss., 35. See § 44.

§ 16. Railroad companies are liable as common carriers. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155; *Peik v. Chicago, etc., R. Co.*, 4 Otto, 164; *Munn v. Illinois*, 4 Otto, 118.

§ 17. A tug engaged in towing vessels for hire is not liable either as a common carrier or insurer, but for negligence as a hired bailee. *Abbey v. Steamboat R. L. Stevens*,* 22 How. Pr., 78; *Richards v. Tug Stranger*,* 13 Int. Rev. Rec., 150; S. C., 3 Ch. Leg. N., 217; *The Steamtug Enterprise*, 3 Wall. Jr., 58; *Brawley v. Steamboat Jim Watson*, 2 Bond, 356; *The Lyon*, 1 Brown, 59; *The Stranger*, 1 Brown, 281; *The Steamboat Angelina Corning*, 1 Ben., 109; *The Tug Oconto*, 5 Biss., 460.

§ 18. Owners of vessels employed in the carrying trade on the great lakes are common carriers. *The Juniata Paton*,* 1 Biss., 15. And see *The Huntress*, Dav., 82 (§§ 871-876).

§ 19. An advertisement of a general undertaking to carry goods, when identified with the party publishing, is admissible in evidence that such party is a common carrier. *Doty v. Strong*,* 1 Burn. (Wis.), 158.

§ 20. A ship-master is as well as a ship-owner regarded as a common carrier, and is liable for his own negligence and breach of duty. *White v. McDonough*, 3 Saw., 311. But as to the case where the ship-owner lets the whole of the vessel upon charter to one who is to furnish a full cargo, see *Lamb v. Parkman*, 1 Spr., 343.

2. Public Duties of the Vocation.

SUMMARY.—*Discriminations in receiving freight*, § 21.—*Other oppressive acts contrary to public policy*, §§ 22, 23.

§ 21. Discrimination in the rates of freight charged by a railroad to shippers, based solely on the amount of freight shipped, is contrary to sound public policy and a wrong to the disfavored party. And the latter may recover back the excess paid by him over the rates exacted from the most favored shippers. *Hays v. Pennsylvania Co.*, §§ 24-27.

§ 22. A railway company owning a dock refused to receive coal on its cars from a canal-boat lying there, unless the canal-boat would employ shovelers designated by the company, at its own price, to shovel the coal on board of the boat into tubs belonging to the company, which tubs were then to be hoisted by means of a derrick on the dock, so that the coal could be dumped into such cars. The price fixed by the company was claimed to be the ordinary market price, and this requirement was enforced against customers; but *semble* it made extra cost to the canal-boat. *Held*, that the requirement of the company was unreasonable and contrary to public policy. 318½ Tons of Coal, §§ 28-32.

§ 23. Where a stock yard has for twelve years been established at much expense, near a railroad depot, and maintained as a convenience to the railroad business, the railroad company cannot, at its arbitrary discretion, transfer its entire patronage so as to establish another stock yard a mile distant and deprive the former one of its business facilities. Preliminary injunction granted accordingly on the prayer of the owners of the former stock yard. *Coe v. Louisville, etc., R. Co.*, §§ 33-39.

[NOTES.—See §§ 40-43.]

HAYS v. THE PENNSYLVANIA COMPANY.

(Circuit Court for Ohio: 12 Federal Reporter, 309-314. 1882.)

Opinion by BAXTER, J.

STATEMENT OF FACTS.—The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville, and near de-

defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was \$1.60 per ton, with a rebate of from thirty to seventy cents per ton to all persons or companies shipping five thousand tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at \$1,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

§ 24. *Unjust discrimination in railroad freights is contrary to sound public policy.*

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was, nevertheless, constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders, but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry

fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads, to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care and responsibility in the handling. It has been held that twenty separate parcels done up in one package and consigned to the same person may be carried at a less rate per parcel than twenty parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing twenty parcels to one man than it does to receive and deliver twenty different parcels to as many different consignees.

§ 25. *English case cited and distinguished from the present.*

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of *Nicholson v. G. W. R. Co.*, 4 Com. B. (N. S.), 366, is, in its facts, more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of ten years, as much coal, for a distance of at least one hundred miles over defendant's road, as would produce an annual gross revenue of £40,000 to the railroad company in fully-loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice referred to by the statute must be undue or unreasonable to be within the prohibition, and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully-loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of one hundred miles, to produce a gross revenue to the railroad of £40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

§ 26. *Discrimination based solely on the amount of freight shipped is a discrimination in favor of capital and wrongful.*

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for ten years to the railroad company, and to tender the same for shipment in fully-loaded trains, at the rate of seven trains per week. It was in consideration of these obligations — which, in the judgment of the court, enabled the railroad company to perform the service at less expense — the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully-loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

§ 27. — *courts are competent to give redress to the party wronged by such discrimination.*

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of

every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress. The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

318½ TONS OF COAL.

(Circuit Court for Connecticut: 14 Blatchford, 453-463, 1878.)

APPEAL in a suit *in rem*. The following is the decision rendered in the district court:

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—The New Haven & Northampton Company is a railroad corporation duly incorporated by the legislature of the state of Connecticut, and owning and operating a line of railroad, for the transportation of persons and goods, from New Haven, Connecticut, to Northampton, Massachusetts. Said corporation is a common carrier, and a considerable portion of its regular business is the transportation of coal from New Haven to the various places upon the line of its railroad. This coal is brought from different coal ports to the port of New Haven, in coal barges, or in coal vessels, and is delivered to said railroad company upon its dock in said city, commonly called the canal dock. About one hundred and forty thousand tons of coal are annually received at this dock. By the universal custom of the port of New Haven, which custom was known, understood and assented to by the libelants, and in conformity with which custom the contract evidenced by the bill of lading hereafter recited was entered into by them, coal consigned to a railroad company, or to consignees upon the line of a railroad company, and which coal is to be transported by the railroad company, as an intermediate carrier, must be delivered to said company in its coal cars, unless some other place of delivery is expressed in the bill of lading. The said New Haven & Northampton Company, for the convenient, speedy and economical delivery of said coal, has erected upon the canal dock derricks furnished with buckets or tubs, which derricks and buckets are operated by steam power. The buckets, being lowered upon the deck of a coal barge lying alongside of the dock, are filled with coal by shovelers upon the vessel, who are paid by the owners of the barge, and the buckets are moved by steam power over the coal car, and the contents are dumped into the car. For the use of this machinery and these appliances, the railroad company receives ten cents per ton from the barge owner. This method of delivery is the ordinary one, and is the method which the railroad company has provided, both for its own accommodation and for that of the barge owners. In the present condition of the wharf, which is traversed on one side with railroad tracks, which are being occupied with cars and engines,

the only practicable method of delivery, and the only practicable place from which delivery can be made, is under the derricks. The duty of the shovelers is swiftly to fill the buckets from the vessel. Prior to September 4, 1871, the shovelers were always selected by the captains of the barges, and were paid directly by them. On that day said railroad company established the following rule, printed copies of which were posted conspicuously upon the wharf: "New Haven & Northampton Company. Special notice. All coal vessels discharging at the dock of the New Haven & Northampton Company will be under control of the dock-master from time of arrival till discharged, and he will furnish men to discharge their cargoes. Chas. N. Yeamans, Vice-Prest and Supt. M. C. Parker, Gen. Freight Agt."

Under this notice the railroad company has claimed the exclusive right to furnish, at the regular price, shovelers to discharge coal cargoes, and to refuse to receive coal unless these shovelers, so furnished at such regular price, were employed by the barge captains; and if this latter rule is not embraced in the notice, there has been such a rule, in addition to the notice, well understood by the owners of barges generally, and by the libelants. The libelants have known that the railroad company would not allow coal to be discharged at their wharf except by shovelers whom they selected and furnished to the captains. The company has derived no pecuniary benefit from furnishing the shovelers, who were paid nothing except for shoveling, and who performed no service for the company. They were paid from September 4, 1871, to the date hereafter mentioned, uniformly ten cents per ton, which sum was paid by the captains of the barges to the dock-master, with the amount of the bill for hoisting and dumping, and by him paid to the shovelers. This rule was adopted by the company because they deemed its adoption to be a convenience and benefit to the freighting public. Previous to the time of its adoption a strike had occurred among the shovelers, and delays had occurred arising from the shovelers absenting themselves, or deserting after they had been hired. Since the adoption of the rule delivery of coal has been more rapidly conducted, and fewer delays have occurred. The consignees of coal deem the rule a reasonable one. From September 4, 1871, until a short time prior to April 22, 1876, the uniform price for shoveling in New Haven had been ten cents per ton. In the spring of that year this price began to break, and coal was shoveled at other wharves at eight cents per ton, and good shovelers could easily be obtained at that price. The general and customary price in New Haven had not, however, then dropped to eight cents, and had not been lowered at the canal dock. The officers of the railroad company were not aware of this breakage in the market. The Derby Railroad Company has a similar rule. The New York, New Haven & Hartford Railroad Company, which receives about two hundred and fifty thousand tons of coal annually at its wharf, does not have such a rule. All the companies have similar facilities for hoisting and dumping, for the use of which compensation is paid by the barge owners. No question is made in regard to the reasonableness of requiring this compensation. On April 19, 1876, the libelants, who are the owners of the barge Joseph Wilkins, received on board said boat at Brooklyn, N. Y., 318½ tons of coal for delivery to the Glasgow Company at the canal dock in New Haven. The agreed rate of freight was sixty cents per ton. The Glasgow Company is a manufacturing corporation at South Hadley Falls, in Massachusetts, a place upon the line of said railroad. Said coal was to be delivered to said railroad company as an intermediate carrier, and was by said company to be then carried and delivered

to the owners. A bill of lading, of which the following is a copy, was signed by the captain of the Wilkins: "New York & Eastern Department, North 8th, 9th and 10th St. wharves, Brooklyn, E. D., April 19, 1876. Received, in good order, from the Philadelphia & Reading Coal & Iron Co., on board the Bt. Joseph Wilkins, whereof I am master, 318½ tons of coal (2,240 pounds each), which I agree to deliver to Glasgow Co., Canal Dock, New Haven, danger of the seas excepted, they paying freight for the same at the rate of sixty cents per ton. No. 491. Advance to captain \$9.55 for 'trimming.' No. of tons, 318½. Freight per ton, 60 cts. C. F. Smith."

The libelants were aware of said rule of the railroad company in regard to shovelers, and were also aware that shoveling could be hired at eight cents per ton. Said barge arrived at the canal dock on April 22, 1876, and the agent of the libelants informed the railroad company of its arrival and his readiness to deliver the coal. He also said that he should employ his own shovelers, unless the railroad company would furnish laborers at eight cents per ton. He was willing to employ the shovelers whom the company might furnish if they would furnish at eight cents. The boat was placed under the derrick designated by the company. The libelants' agent hired his shovelers at eight cents, and was ready, and offered to enter upon the discharge and delivery of the coal into the coal cars of the company upon its wharf. The company refused to put on steam, or to receive the coal at that place, unless the barge employed its shovelers at ten cents per ton. The barge was removed to another point, so as to accommodate an incoming barge, and, after various interviews between the libelants' agent and one of the libelants, with the proper officers of the company, and a delay until May 1, 1876, the stipulation mentioned in the twelfth article of the libel and the twelfth article of the answer was entered into, and the vessel was discharged on May 2, 1876. Five days are allowed for discharging a three hundred-ton coal vessel in New Haven. The ordinary demurrage for coal vessels is six cents per ton. The said rule of the company is an unnecessary one in the present condition of the coal traffic in the port of New Haven. I find that the first, second, third, fourth, fifth, sixth, seventh, eleventh and twelfth articles of said libel, and the fifth and twelfth articles of the answer, are true. The amount of freight upon said coal, less the amount which was paid, is \$171.55.

In the above finding I have omitted to enter into the details of various conversations between said parties, or the details in regard to the removal of the barge from one point to another, believing the same not to be necessary to the decision of the point in issue between the parties, which is the validity and reasonableness of the rule of the railroad company, which requires that coal should be unladen from vessels lying at its wharf by shovelers selected and furnished by the company at the ordinary price which is paid for the same service at other wharves in the harbor. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event the contract of affreightment was complied with by the libelants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the canal dock. It is admitted that the

company, upon notification that the coal was ready to be discharged, replied that said cargo might be forthwith discharged, and would be received by it for the defendants.

§ 28. *Railroad company's wharf is used in connection with its public vocation.*

The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used (*Croucher v. Wilder*, 98 Mass., 322); but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation.

§ 29. *Duty of common carrier to receive for all upon reasonable compensation.*

"Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. . . . As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action." 2 Kent's Comm., 599. A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. *Crouch v. London & N. W. R'y Co.*, 14 Com. B., 255. The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike.

§ 30. *Carrier cannot compel barge owners to employ its shovelers about the barge.*

The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shoveling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner—you shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be han-

dled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier, for which he is responsible, and should be in his own control. *Beadell v. Eastern Counties R. Co.*, 2 Com. B., N. S., 509. It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery. It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

§ 81. — *abuses of such a requirement.*

It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company which is generally paid by others for the same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates determined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor. As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. "Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage." *Wordin v.*

Bemis, 32 Conn., 268. The libelants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less \$19.55, the amount paid, to wit, the sum of \$171.55, and for damages in the nature of demurrage, for a detention for six days, being \$114.66.

§ 32. — *unreasonableness of this requirement affirmed on appeal.*

Opinion by BLATCHFORD, J.

The decision of this case in the district court was placed upon the ground that the New Haven & Northampton Company, as a common carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place it there, shovelers designated by the company, and pay such shovelers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the district court ignored the *status* of the company as a wharf owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libelants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, etc., is the use of the wharf; that all which the company did, was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shoveled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptance of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven"—the Glasgow company being a mill owner at a place on the line of the railroad company, and the latter company being the owner of the canal dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the track—the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on the wharf, no such charge was made. There was therefore no foundation for the requirement as to the shovelers in any relation between the company as a wharf owner and the boat.

The imposition of the requirement by the claimant's agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the district judge in his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable it would have been reasonable. It might indeed have been reasonable without being necessary. But, to be reasonable, it must be reasonable as respects both parties. In the present case the effect of the requirement was to

impose on the boat an unnecessary expense of two cents per ton of coal for shoveling into the tubs. There must be a decree for the libelants in affirmance of the decree below, with costs.

COE v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(Circuit Court for Tennessee: 3 Federal Reporter, 775-782. 1880.)

Opinion by BAXTER, J.

STATEMENT OF FACTS.—The defendant corporation owns the Louisville & Nashville Railroad, and, in virtue of its purchase of the southeastern lease of the Nashville & Decatur, and ownership of a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, controls every railroad centering at Nashville. It has, for many years past, been engaged in carrying such freights as are usually transported by rail, including live stock. Twelve or more years since, when it needed facilities for loading and delivering live stock, the complainants bought a lot contiguous to defendant's depot, in Nashville, at \$14,000, and fitted it up as a stock yard at a cost of \$16,000 more. There was no express contract between complainants and defendant in relation to the matter. But it is clear that it was a convenience to defendant's business. By the permission or acquiescence of defendant, complainants' yard was connected with defendant's road by appropriate stock gaps and pens, which have been in use by both parties for more than twelve years; but, on the 25th of March, 1880, the defendant and the Nashville, Chattanooga & St. Louis Railway Company entered into a contract with the Union Stock Yard Company, whereby the said stock-yard company stipulated "to erect, maintain and keep in good order," etc., "a stock yard in the city of Nashville, on the line of the Nashville, Chattanooga & St. Louis Railway," outside the city limits, and more than a mile from complainants' yard. And the parties of the first part — the railroad companies — among other things, agreed that "they would establish no other stock yard in Nashville," and that they would "deliver, and cause to be delivered, to said party of the second part all live stock shipped over the roads of the parties of the first part, and consigned to the city of Nashville; the parties of the first part hereby agreeing to make this stock yard of the party of the second part their stock depot for said city, and will not deliver at any other point or points of the city, and agree to deliver all live stock shipped to said city of Nashville at the yards of the party of the second part."

In furtherance of this contract Edward B. Stahlman, defendant's traffic manager, and owner of \$5,000 of the capital stock of the stock-yard company, issued the following order, addressed to defendant's agent, dated July 10, 1880: "On the 15th inst. there will be opened and ready for business the stock yards erected by the Union Stock Yard Company, at Nashville, Tenn. These yards have every facility for the proper handling and care of live stock, and will be constituted our stock delivery and forwarding depots. Live stock from and after that date consigned to Nashville proper, or destined to any points over our line via Nashville, should be way-billed care of the Union Stock Yards;" and on the 24th of the same month James Geddes, defendant's superintendent, supplemented the foregoing order with a notice to complainants in the following words: "I am directed by Mr. De Funiak, general manager, to notify you that after the last day of July, 1880, no delivery of stock will be made to you at our platform here, Nashville depot," to wit, the platform, gaps and pens communicating with complainants' yard, where the defendant had heretofore

delivered to them. Complainants remonstrated against this threatened discrimination against them and their business; but, being unable to induce any change in defendant's avowed policy, filed their bill in which they pray for an injunction to restrain "defendant's agents and officers and servants from interfering with or in any manner disturbing the enjoyment and facilities now accorded to complainants by the said defendant upon its lines of railway, for the transaction of business now carried on by the complainants, and especially from excluding or inhibiting persons from consigning stock to complainants, and from refusing to receive and transport stock from complainants' yard, and from interfering with or in any way disturbing the business of the complainants, and from refusing to permit the complainants to continue their business on the same terms as heretofore." The injunction asked for is both inhibitory and mandatory; it seeks to prohibit the doing of threatened and alleged wrongful acts, and to compel defendant to continue the facilities and accommodations heretofore accorded by defendant to complainants; and the question is, Are complainants entitled, preliminarily, to the relief prayed for, or any part of it?

§ 33. *How far may public carriers advance their own private interests and depress the business of particular persons for the benefit of certain others.*

The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities.

§ 34. — *railroads are bound to an expeditious and economical delivery of freights.*

As common carriers they are by law bound to receive, transport and deliver freights, offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee. But the rule which requires common carriers by land to deliver to the consignee personally at his place of business has been somewhat relaxed in favor of said roads on the ground that they have no means of delivering beyond their lines; but it was held in *Vincent v. Chicago & Alton R. Co.*, 49 Ill., 33, that at common law, and independent of the statute relied on in the argument, that in cases where a shipment of grain was made to a party having a warehouse on the line of the carrying road, who had provided a connecting track and was ready to receive it, it would be the duty of the railroad company to make a personal delivery of the grain to the consignee at his warehouse; because, say the court, "the common law rule must be applied, as the necessity of its relaxation" did not exist. This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided.

§ 35. *Can railroad, after encouraging locations contiguous to depot, compel delivery elsewhere?*

Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prose-

cution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots; and may a railroad company, after encouraging investments in mills, furnaces and other productive manufacturing enterprises on its line of road, refuse to make personal delivery of the material necessary to their business, at their depots, erected for the purpose, and require them to accept delivery a mile distant, at the depot of and through a rival and competing establishment? Or may such railroad company establish a "union coal yard" in this city, and constitute it its depot for the delivery of coal, and thus impose on all the coal dealers in the city, with whom it has side connections, the labor, expense and delay of carting their coal supplies from such general delivery to their respective yards? Or may such railroad company, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

§ 36. *Impartiality required of common carriers; they cannot destroy and build up at arbitrary discretion.*

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public. By an unjust exercise of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever.

§ 37. *Railroad must not arbitrarily break up a long established stock yard business by transferring its patronage.*

The case in hand is but a sample of what might be done by these corporations if the power claimed in this case is possessed by them. Complainants' stock yard was purchased and fitted up at a heavy outlay of money. It was, at the time, a necessity to defendant's business. By the express agreement or tacit understanding of the parties, suitable connections for receiving and delivering stock were made, of which the defendant availed itself for twelve years. But, after thus accepting the benefits of complainants' expenditures, the defendant proposes to sever its connections, withhold further accommodations, decline to receive from or deliver stock at complainants' yard, concentrate its patronage on the Union Stock Yard Company, require all consignors to way-bill their stock to the care of said favored company, and, by this invidious discrimination, compel complainants to carry on their trade through a rival yard, or else abandon their established and lucrative business. The execution of defendant's threat would destroy complainants' business, depreciate their property, and deprive the public of the protection against exorbitant

charges which legitimate competition, conducted on equal terms, always incurs. Complainants' yard is on defendant's road; it furnishes every needed facility; was purchased and improved in the belief that they would receive the same measure of accommodation extended to others sustaining the same relation to defendant; defendant can receive and discharge stock at complainants' yard as easily and cheaply as it can at the Union Stock Yard Company's yards. Such delivery is both practicable and convenient, and it is, we think, its legal duty, under the facts of this case, to do so.

§ 38. — *injunction lies against the carrier to prevent the wrong.*

But defendant, protesting that the proposed discrimination in favor of the Union Stock Yard Company would, if executed, constitute no wrong of which complainants ought justly to complain, contends — *First*, that complainants, even supposing the law to be otherwise, have an adequate remedy at law, and therefore cannot have any relief from a court of chancery; and *second*, that if a chancery court may entertain jurisdiction, no relief in the nature of a mandatory order to compel defendant to continue accommodations to the complainants ought to be made until the final hearing. If such is the law it must be so administered. But we do not concur in this interpretation of the adjudications. Those cited in argument are not, we think, applicable to the facts of this case. Complainants could, in the event defendant carries its threat into execution and withholds the accommodations claimed as their right, sue at law and recover damages for the wrong to be thus inflicted. But they could not, through any process used by courts of law, compel defendant to specifically perform its legal duty in the premises. And this imperfect redress could only be attained through a multiplicity of suits, to be prosecuted at great expense of money and labor; and then, after reaching the end through the harassing delays incident to such litigation, complainants' business would be destroyed and the Union Stock Yard Company, born of favoritism and fostered by an illegal and unjust discrimination, would be secure in its monopoly. Here an adequate remedy can be administered and a multiplicity of suits avoided.

§ 39. — *mandatory order here issued on preliminary application.*

One other point remains to be noticed. Ought a mandatory order to issue upon this preliminary application? Clearly not, unless the urgency of the case demands it, and the rights of the parties are free from reasonable doubt. The duty which the complainants seek by this suit to enforce is one imposed and defined by law — a duty of which the court has judicial knowledge. The injunction compelling its performance, pending this controversy, can do defendant no harm; whereas a suspension of accommodations would work inevitable and irreparable mischief to complainants. The injunction prayed for will, therefore, be issued.

§ 40. A railway company, incorporated as a common carrier, is bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage; these being incidents of the occupation in which it is authorized to engage. Charter construed accordingly. *Winona & St. Peter R. Co. v. Blake*,* 4 Otto, 180.

§ 41. As to permitting a business to be transacted on the carrier's vehicles, see *Jencks v. Coleman*, 1 Sumn., 221 (§§ 1847-1850). *The D. R. Martin*, 11 Blatch., 223 (§§ 1851-53). And as to discriminating in the conduct of an express business, see *post*. IX. See § 1816.

§ 42. A common carrier transporting cotton ties, manufactured in infringement of certain patents, and shipped to be sold at the place of delivery for use there, for shippers whose names he refuses to disclose, is an infringer of such patents and may be restrained from so doing. *American Cotton Tie Supply Co. v. McCready*, 17 Blatch., 291.

§ 43. Where a railroad's charter authorized it to "demand and receive such sum or sums of money" for transportation and storage "as it shall deem reasonable," yet the legislature,

under a clause in the state constitution in force at the time providing for the alteration or repeal of a charter at any time, may prescribe the maximum of charges to be made by the railroad within the state, in bringing into the state or carrying without either persons or property. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155; *Peik v. Chicago, etc., R. Co.*, 4 Otto, 164; *Munn v. Illinois*, 4 Otto, 113; *Chicago, etc., R. Co. v. Ackley*,* 4 Otto, 179. See § 1057.

II. RECEIVING GOODS FOR CARRIAGE.

SUMMARY—*Method of packing for transportation*, §§ 44, 45.—*Whether property is received by carrier's servant as such*, §§ 46, 47.—*Putting goods on the vehicle without carrier's knowledge*, § 48.—*When delivery to the carrier takes place*, §§ 49-51.—*Transportation within a reasonable time after shipment*, § 52.—*Demurrage for delay in delivering on board*, § 53.

§ 44. A common carrier of money or other property should inquire as to property offered for shipment. As a general rule a shipper is not bound to disclose the kind, quality or value of the property offered. But he must not pack up so as to deceive. *Kuter v. Michigan Central R. Co.*, §§ 54-59.

§ 45. If a railroad company is not liable as a common carrier for money packed in a box and accepted as freight, it is liable on the footing of a bailee for hire. *Ibid.*

§ 46. Receipt of a parcel by the purser of a steamboat, merely out of favor to one who offered it without intending to pay freight, constitutes the purser a personal bailee, and does not charge the steamboat company; and the fact that the purser, not being the regular agent to receipt for freight on behalf of the steamboat owners, gave a receipt for the parcel, signed in his own name as purser, does not affect the case. *Suarez v. The George Washington*, §§ 60-62.

§ 47. Charter and modes of business of a steamboat company considered; and held, that the company was not a common carrier of money and bank bills. Such property, if intrusted to the master and lost by him, renders him *prima facie* accountable personally as a bailee, but not his employers. The burden of proof is upon the party claiming loss to establish otherwise. Knowledge of the owners that the master carried the money and bank-bills for personal hire or perquisites would not render them liable, unless the hire was on their account instead of his, or the master held himself out as their agent in such business within the usual employment or service of the steamboat. *Citizens' Bank v. Nantucket Steamboat Co.*, §§ 63-83.

§ 48. No maritime relation between vessel and freight arises except upon delivery under a contract. Where one loads a barge by his own men without knowledge of the carrier, and then delivers to the steamer which he expects will tow such barge, unsigned bills of lading, under circumstances which preclude a clear notice to the master of the steamer that the barge is loaded at all, there is insufficient delivery to charge the carrier with loss of the contents of the barge. *The Keokuk*, §§ 84, 85. And see § 876.

§ 49. Where the condition of a harbor prevents heavily laden vessels from passing the bar, and, in accordance with custom, the master of a vessel hires lighters to receive freight at a wharf and bring it down the harbor to the ship's side, a delivery to the lighter by a shipper is a delivery to the master in such sense that the relation of carrier to the goods commences. The goods being lost by an explosion of the lighter before it reaches the ship, there exists accordingly such a relation between ship and cargo as to give to the shipper the usual remedies *in rem* against the vessel for the carrier's non-performance of his contract. *Bulkley v. Naumkeag, etc., Co.*, §§ 86-92.

§ 50. Where cargo is to be delivered from the lighter at the side of the ship, the lighter-man's responsibility ceases when the cargo is placed properly on the slings and hooked to the tackle; and the duty of the ship begins with hoisting it to the deck; the apparatus of the ship then having possession of the goods. *The Cordillera*, § 93.

§ 51. In delivering wheat from a warehouse through a pipe into the vessel, the duty of the warehouseman ceases with the discharge of the wheat into the pipe; the pipe being for the delivery in control of the carrier. Vessel held liable where, through negligence of the mate, wheat was lost by the careening of the vessel so that the pipe parted. *The R. G. Winslow*, §§ 94-97.

§ 52. A carrier should transport within a reasonable time after the goods are delivered to him for shipment; and this reasonable time depends on circumstances. An extraordinary and unexpected pressure of freight may excuse his delay, if he employs reasonable and seasonable efforts to avert the ill consequences. But if, at the time of contracting to transport, the carrier knows of such extraordinary pressure, he should so inform the shipper, and leave the latter free to withhold the shipment; for otherwise the carrier must bear the consequences of ensuing delay. *Helliwell v. Grand Trunk R'y of Canada*, §§ 98-105. And see § 1310.

§ 53. Demurrage for delay in the delivery on board not allowed, upon the facts shown, where delivery of wood was made from lighters. Usage of the port as to receiving cargo from a lighter in two days is not proved by evidence of rules adopted by a "Produce Exchange." The *Bark Innocenta*, §§ 106-108.

[NOTES.— See §§ 109-122.]

KUTER v. MICHIGAN CENTRAL RAILROAD COMPANY.

(Circuit Court for Illinois: 1 Bissell, 35-40. 1853.)

STATEMENT OF FACTS.— Plaintiff was moving from Pennsylvania to Illinois. He packed a quantity of clothing, books, household goods and money in a dry-goods box. The money (\$1,800 in gold) was wrapped up and placed in the middle of the box. The box was well nailed, and bound with one iron and two wooden hoops. The box arrived at Detroit, and was there delivered to defendant's agents to be shipped to Chicago. Plaintiff requested that it be sent on the same train with himself, but it was sent on a different train and never reached Chicago. The action was *assumpsit*, and the question is as to the liability of defendant under its charter for the loss of the money.

§ 54. *Railroads are not required to transport money.*

Charge by DRUMMOND, J.

The first thing to be considered is as to the proper construction of the charter. By it they were required to transport all merchandise and property. It is insisted by the plaintiff's counsel that this includes money. Property is a word of very enlarged meaning. It comprehends ordinarily everything which is valuable and is subject to disposition and to protection under the law. But it is plain, in order to arrive at the true meaning of the legislature when using the word in this charter, we must look at the connection and circumstances. What was the intent of the law? The state was chartering a railroad company to perform all the usual business and offices of such a company, and we must construe this law with reference to the subject matter of the grant. At the time this charter was granted, it was not incumbent, as a general thing, on common carriers of merchandise and property, to transport money. They might become carriers of money, undoubtedly, but this was considered out of the ordinary line of business, and subject to unusual risks, requiring corresponding care and compensation. The word property, as used in the charter, must certainly have some limitation. It did not include all kinds of property. We must understand the meaning to be such property as is usually carried on a railroad. If it had appeared by the evidence that it was the practice of railroad companies to transport all money offered, then it might be different. As it is, I think a fair interpretation of their charter would justify a refusal on their part to act as common carriers in the carriage of money.

§ 55. — *how they may become common carriers of money by their acts.*

But if it be conceded that they are not obliged by their charter to be common carriers of money, there is no doubt they may become so by their acts,— they may hold themselves out to the world as carriers of money. It seems that the defendants did transport money for the express company, which, as well as all other property carried by the express company, was under the sole charge of a messenger of the latter company, and at their risk, under a special contract, which certainly greatly restricted the common law liability. But that circumstance alone did not make them common carriers of money, and subject to the extraordinary responsibilities of common carriers of money.

§ 56. *A common carrier of money should inquire as to property offered for shipment.*

If you shall believe the defendants were common carriers of money, and that no notice of any restriction or limitation of their liability was brought home to the plaintiff, then the plaintiff, subject to the qualification hereafter stated, was not bound to disclose to the defendants the contents of the box in order to render them liable; but if the defendants wished to guard themselves against risk, they should have inquired as to the contents of the box.

§ 57. *As a general rule, a shipper is not required to disclose the kind, quality or value of the property offered.*

As a general rule, a person who delivers to a carrier any article or property, of which the latter is a common carrier, is not bound to disclose the kind, quality or value of such property, and the carrier, in the absence of notice, or fraud, or artifice on the part of the person making the delivery, is liable, notwithstanding no disclosure is made. But this rule must be taken and applied subject to the usual course of business, and this is a very important qualification of the rule itself. If, in point of fact, the property is put up or packed in such a manner as is calculated to deceive the carrier, then he does not become subject to the extraordinary responsibilities of a common carrier. But if there may be justly any ambiguity or doubt about the contents of a package or box, resulting from its examination or appearance, then the consequences of such doubt must fall upon the carrier, if he do not make inquiry.

§ 58. — *but he must not pack up so as to deceive.*

The thing must be calculated to deceive; and if you believe that it was contrary to the usual course of business for money to be packed in the way proved in this case; that it was calculated to deceive the defendants as to the value of the contents, or that it operated as a fraud upon the defendants, though none was intended,—then they are not liable as common carriers. And by “operating as a fraud,” I mean that by no reasonable inference could the defendants suppose the box contained what was actually within it. It is upon this principle that common carriers of passengers are liable for the ordinary baggage of a passenger and the money for usual traveling expenses, which may be in a trunk, but are not liable for a sum of money beyond this limit, nor for merchandise found therein. If, however, the defendants knew, as is insisted they did, that parties emigrating like the plaintiff, were in the habit of packing up valuable articles and money among their household wares, and, from such knowledge, might infer that this box of the plaintiff’s might contain money, then it was their duty to make inquiry, in order to relieve themselves from liability.

§ 59. *Though a party may not be liable as a common carrier, he may still be liable as a bailee for hire.*

There is a count for a general bailment. If it be true that these defendants were not common carriers of money, or if there was any improper means or artifice made use of to conceal the value of the box, or to mislead, or to deceive the defendants, they might not be liable as common carriers; still, in every case where a party delivers to a common carrier an article of property to be transported to a particular place, for a certain sum, if there be any facts in the case which would relieve the carrier from the responsibilities of a common carrier, as by special contract, or notice, or concealment of the value of the article—actual fraud being absent,—there is an implied contract on the part of the carrier to take due care of the property. This only changes the obliga-

tions of the carrier and does not free him from all responsibility. He is still bound to the use of ordinary care. If in this case you shall believe that the defendants were not common carriers of money, or that this money was so placed as to mislead or deceive the defendants as to the value of the box and its contents, yet if you shall also believe that the defendants have been guilty of negligence, if they have not taken ordinary care of the box and its contents, then the defendants are liable for the loss. But if, on the contrary, you shall believe the defendants were not guilty of negligence, but exercised ordinary, reasonable care about the property — and by ordinary care is to be understood such care and diligence as a prudent man exercises over his own property, supposing it to be what it purported to be from the general appearance and aspect of the box,—then they are not liable for the loss of the money. But if you shall believe there was an improper concealment of the value of the contents of the box, and this concealment was the cause of negligence, if any negligence existed, then the defendants cannot be held liable for what was the result of the act or conduct of the plaintiff. It is admitted by the plaintiff's counsel that if you shall be of opinion that the defendants, as to the money, were mere ordinary bailees, it devolves upon the plaintiff to prove affirmatively that the defendants have been guilty of negligence.

SUAREZ v. STEAMSHIP GEORGE WASHINGTON.

(Circuit Court for Louisiana: 1 Woods, 96-99. 1870.)

Opinion by Woods, J.

STATEMENT OF FACTS.—On the 31st of July, 1868, E. S. Allen, the purser of said steamer, signed and delivered the following receipt:

“NEW ORLEANS, July 31, 1868.

“Received, in good order and condition, from P. Manich, on board steamer George Washington, one box, said to contain 6,000 cigars, marked E. S. Allen, to be delivered to Mr. E. S. Lagram, in New York, on his payment to Mr. T. Masich of (\$660) six hundred and sixty dollars, or, in case of non-payment by him, for me to return said cigars to Mr. F. Masich, New Orleans.

(Signed)

“E. S. ALLEN, *Purser*.

“Freight collected.”

The libel alleges that the proof shows that Masich was only the agent of libellant in the matter; that the box actually contained six thousand cigars; that they were the property of libellant; that they were conveyed to New York and there delivered without the collection of said sum of \$660. Libellant claims that he has a lien on the steamer for the said sum, and that her owners are jointly and severally liable to him for that amount.

The respondent Moulton answers by way of defense: 1. That Allen did not receive the box of cigars or give the receipt as agent of the owners of the steamer, but undertook to carry said box to New York and deliver it to Lagram as a personal favor to Lagram; and no freight was paid or agreed to be paid thereon of which Masich had notice when he delivered the box on board the steamer. 2. That the acts of said Allen in the premises were done out of the scope of his employment, and without the knowledge and consent of respondents, and that he was not authorized to sign receipts and bills of lading for freight shipped on board the steamer.

§ 60. *Did the shipper deliver to the purser of the steamboat as bailee or as agent of the steamboat?*

This case turns upon the question, Did the shipper deliver the box to Allen as his bailee, or did he deliver it to the steamer through Allen, acting as the agent of the steamer? Upon this point Allen testifies: That about July 25, 1868, while in New Orleans, he received from Lagram, who was then in New York, a letter asking him to bring on a case of cigars from Mr. F. Masich. About that time Masich applied to him personally in New Orleans; stated that he had received a letter from Lagram informing him, Masich, that he thought he, Allen, would bring on the box, and asked him if he would do so, and deliver the box to Lagram. He told Masich he would. He considered the transaction a personal one between Masich, Lagram and himself. At Masich's request, he signed the receipt as purser of the steamer in order that Masich might effect an insurance upon the box. He did not intend to sign the receipt as purser of the steamer, and Masich understood the reason of his so signing. No freight was paid or agreed to be paid on the box. He was not authorized to sign, and never did sign, receipts or bills of lading for freight except for specie, when he had express orders to do so. No application was made to the office of the steamer's agent, which was customary, and the only place where freight engagements were made. The box was not on the ship's manifest, nor stored with the other cargo of the ship, but put in the bath room as a personal matter of his own. This testimony is entirely uncontradicted, and there is no evidence whatever to show that freight on the box was ever paid, tendered or agreed to be paid. These facts clearly establish the character of the transaction, and show that the box was delivered to Allen on his own account, and not as agent or purser of the steamer. Masich clearly so understood the transaction; otherwise, why did he apply to Allen personally and inquire whether he would take the box? He must have known that if he desired to send the box as freight, the steamer would take it, and was bound as a common carrier to take it. The circumstances clearly establish that the purpose of the application to Allen was to get the box transported by him as a friend of Lagram without the payment of freight, and perhaps also to secure his services in collecting from Lagram the price of the package.

§ 61. *Purser does not bind the steamboat by taking package as a favor.*

It is within the observation and experience of almost every one that the officers and passengers on steamers frequently take small packages, for carriage and delivery, as a personal favor to the sender, on which no freight is paid or expected to be paid. It would be a great injustice to the steamer to hold her responsible for the safe delivery of such parcels. There is nothing to distinguish this case from the class just mentioned, except the fact that Allen signed a receipt as purser. But he testifies he had no authority so to do, and that he did it at Masich's request in order that he might get insurance on the box, and that Masich so understood it. The case is that Lagram and Masich attempted to get the box carried to New York without the payment of freight. Masich delivered the box to Allen, who became his agent, or the agent of his principal. Having failed to receive pay for his goods, through the neglect of Allen, he is now seeking to recover their value from the steamer, with which he never made any contract of affreightment, and to which he neither paid, nor agreed to pay, nor tendered any freight.

§ 62. *Common carrier not bound by act of agent outside the scope of authority.*

The record further shows that Allen had no authority to sign receipts or bills

of lading, and that the steamer had an agent at New Orleans charged with that duty. The law says that the principal is bound by all the acts of his agent within the scope of his authority, which he holds him out to the world to possess. It is clear that the signing of the receipt was not within the scope of the authority conferred on the purser by his employers. So says the testimony. Did they nevertheless hold him out to the world as having such authority? There is nothing in the record to show that they did either expressly or by recognizing his acts in signing receipts, nor does it appear from the testimony that it is by any means a universal custom or even general custom with lines of steamers having agents, to authorize the purser to sign receipts or bills of lading. The act of the purser in signing the receipt in this case was therefore beyond the scope of his authority, nor had he been held out to the world as having such authority. His principals could not, therefore, be bound.

The libel must be dismissed at costs of libellant. Decree accordingly.

CITIZENS' BANK v. NANTUCKET STEAMBOAT COMPANY.

(Circuit Court for Massachusetts: 2 Story, 16-58. 1841.)

Opinion by STORY, J.

STATEMENT OF FACTS.— This cause has come before the court under circumstances involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment. The suit is in substance brought to recover from the steamboat company a sum of money, in bank-bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which, it was lost, do not appear distinctly in the evidence; and are no otherwise ascertained than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know.

§ 63. *This cause is one of admiralty jurisdiction.*

The libel is not *in rem*, but *in personam*, against the steamboat company alone; and no question is made (and in my judgment there is no just ground for any such question) that the cause is a case of admiralty and maritime jurisdiction in the sense of the constitution of the United States, of which the district court had full jurisdiction; and, therefore, it is properly to be entertained by this court upon the appeal.

§ 64. *Steamboats may be employed as common carriers, under limitations as to scope of business.*

There are some preliminary considerations suggested at the argument, which it may be well to dispose of before we consider those which constitute the main points of the controversy. In the first place there is no manner of doubt that steamboats, like other vessels, may be employed as common carriers; and when so employed their owners are liable for all losses and damages to goods and other property intrusted to them as common carriers, to the same extent and in the same manner as any other common carriers by sea. But whether they are

so depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent.

§ 65. *Transportation of passengers and merchandise does not necessarily constitute one a common carrier of money.*

The transportation of passengers or of merchandise, or of both, does not necessarily imply that the owners hold themselves out as common carriers of money or bank-bills. It has never been imagined, I presume, that the owners of a ferry-boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the boatman employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*, they would not be liable for the carriage of parcels of money or bank-bills, under the like circumstances. So, if money should be intrusted to a common wagoner, not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend that they would not be liable for the loss thereof as common carriers any more than they would be for an injury done by his negligence to a passenger whom he had casually taken up on the road. In all these cases the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties and liabilities.

§ 66. — *the true nature and extent of employment as held out to the public affords the test.*

The question, therefore, in all cases of this sort is what are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise and of money; or they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank-bills, perhaps very different usages do, or at least may, prevail in different routes and different ports. But, at all

events, I do not see how the court can judicially say that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money, on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

§ 67. *No one is a common carrier unless for hire.*

In the next place, I take it to be exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier, but he is a mere mandatary, or gratuitous bailee; and, of course, his rights, duties and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry whether, in point of fact, the respondents were carriers of money and bank-notes and checks for hire or recompense, or not. I agree that it is not necessary that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the company. And I farther agree that it is by no means necessary that, if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight-list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining what the true understanding of the parties is as to the character of the bailment.

§ 68. *If not a common carrier of money, the steamboat may be liable as bailee in permitting agent to carry it.*

In the next place, if it should turn out that the steamboat company are not to be deemed common carriers of money and bank-bills, still, if the master was authorized to receive money and bank-bills, as their agent, to be transported from one port of the route of the steamboat to another, at their risk, as gratuitous bailees or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank-bills have been lost, the company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter, upon the plain ground that they are responsible for the gross negligence of their agents within the scope of their employment.

§ 69. *Foregoing principles applied to present facts.*

Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, whether the steamboat company were, or held themselves out to the public to be, common carriers of money and bank-bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms; or the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire; and money and bank-bills, although known to the com-

pany to be carried by the master, were treated by them as a mere personal trust in the master by the owners of the money and bank-bills, as their private agents, and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers.

§ 70. *Burden of proof to show whether common carriers of money.*

The question has been made at the bar upon whom, in this case, the burden of proof lies to establish that the company were common carriers of money or bank-bills, or not. It does not appear to me to be of any great importance, in the actual posture of the present case, how that matter is decided. But I have no doubt that the *onus probandi* is upon the libelants to establish the affirmative; for, until that is done, no liability can attach to the respondents, and the libelants are bound to establish a *prima facie* case; and, indeed, it is scarcely within the rules of evidence to call upon the respondents to establish the negative. But it seems to me the less necessary to sift this matter, since the evidence on the part of the libelants is in my judgment sufficient to establish such a *prima facie* case, at least to the extent of a compliance with the exigency of the rule. It is abundantly proved that the masters of the steamboat have been constantly and habitually employed in the transportation of money and bank-bills for banks and private persons (as, indeed, common packet masters were likewise employed long before steamboats existed) upon this very route, and upon the common routes from Nantucket to other ports. This usage, or practice, or employment (call it which we may), was so notorious that it must be presumed to be known to the steamboat company; and, indeed, that fact is not controverted. Under such circumstances the natural inference would be that the transportation of money and bank-bills was within the scope of the usual employment of the master in his official capacity, and on account and at the risk of the owners, unless the inference were repelled by other circumstances. The *onus probandi*, then, of disproving this inference may be deemed to be fairly shifted upon the respondents.

§ 71. *Defense that, though master was known to carry money, it was not part of business.*

The ground of the defense of the company is, that in point of fact, although the transportation of money and bank-bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were in fact common carriers of money or bank-bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master in receiving and transporting money and bank-bills acted as the mere private agent of the particular parties who intrusted the same to him, and not as the agent of the company or by their authority; that in truth he acted as a mere gratuitous bailee or mandatary on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defense against the present suit. There are some facts in the case which are beyond the reach of any just controversy. In the first place, there is no pretense to say that the company have ever received any freight, hire or compensation, for the carriage of money or bank-bills transported in the steamboat, either from the master or from the owners thereof, or have ever supposed themselves entitled thereto.

No claim of that sort has ever been set up by them against the owners of such bank-bills, or against the master, although the carriage of packages of money and bank-bills by him has been constantly known and understood by them; nor has the master ever credited them with any such hire, freight and compensation, although he has constantly credited them with the freight of goods and merchandise carried in the steamboat, whenever he has received it. This is a very significant circumstance to establish, on the part both of the master and the company, their mutual understanding of such transactions,— that they were mere private agencies of the master, and not agencies on behalf of the company, authorized by them, either as common carriers or as mandataries. There is also a total absence of all evidence to establish that the company ever held themselves out to the public by advertisement or otherwise, through their directors, or the other regular officers of the corporation, as common carriers for such purposes; or that they ever entered into any contracts of this sort, for hire or compensation, directly with any person or persons for whose benefit the money or bank-bills were transported. The most that can be said is, that the master might well be deemed their agent for such purposes. But that must proceed upon the ground, either that he had full authority, or that he was held out to the public as having full authority, or that his acts admit of no other reasonable interpretation. If his acts may just as fairly be attributed to a private personal agency for third persons, and, *a fortiori*, if, taking all the circumstances, they naturally lead to the latter conclusion, then the presumption of the liability of the company therefor is completely repelled.

In the next place, if the testimony of the persons who have been successively masters of the steamboat is admissible, and is believed, they state facts and circumstances which directly confirm the material grounds of the defense. They state, in substance, that at the successive periods of their command of the steamboat, they have been accustomed to carry packages of bank-bills for the banks at Nantucket, and for various private persons, to New Bedford, for several years, to the amount of hundreds of thousands of dollars; that they have always deemed themselves as acting therein as the private agents of the bailors; that they have never received any such packages for the account of the company or by their authority; that they have always done this business as gratuitous bailees, never charging any commission or requiring any compensation as a matter of right, except when requested to give a special receipt therefor (which, however, was rarely done), and then they charged on their own account a small commission; that they have occasionally received from the banks, as well as from private persons, a small compensation for these services, such as they chose to pay, as a mere gratuity, or voluntary recompense, but without any claim of its being due to them as a matter of right or duty; that such gratuities and recompenses have been rarely paid by private persons, and not even uniformly paid by the banks, which were in the constant habit of sending such packages; but it has been sometimes intermitted by them for a considerable length of time; and that such gratuities and recompenses were never accounted for by them to the company, but were always applied to their own private use and benefit.

Such is the substance of the facts and circumstances, either directly stated by the masters, or fairly deducible from their testimony. It is in no small degree corroborated in its general bearing by the testimony of common packet masters, who have been accustomed to carry like packages of bank-bills for the last forty years, and who always treated such bailments as gratuitous, and as

special agencies of their own, and never claimed any compensation therefor, on account of the owners of their vessels. It is also in no small measure sustained by the absence of any positive testimony on the part of the libelants of any instances, except those stated by Mr. Starbuck, in which a compensation has been claimed of banks, or allowed by them, as a matter of right by the master, or of its having been paid by individuals at any time otherwise than as a gratuity to the master, or as a personal compensation to him for his services. There is this additional consideration of no small weight, that if these packages were within the scope of the business of the company, and were carried at their risk, and for compensation and hire, it is surprising that there should not have been a uniform course of dealing with all persons sending the packages, and a uniform price, or at least a reasonable recompense, always charged on one side and paid on the other. Yet there is a total absence of all proof to this effect. It is not pretended that the company ever received any such price or recompense, or ever claimed an account therefor from the master; or ever made it an item of charge or credit in their dealings with the bailors. How are we to account for such a state of things, if in truth they were incurring on every trip such vast risks and responsibilities for uncounted sums? One should suppose that such risks and responsibilities would naturally introduce a regular commission or charge therefor, such as is generally paid in other cases, in nature of a commission *del credere* or guaranty. It would seem strange that the company should slumber over their own rights during so long a period, and should indiscriminately receive all such packages from all persons, and yet should not charge any fixed commission or uniformly claim any from the bailors for such risks and responsibilities. On the other hand, if these were cases of gratuitous bailments or of personal agencies on the part of the master, unconnected with his official duties or the common business of the company, the state of the facts is exactly what it ought to be, and there is nothing which either requires explanation or solicits inquiry. On the opposite supposition there would seem to be many circumstances admitting of no reasonable or satisfactory explanation.

§ 72. *Release of witness, how proved; effect.*

But the testimony of the masters has been denied to be competent, and the exception has been especially urged against that of Captain Phinney. The latter was the master who took the package of bank-bills, for the loss of which the present suit is brought. In order to establish his competency, notwithstanding his relation to the cause, the respondents, upon their direct interrogatories annexed to his deposition, asked him if he had not received a release from them of all liability on account of the subject-matter of the suit. He answered that he had, and produced the supposed release and annexed it to his answer. Now, it was first objected that his answer upon the interrogatories of the respondents was no proper proof of the execution of the release (whatever might have been the case if the answer had come out upon the cross-examination, upon the interrogatories of the libelants), but the execution should be proved by the subscribing witness. I thought, at the argument, that the objection was untenable, and that it was wholly immaterial by which party the question was asked, because a witness producing a release from his own possession, as a part of his testimony, in answer to a question put to him, need not prove the execution of the release by the subscribing witness, but it is to be taken as a part of his testimony. Indeed, when the question was asked by the respondents in order to establish the competency of the party as their own wit-

ness, they would be estopped afterwards to deny it, and, the witness having received the release, it would be, and must be, treated, as between him and them, as a true and valid release, without any other proof. The case of such a release produced by a witness is entirely different from that of a release produced by a party to a suit to establish his own title. In the latter case the party must prove its due execution by the subscribing witness. Several of the cases cited at the bar turned upon this distinction. *Morris v. Thornton*, 8 Term R., 303; *Jackson v. Pratt*, 10 John., 381, were cases where the party to the suit founded his title upon the deed or diploma. The case of *Hall v. Connecticut Steamboat Co.*, 13 Conn., 329, stands upon a distinct ground, for there the witness did not produce the release, nor did it appear ever to have been delivered to him, and his interest was established by independent testimony, and not upon his own examination or cross-examination. Whether some of the *dicta* in the opinion of the court are maintainable or not in point of law is a matter, therefore, which this court is not now called upon to consider. In all cases of this sort where the question of competency of a witness arises upon his deposition, and not otherwise, it is to be disposed of upon the interrogatories in the deposition in the same manner as it would be upon an examination upon the *voire dire*; that is to say, the objection of incompetency may be removed in the same way and by the same evidence of the witness by which it has been established. The doctrine is fully borne out by the language of Mr. Phillips in the later editions of his work on evidence, and by the cases there cited (*Phillips & Amos on Ev.*, 8th London ed., 1838, pp. 149-151; S. P., 1 *Phillips on Ev.*, by Cowen, 7th Amer. ed., 1839, p. 134); and especially by the case of *Ingram v. Dade*, before Lord Ellenborough in 1817, 1 Carr. & P., 235, and *Goodhay v. Hendry*, 1 Moody & M., 319, and the case of *Wandless v. Cawthorne*, 1 Moody & M., 320, 321, note, and *Carlisle v. Eady*, 1 Carr. & P., 234. Indeed, the only point of difference among the learned judges upon any of these occasions has been, not whether the release should be proved by other witnesses, but whether it should be produced at the trial by the witness.

Another objection of a more serious cast has been taken to *Phinney*; and that is, that the release cannot be operative at all to discharge the master from the damages which may be recovered by the libelants in this case, because it is not a release of a present, but of a future interest, not yet vested in the releasors; and for this position the *dictum* of the court in *Francis v. Boston & Roxbury Mill Corp.*, 4 Pick., 367, 368, is relied on, that a release cannot operate to extinguish or defeat future rights or claims; a *dictum* which may be perfectly correct, when applied (as it there was) to a release of future damages for future acts; but which cannot be applied to a release of future damages for past acts without shaking the well established doctrine. If the argument be well founded, then every person who is sued as principal, for any act of negligence of his agent or servant, such as a coachman, or a factor, or a master of a ship, could not, by a release, restore the competency of such person; and yet, as we all know, this is every-day practice. In the case of *Green v. New River Co.*, 4 Term R., 589, which was an action against the principals for the negligence of their agent, the court held the agent incompetent without a release; and by necessary implication, therefore, held him competent with a release. The same doctrine is abundantly shown to be well established by Mr. Phillips in his *Treatise on Evidence*, and in the cases there cited. Indeed, it may be taken as a general principle, in cases of this sort, that a release of all actions and causes of actions, or of a particular cause of action, which

has happened before the time of the release, will discharge the witness from all liability depending upon the event of the suit in which he is called as a witness, touching his conduct in the matter on which the suit is founded; for the cause of the liability then existing, the release will operate to discharge that, and incidentally the future damages recovered on account thereof. The cases of *Scott v. Lifford*, 1 Camp., 246, and *Miller v. Falconer*, 1 Camp., 281, and *Cartwright v. Williams*, 2 Stark., 342, are directly in point. Another objection was taken to the language of the release; and certainly there was an accidental mistake in it, which might, perhaps, have brought its true construction into doubt as a release of the present cause of action. But I should have had no difficulty, if this objection had not been waived, in deciding that time ought to be allowed to correct the mistake, as it was obviously a matter of entire surprise upon all the parties thereto.

§ 73. *Testimony considered.*

But it does not appear to me that, upon a just survey of the whole evidence, anything very material hinges upon the admissibility of any of the witnesses whose testimony has been objected to; for the main facts are abundantly supported by evidence *aliunde*; and presumptive inferences against its force are equally repelled by the offer as it would be by the production of their testimony. Now, is it not a little remarkable (as has been already suggested), that most of the witnesses, who have been examined on each side, agree that they never supposed the owners responsible, but they have treated the case as one of a private personal agency of the master, either gratuitous, or as his personal and private perquisite. Most of them have deemed the service gratuitous; and not one of them pretends that the company ever, to their knowledge, held themselves out as common carriers, for hire, of bank-bills; or that they avowed any responsibility for the carriage thereof, or ever demanded any compensation therefor.

§ 74. *Whether, if common carriers of money, steamboat owners could set up usage to exempt them.*

The main stress of the argument for the libelants is, indeed, founded upon the general proposition that steamboat owners generally are common carriers not only of passengers, but of goods and merchandise of all sorts, including money and bank-bills, for hire. Now, if this were clearly made out, there would, in my judgment, be great difficulty in maintaining that any evidence would be admissible to prove any usage or custom in this particular business, to exempt them from the ordinary liabilities of common carriers, and to throw the responsibility exclusively upon the masters of the boat. I have in former cases had occasion to express my entire dissatisfaction with the practice of introducing supposed usages and customs, to control the construction of contracts and the ordinary principles of law (*Donnell v. Columbian Ins. Co.*, 2 Sumn., 366; *The Schooner Reeside*, 2 Sumn., 567; §§ 451-454, *infra*); and I greatly rejoice to find that my own doubts and difficulties have been fully borne out and confirmed by very recent decisions in England, and especially by the case of *Trueman v. Loder*, 11 Ad. & Ell., 589, 597-601, where the subject was very elaborately considered by Lord Denman, in delivering the opinion of the court. I am not unaware of the bearing of the cases of *Halsey v. Brown*, 3 Day, 346; and *Renner v. Bank of Columbia*, 9 Wheat., 581, 590, 591, in the opposite direction, but they are clearly distinguishable. They do not go to the extent of establishing that a local custom or usage will dispense with the principles of law; but merely to establish, in the one case, what the local

custom, as to days of grace, was, and in the other case, what were properly to be deemed contracts on account of the owners of the ship, and what merely personal contracts of the master. That is the very question involved in the present case.

§ 75. *How far owners of ship are bound by contracts of a master made in violation of his private instructions.*

It is, therefore, assuming the very point in controversy, to assert that the company in the present case were common carriers for all purposes for the carriage of bank-bills, as well as for the carriage of passengers and goods and merchandise for hire; and that the master acted as their agent, and on their account, in the receipt of bank-bills, as well as in the transportation of passengers and goods and merchandise. That is a matter to be made out by proofs, establishing that it was within the ordinary scope of their business, and adopted and sanctioned by them; or, at all events, that they held themselves out to the public as general carriers to such an extent. It is said that the owners of a ship are bound by the contracts made by the master thereof, notwithstanding he may have violated his private orders; and this is true, where the act done is within the scope of the ordinary employment of the ship; for to that extent he is held out by the owners as having a general authority. But this doctrine leaves the question quite open and untouched, what is the ordinary employment of the ship; for the master cannot bind them beyond it. Lord Tenterden, in his treatise on shipping (see *Johnstone v. Osborne*, 11 Ad. & Ell., 549, 557), lays down the rule of law on this subject in its true terms, that the owners are bound to the performance of every lawful contract of the master relative to the usual employment of the ship (*Abbott on Shipp.*, pt. 2, ch. 2, §§ 2, 3, 6); and he adds, in illustration of the rule, that if a ship were built for the purpose of conveying passengers only, or merchandise only, and employed in that particular trade, the owners are not answerable for a contract made by the master to employ the ship for a different purpose or in a different trade; for it does not relate to the usual employment of the ship. *Abbott on Shipp.*, pt. 2, ch. 2, §§ 3, 6. The case of *Boucher v. Lawson*, Cas. Temp. Hard., 85; *id.*, 194, turned mainly at the argument upon this consideration. The property (gold) there taken on board in Portugal was on freight, and shipped under a bill of lading; and the special verdict found that fact, as also that it was usual, when any gold is exported from Portugal to England, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners, unless there be some special agreement between them to the contrary, which there was not in that case. The cause was several times argued, and finally went off upon another point. Lord Hardwicke, however, seems to have thought that the special verdict was not as full as it should be. He said that the property being shipped on *freight*, and *freight* being the fruit and earnings of the ship, by the rule of law belonged to the owners, and the master was only entitled to wages; and, therefore, upon the terms of the bill of lading, the freight would belong to the owners under such circumstances. The usage might not make any difference; for then it might amount only to this, that the owners intended to make an allowance to the master of this part of the freight, in consideration of paying him less wages, or on some other consideration; so that it would be but an allowance of part of their own profits to the master; and they would, notwithstanding, be liable. And, therefore, if the finding on the usage was to be taken consistently with the bill of lading, and the reward for carrying the gold was *freight*, and consequently by the rule of law

belonging to the owners, they would be liable for the loss. The whole of his lordship's reasoning turned upon the peculiar wording of the special verdict, as to the shipment being on *freight* and technically so called; and upon this, that the taking of goods on freight was within the scope of the ordinary employment of the ship. But it seemed to be understood on all sides, that if such was not the ordinary employment of the ship, or if the shipment was a mere personal contract of the master, on his own account, and he alone was entitled to the hire, and the owners had no title to the hire as owners, that then, and under such circumstances, they were not liable for the loss. See Abbott on Shipp., pt. 2, ch. 2, §§ 6-9.

§ 76. *Various cases considered.*

The case of *Dwight v. Brewster*, 1 Pick., 50, 54, does no more than affirm that the owners are liable, where they are common carriers, and the profit made by the carriage of bank-bills is within the scope of their business and for their account; and that of *King v. Lenox*, 19 John., 235, shows that the owners are not bound for shipments not made in the course of the employment of the ship on their account, but on account of the privilege of the master. The case of *Middleton v. Fowler*, 1 Salk., 282, is, however, still more directly in point to the circumstances of the present case. There the action was against the proprietors of a stage-coach for the loss of a trunk of the plaintiff; and Lord Chief Justice Holt was of opinion that the action did not lie, saying that a stage-coachman was not liable, within the custom, as a common carrier, unless such as take a distinct price for carriage of goods as well as persons; as wagons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom, for no master is chargeable with the acts of his servant, but when he acts within the execution of the authority given by his master. See, also, Story on Bailm., §§ 500, 507, and cases there cited. The case of *Allen v. Lowell*, 2 Wend., 327, is not an authority the other way, for it was reversed upon error by the court of errors of New York. *Lowell v. Allen*, 6 Wend., 335. If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the court of errors the best founded in the principles of law. The reasoning of the court below in that case seems to me to have been founded mainly upon an assumption of the very point in dispute; that is, whether the owners of the steamboat were common carriers of money for hire; for no one can well doubt that they were not liable therefor, if the ordinary employment of the steamboat, on account of the owners, was confined to passengers and common merchandise for hire, and that the carriage of money was a personal perquisite of the master upon his own sole account, and he received the same and pay therefor, not by their authority or as a part of their business, or by their command, but simply at his own personal risk as special bailee.

§ 77. *Knowledge of owners that master carried money for hire does not conclude the question.*

The knowledge of the owners, that he carried the money for hire, would not affect them, unless the hire was for their account, or the master held himself out as their agent in that business, as being within the scope of the usual employment and service of the steamboat. That is the true doctrine, and is fairly deducible from the case of *Edwards v. Sherratt*, 1 East, 600, although the circumstances of that case called for a somewhat modified statement of it. The

case of *Sheldon v. Robinson*, 7 N. H., 157, directly decided that the driver of a stage-coach (the proprietors of which were common carriers of passengers for hire) did not, by carrying packages of money and bank-bills for hire, which he received for his own sole account, become himself responsible as a common carrier; but was merely a common bailee for hire, and subject only to the responsibilities thereof, which necessarily supposes that he did not in such cases act as agent of the proprietors in their common stage-coach business; and that they were not responsible for his acts.

§ 78. *If master receives hire on his sole account, and outside his business, owners are not responsible.*

In short, in all cases of this sort, the true solution of every question of the liability of the owners of a steamboat must depend upon this: whether the master is acting within the scope of the ordinary employment of the owners of the boat or not. If the master alone receives the hire for himself, and on his sole account, and does it as a matter of favor and not of duty, and it constitutes no part of the business or employment in which the owners are engaged, and is not performed by their orders or authority, and they are entitled to no share of the profits, then the owners are not responsible, unless, indeed, the owners hold the master out to the public as acting in these respects for them, and as capable of binding them by his acts. And my judgment, therefore, is that the *onus probandi* is upon the libelants to establish that the owners are common carriers to the full extent of incurring liability for the carriage of these bills before they are entitled to recover. If they leave the matter in doubt, that is decisive for the respondents. It is precisely in this view that the evidence, as to the supposed usage or practice introduced into this case, is admissible, not to show, if the owners were common carriers of bank-bills for hire, some usage or practice to treat them as not liable for losses of bank-bills intrusted to them, for I am not prepared to say that any such evidence would be admissible to control the well-established rules of law; but as evidence to show what was the ordinary employment or business of the company, and whether they ever held themselves out to the public as common carriers of bank-bills for hire, or that the master was authorized as master to contract for the carriage thereof on their account. In this view it appears to me that the evidence is exceedingly strong and cogent to establish that the public at large did not understand that the company ever held themselves out as common carriers of bank-bills for hire, or even as gratuitous bailees; or that the masters of the steamboat ever held themselves out as capable or authorized to bind the company by any such contract, or that it was within the scope of the ordinary employment or business of the company. Most of the witnesses, as has been already suggested, treat it clearly as a case of personal agency of the master, on his own personal account, either as a common bailee for hire or as a gratuitous bailee. The weight of the evidence, indeed, seems to lead to the conclusion that the master acted often, if not generally, as a gratuitous bailee, and that the reward sometimes paid him was either a mere gratuity, or, at most, a mere personal charge on his own account. If it was a mere gratuity, it would be difficult to show how the company could be liable therefor, since it would be almost incredible that they should be willing to incur said extraordinary risks without any compensation; and, indeed, since it might well be questioned whether any such business was within the scope and objects of their charter. At all events, no presumption of this sort should be indulged, unless upon the most direct and positive proofs that the company had expressly sanctioned and authorized it.

§ 79. *Incorporating act of the steamboat company construed in this connection; "merchandise," "bank-bills," etc.*

And this leads me to say a few words upon the language of the charter of incorporation of the company, by the act of 1833, chapter 11 (7 Mass. Special Laws, p. 283). That act incorporates the company expressly for the purpose of running "a steamboat and two other vessels, not exceeding seventy-five tons each, for the convenience of the public travel and the transportation of *merchandise* between Nantucket and New Bedford and the intervening places." Now, certainly, it may be fairly presumed that the public either knew, or were bound to know, what the powers and rights conferred by the charter upon the company were; and the company are to be presumed not to intend to transcend the powers and rights so conferred, or to usurp other functions. Unless, then, the word "*merchandise*," in that act, fairly interpreted in its common sense, includes the transportation of *bank-bills*, it is certain that the company had no authority to engage in such business for hire as common carriers; and the public had no right to contract with the company for the transportation thereof. The argument, therefore, has been addressed to the court that bank-bills are "*merchandise*" within the scope and objects and sense of the charter. I confess that I am unable to accede to the argument. I agree that the word "goods" may, in some connections (certainly not in all), include bank-bills; for the term goods (*bona*), in the common law, has a very extensive signification. So the word "chattels" may; and *a fortiori* the word "property," which is of larger signification. Some of the cases cited at bar go to this effect. In *Tisdale v. Harris*, 20 Pick., 9, it was held that, under the word "goods," in the statute of frauds, the sale of the stock or shares of an incorporated company are included. But the same question has never yet been decided in England; and, upon argument, at one time, before all the judges of England, they were divided in opinion upon the point. See *Pickering v. Appleby*, Comyn, 354; 2 Peere Will., 308; *Musself v. Cooke*, Prec. in Cha., 533; Long on Sales, Rand's ed., 1839, pp. 90, 91; 2 Starkie on Evid., 4th Amer. ed., 608; id., 2d English ed. (1833), p. 352; *Calye's Case*, 8 Coke, 32, 33. In *Whiton v. Old Colony Ins. Co.*, 2 Metc., 1, the same learned court held that "bank-bills" were well insured under the word "property," in a policy on time in the coasting trade. In this case the court placed some reliance upon the nature of the business, the insured being the master as well as the owner, and, therefore, contemplating various changes of the property from sales and purchases. But at the same time the court admitted that, ordinarily, bank-bills are treated as money or cash. In *Turner v. Fendall*, 1 Cranch, 117, 133, the supreme court of the United States held that money (that is, coin or specie) might be taken in execution; and in *Handy v. Dobbin*, 12 Johns., 221, the supreme court of New York held that "bank-bills" were money, and might be taken in execution. On the other hand, it was held, by Mr. Justice Dampier, in *Thomas v. Royal Exch. Ins. Co.*, Manning's Dig. Ins., B. a., pl. 5, 6; 1 Phillips, Ins., ch. 5, § 2, p. 172, 2d ed., that, although a policy on goods and merchandise will cover specie dollars, yet it will not cover "bank-bills." In *Rex v. Burrell*, 1 Carr. & P., 310, 454, it was held that an indictment for embezzlement of money, alleged to be the money of certain directors, who were by statute vested with "all goods, chattels, furniture in the house of industry, clothing and debts," due to the corporation, established by the act, was not sustained by proof that the money belonged to the corporation; for that the words "goods, chattels," etc., did not include money. Under a bequest in a will of "goods," bank-bills and money

will pass; and under a bequest of "money" bank-bills will pass. But no case can be found, at least as far as my researches extend, in which it has been held that a bequest of merchandise would include "bank-bills." The term "merchandise" is usually, if not universally, limited to things that are ordinarily bought and sold, or are ordinarily the subjects of commerce and traffic, and is never applied to *choses in action*, as bank-bills really are. In truth, bank-bills are ordinarily treated as money or currency, and the phrase "merchandise" is used in contradistinction thereto. The fact that a thing is sometimes bought and sold is no proof that it is merchandise. A bond, an annuity, a legacy, a debt due on account, may be bought and sold; but no one would assert any of these things to be merchandise. They would never pass by a grant of merchandise. A sale of all the goods and merchandise in a certain shop would never be presumed as intended to include the personal wearing apparel of the owner, although at the time it might be deposited there. It is said that bank-bills are often bought and sold; that is true; but it does not hence follow that they cease to be currency and become merchandise. Their primary function, that of currency, gives them their common denomination, and they are, therefore, in the ordinary transactions of life, treated as money. They may, if not objected to, be a good tender in payment of a debt. But no person ever supposed that merchandise, in the ordinary acceptation of the word, could be a good tender. In short, the term "merchandise" is usually applied to specific articles, having a sensible, intrinsic value, bulk, weight or measure in themselves, and not merely evidences of value, such as notes, bills of exchange, checks, policies of insurance and bills of lading. In the case of *Sewall v. Allen*, 6 Wend. R., 335, the court of errors held that a steamboat charter, authorizing the company to transport "goods, wares and merchandises," did not necessarily or naturally include the carriage of bank-bills, so that, unless the company actually made that a part of their ordinary business of common carriers, they were not liable for any loss thereof. Upon that occasion two of the learned judges, constituting a part of the majority, were of opinion that "bank-bills" did not fall within the denomination of goods, wares or merchandises; and another judge held that, although they might fall within the denomination of goods, under certain circumstances, yet that they ought not to be held so in that case, unless that was a part of the ordinary business of the company. My own judgment strongly inclines me to the same conclusion; and the reasoning of the judges of that high court, in support of it, appears to me very cogent and striking. But in the charter now under consideration the word "goods" is not found. If it were, there might be a more distressing difficulty to be encountered in construing it. 2 Williams on Ex'rs., Pt. 3, B. 3, ch. 2, § 4, pp. 854, 855, 861, 862, 2d ed., London, 1838. As it is, I have not been able to persuade myself that either the corporation or the legislature, under the word "merchandise," meant to include "bank-bills" as an object of regular transportation for hire. At all events, if they did, it seems to me that the word merchandise, ordinarily, has a much more restricted meaning, and in this respect I adopt the doctrine of the court of errors of New York.

§ 80. *Not apparent that company acted as if a common carrier of bank-bills and money under charter.*

It is incumbent on those who assert that the charter includes such an expanded meaning, to show by some clear and determinate proofs that the company have positively adopted and acted upon that meaning. If they had advertised that they would transport merchandise or freight in their steamboat,

it would hardly be pretended that the public were misled, by supposing that it included transporting bank-bills for hire, unless some unequivocal act of the company established that interpretation beyond controversy. There is no evidence in the present case that the company ever did intend to receive any bank-bills for transportation for hire, or held out such an intention to the public, or ever gave any authority to the master to receive it on their account. All his acts admit of a very different interpretation, whether the compensation received by him was a gratuity or a price for the service, and are of just such a character as must occur, if he was acting on his own personal account, and at his own personal risk, and for his own personal advantage, or his desire to oblige others. It is no sufficient answer that the company did not give notice that they would not be responsible for the acts or negligences of the master in the carriage of bank-bills. Such a notice could be required only in cases where they had reason to believe that the master held himself out to the public as entitled to contract on account of the company, or it was an act done within the ordinary scope of their business or employment.

In the view which I have taken of the law applicable to the present case, and the evidence produced by the parties, it has been unnecessary for me nicely to compare and sift the relative credibility of those of the witnesses whose testimony is in contradiction to each other, because the facts which stand uncontradicted, or are supported by an unequivocal weight of evidence, in my judgment satisfactorily dispose of the whole merits.

§ 81. *Result reached upon the whole evidence, steamboat company exempt.*

The result to which I have arrived upon a review of the evidence is, that the company never intended to be common carriers of bank-bills for hire; that they never held themselves out to the public in that character; that they never authorized the master to contract on their account for the carriage thereof; that he never intended to do so, or held out to the public that he had any authority; that all the contracts made by him for the carriage of bank-bills were designed by him to be his own personal contracts, and upon his own personal responsibility; that for the most part the services performed by him in the carriage of bank-bills were gratuitous; and even when he received any compensation it was commonly received by him as a gratuity, and not as a matter of right, although there were some instances to the contrary. That the public generally, although not universally, seem to have understood these to be the mere personal contracts of the master, and not at the risk or for the account of the company; or, at least, that this was a common impression among many of those who intrusted him with the carriage of bank-bills; that the charter of the company does not seem to have contemplated the transportation of bank-bills as an ordinary business or employment of the company, even if capable of being construed to include the right so to do, under the term "merchandise;" and, therefore, clear and unequivocal proofs ought to exist to establish the broader construction on the part of the company, before they should be affected with liability therefor; and, finally, that in this case there are no such proofs. Under such circumstances, it seems to me that the decree of the court below, dismissing the libel, ought to be affirmed.

§ 82. *Whether master is personally liable as for ordinary or gross negligence.*

In delivering this opinion, I have studiously abstained from deciding whether the master in this case was guilty either of gross or of ordinary negligence, in the loss of this package of bank-bills, because that question may yet arise, and be

brought directly in judgment in a suit against the master. I feel, however, bound to say, that if I had been entirely satisfied that the master was not guilty either of gross or of ordinary negligence, I should have been spared the many other laborious inquiries to which this opinion has been addressed. It is the doubt on this head, brought to my mind, which has compelled me to go at large into all the other grounds upon which I hold the company absolved, even if the master was guilty either of gross or of ordinary negligence.

§ 83. *In admiralty, proceedings in rem and in personam cannot be brought in one libel.*

In the course of the argument it was intimated that, in libels of this sort, the proceedings might be properly instituted *in rem* against the steamboat, and *in personam* against the owners and master thereof. I ventured at that time to say, that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character, and decretal effect. On the contrary, in this court, every practice of this sort has been constantly discountenanced, as irregular and improper. The case of *The Friend*, 3 Hagg. Adm., 114, was cited at the bar in support of the right to join the proceedings. That case is very imperfectly reported. But it appears that the original proceeding was *in rem* against the ship for a collision, and that Wardell, who was the master, and also the principal owner, and to whose negligence the libel attributed the collision, alone appeared in the suit. By the statute of 53 Geo. 3, ch. 159, the owners, when the loss has been without their fault or privity, are not liable beyond the value of their ship and freight; but the owners who are in fault, and the master also, are liable to full damages to the extent of the injury done to the other party. No bail was given. The freight was brought into court, the ship was sold, and the proceeds falling short of the damages by 400*l.*, a monition issued against Wardell to pay that sum, which failing to do, he was imprisoned upon an attachment, moved for and granted by the court. Now, it is apparent that there was a great peculiarity in this case, Wardell being the sole party who intervened, and being by the statute liable for the full damages. A monition issued before the attachment was granted; and if that monition was preceded by a supplementary libel, or act on petition, stating the facts of the sale of the ship, and the deficiency to pay the damages, the proceeding was clearly regular and right. But if no preliminary proceeding was had, I confess that I do not well see how a proceeding, originally *in rem*, could be prosecuted *in personam* against a party who in such proceeding intervened only for and to the extent of his interest. Probably there were other circumstances which varied the general rule. At all events, I am not prepared to accede to the authority of this case, if it is to stand nakedly, and only upon the circumstances above stated. In cases of collision, the injured party may proceed *in rem*, or *in personam*, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in the libel. The case of *The Richmond*, 3 Hagg. Adm., 431, is a case more conformable to my notion of the practice. But there the ship was not arrested; and the proceedings were *in personam* against the owners.

On the whole, I am of opinion that the decree of the district court ought to be affirmed; but as the appeal seems to me, under all the circumstances, in a case of such novelty and intricacy, to have been fully justifiable, I should have inclined to award that one-half of the respondents' costs in this court should

be borne by them, and the other half should be borne by the libelants, if it could have been done without breaking in upon the settled practice of the court. As it is, the respondents must take their full costs. ▴

THE KEOKUK.

(9 Wallace, 517-521. 1889.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—A steam packet company owned the steamer Keokuk and the barge Farley, which were engaged in carrying freight on the Mississippi. The Keokuk towed the barge Farley to a port, left her moored there, but not in any one's charge, and departed. A shipper took the barge to an elevator, without permission, and with his own men loaded her with wheat to be shipped to La Crosse. The Keokuk returned at night, and after unloading, put off about midnight for La Crosse. The shipper's book-keeper, in the rain and dark, handed to the second clerk of the Keokuk what he called "the bills of that barge." The clerk subsequently laid them on the first clerk's desk, not knowing their contents. No other notice that the barge had been loaded was brought to the notice of the officers of the Keokuk until they were one-third of the way to La Crosse, when the papers were discovered to be memorandum bills of lading of the barge. The barge was not watched, and in the morning was found sunk where the shipper left it. The remaining material facts are stated in the opinion of the court.

§ 84. *No maritime lien, as between ship and cargo, arises until delivery is made to the ship.*

Opinion by MR. JUSTICE DAVIS.

It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it. *Schooner Freeman v. Buckingham*, 18 How., 188. The inquiry then arises whether there was any contract to carry the wheat in question, and, if so, was the barge containing it delivered to the custody of the steamer? It is very clear, had the steamer taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And the steamer would be equally liable if the barge had been left at the landing by the fault of the officers of the boat. But the evidence not only fails to prove this, but establishes the contrary conclusion. The only witness on the part of the libelant whose testimony has any bearing on the subject is his book-keeper. He says that, on the night in question, he gave to the second clerk of the steamer, who was on the levee checking freight, two bills of lading, with the statement (of this he is not positive), "These are the bills of that barge," to which the clerk made some assenting remark. But the clerk denies that he knew the contents of the papers when handed to him, or that anything was said at the time from which he could infer their contents. And his subsequent conduct shows that the observation of the book-keeper, if any was made, failed to arrest his attention; for he put the papers in his pocket and remained on the levee until he had completed his work, and afterwards,

without examining them, placed them, in the condition in which they were received by him, on the desk of the first clerk.

If he is not mistaken in his recollection that the first clerk was present on the occasion, and that he told him "here are the bills" (which is very doubtful from the evidence), yet it is manifest the first clerk attached no importance to the bills, for he did not notice them until after daylight, when the Keokuk was far on her way to La Crosse. Each clerk, doubtless, acted on the supposition that the other knew to what particular freight the bills related, but it seems both were equally uninformed concerning them. It is not pretended that, in any other way than this, was any information conveyed to any one connected with the boat of the intended shipment of grain by the libellant. Neither the master, nor any person on the steamer, or in the employment of the company, had notice that he had taken the barge and loaded it with grain, or that he contemplated doing so. If it be conceded the course of business between the two parties justified him in taking possession of the barge and loading it, without the direct permission of the master, yet it falls far short of showing that the barge, when loaded, was considered in the custody of the steamer without notice to any of her officers. Indeed, it would be unreasonable to suppose the parties dealt with each other on any such understanding, for it would place the advantage altogether on the side of the shipper, who would be relieved of care and risk as soon as the barge was filled with grain, and the master could exercise no discretion about receiving it.

§ 85. *No delivery to the ship is shown in the present case.*

As there was, then, no agreement in this case which changed the legal rights of the parties, it is clear the steamer is not subject to a maritime lien. The wheat and barge were, at the time of the accident, in the control of the libellant, and their custody was not changed by handing unsigned bills of lading to the second clerk of the steamer, who did not know their contents, nor had any reason to suppose they related to the barge Farley. It was the misfortune of the libellant that he transacted his business so loosely, and, if it be the corporation is somewhat to blame for this, the steamer has not, on that account, committed any fault for which she is chargeable in admiralty. As no one in her behalf contracted with the libellant to transport the barge to La Crosse, and as he did nothing to transfer the possession to the steamer, the libel cannot be sustained. The case of *Bulkley v. Naumkeag Cotton Co.* (24 How., 386; §§ 86-92, *infra*) is cited in opposition to the views we have presented, but it is not applicable. There the goods were delivered to a lighter in the control of the ship; here the shipper took control of the barge, and did not deliver either barge or cargo to the steamer. The decree of the circuit court is reversed, and this cause is remanded to that court with directions to dismiss the libel.

BULKLEY v. THE NAUMKEAG STEAM COTTON COMPANY.

(24 Howard, 386-394. 1860.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States, sitting in admiralty, for the district of Massachusetts. The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the district and circuit

courts, and upon which both courts decreed for the libellant. From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant seven hundred and seven bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading. The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case. Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board. In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge. The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and one hundred bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the one hundred bales was taken out, her boiler exploded, in consequence of which the one hundred bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the six hundred and seven bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

§ 86. *Question of recovery under bill of lading or contract of affreightment.*

The master of the barque signed bills of lading, including the one hundred bales, being advised that he was bound to do so, and that if he refused his vessel would be arrested and detained. On her arrival at Boston, the master delivered the six hundred and seven bales to the consignees, and tendered the fourteen, which were refused. A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

§ 87. *Delivery for shipment to a lighterman may constitute a delivery to the master.*

The court is of opinion that the vessel was bound for the safe shipment of the whole of the seven hundred and seven bales of cotton, the quantity con-

tracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed — the one entitled to all the privileges secured to the owner or cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognized by principles and usages of the maritime law. The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution. Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

§ 88. *Vessel liable for loss notwithstanding goods were never laden on board.*

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

§ 89. *Case distinguished where master receipts for goods never delivered.*

It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court and in England in support of the position. 18 How., 189; 19 id., 90; and *Grant v. Norway*, 2 Eng. L. & Eq., 337; 18 Eng. L. & Eq., 561; 29 id., 323. But it will be seen, on reference to these cases, the doctrine was applied or asserted upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely, the delivery of the cargo. It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a *bona fide* holder for value. The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of ship-masters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board, when con-

trary to the fact, but that a third party taking the bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it. The first time the question arose in England and was determined, was in the case of *Grant v. Norway*, in the common pleas, 1851, and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no authority to sign the bill of lading, unless the goods had been shipped; cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried, and, in truth, where the whole transaction rested upon simulated bills of lading, signed by the master in fraud of his owners.

§ 90. *Delivery upon present facts was as binding as though goods were on board.*

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

§ 91. *As to the lien relation of ship and cargo, their physical connection is not essential.*

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading, and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment.

§ 92. *The good sense of the transaction determines as to the lien relation.*

We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and in this view we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as

made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf. The decree of the court below affirmed. (*a*)

THE CORDILLERA.

(Circuit Court for New York: 5 Blatchford, 518-520. 1867.)

STATEMENT OF FACTS.—*Libel in rem*. Loss of two tierces of lard by their falling from the slings while being hoisted on board from a lighter. Decree below for libelants. Appeal by claimants.

§ 93. *When does the duty of lighterman in delivering a shipment cease and that of the carrier begin.*

Opinion by NELSON, J.

The ship insists that the loss, in this case, occurred by the mismanagement of the lightermen in putting the tierces into the slings, and, also, in starting the horses which worked the tackle, while they were thus imperfectly slung. The libelants insist that the loss happened after the tierces had passed into the possession and control of the ship. The case resulted in a difference, both as to the facts and the usage in hoisting a cargo from the lighter to the ship, between the lightermen and the stevedores, the lightermen insisting that their duty was performed when the tierces were properly placed on the slings and hooked to the tackle, and the stevedores insisting that it was performed only when the tierces reached the railing of the ship and were ready to be taken from the tackle to the deck. The stevedores are in the service of the vessel, which is responsible to the shipper for the damage done by them to his goods in putting them on board. In this case, the apparatus by which the tierces were hoisted from the lighter, including the horses, belonged either to the ship or to the stevedores, which, as I infer from the evidence, is according to the general usage. I am inclined to think that when, under these circumstances, cargo is to be delivered from the lighter at the side of the ship, the responsibility of the lightermen ceases, as a general rule, when the cargo is properly placed on the slings and hooked to the tackle; and that the duty of the ship begins with the hoisting of it to the deck of the ship. It is then in the possession of the apparatus of the ship, or the stevedores, and under their control and direction.

It is, however, insisted, on the part of the claimants, that in this particular case the master of the lighter gave the order to the horses to move before the tierces were properly secured in the slings. But this is disputed, and the evidence is conflicting. The court below charged the ship, and, in my view, the proofs fairly warranted the finding.

Decree affirmed.

THE R. G. WINSLOW.

(Circuit Court for Wisconsin: 4 Bissell, 13-17. 1860.)

STATEMENT OF FACTS.—*Proceeding in rem* to recover the value of seven hundred bushels of wheat, which were lost while in the act of being loaded from the elevator into The Winslow. The wheat was passed into the vessel through an iron pipe sixteen feet long and ten inches in diameter, which was attached

(a) This case affirms on appeal *The Bark Edwin*,* 1 Spr., 477; S. C. (on appeal to the circuit court), 1 Cliff., 322.

to the elevator bin, the other end lying on the deck of the vessel, to be watched and regulated by the second mate. As the delivery of the wheat was thus being made, the vessel careened and the pipe parted and about seven hundred bushels were lost. At the time the accident took place both the master and second mate were asleep below.

§ 94. *Duty of officers of a vessel in receiving a cargo on board.*

Opinion by MILLER, J.

If the mate who had charge of the pipe had been vigilant in watching the discharge of wheat from the pipe, but a small quantity of one draft would have been lost, for by a word from him to the persons in the cupola the flow of wheat could have been instantly shut off; and it was his duty to give the order. I do not think it material to inquire how much the vessel careened, or whether the pipe broke or parted at the joint, or whether the careening of the vessel caused the parting of the pipe, or whether the parting of the pipe was at a place over the deck of the vessel or over the dock. The mate on board, who had charge of the pipe, and of the discharge of the wheat from the pipe into the hold of the vessel, neglected his duty, and allowed seven drafts of one hundred bushels of wheat to be lost. In respect to the loading and carriage of the goods, the master is chargeable with the most exact diligence. His responsibility with respect to them begins where that of the wharfinger ends, and when they are delivered to some accredited person on board the ship. If he receives them at the quay, or beach, or sends his boat for them, his responsibility attaches from the moment of the receipt. Not only is the master responsible with respect to the safety and security of the goods, but the vessel is also liable. It stands as the shipper's security, and is, by the maritime law, hypothecated to him for his indemnity. The duties of the master as carrier extend to all that relates to the loading, transportation and delivery of the goods. And for the faithful performance of those duties the ship stands pledged, as well as the master and the owners personally. Flanders on Shipping, § 189. And the manner of taking goods on board, and the commencement of the master's duty in this respect, depends on the custom of the particular place. More or less is to be done by the wharfingers or lightermen, according to the usage. Abb. on Shipp., 345.

§ 95. *Negligence here apparent in receiving wheat delivered through a pipe.*

The master of the vessel knew that the wheat was to be delivered on board through the pipe; and he also knew the manner of weighing and discharging the grain from the hopper, when he made the contract; and with such knowledge he had the first mate placed in the cupola, to tally the drafts, and the second mate stationed on deck to watch the discharge of the wheat from the pipe into the hold of the vessel, and to keep the vessel trimmed; and the work had commenced before he turned in. It is not the business of the officer in charge of the receiving of wheat from a warehouse through a pipe, to permit any person not belonging to the vessel, nor under his command, on board, to shift the pipe or to trim the vessel. This is as much the business of the vessel, as weighing the wheat is of the warehouseman. The parties proceeded to put the wheat on board according to the usual manner of loading vessels with grain from warehouses.

§ 96. *Control of the warehouse pipe makes it the pipe of the vessel pro hac vice.*

The pipe is attached to the warehouse, and it is used jointly by the warehouse and the vessel. The vessel controls the discharge of the wheat from the

warehouse through the pipe. The order to discharge or to stop is given from the vessel; and the wheat is weighed by the warehouseman, and the drafts are tallied by the first mate before discharged from the hopper. Using the pipe in loading the vessel was necessary, in the performance of the contract made by the master with the shipper, for which the owners were to receive compensation in the freight earned by the vessel. Unless the wheat was transported, freight would not be earned; and it could not be transported unless a pipe was used in its delivery on board. The master might have supplied a pipe; and, with the consent of the owner of the warehouse, he might have attached it to the warehouse and used it. But there can be no difference in law, whether he used the pipe of the warehouse or his own pipe. He had the sole control of the warehouse pipe, and made it the pipe of the vessel *pro hac vice*. *De Mott v. Laraway*, 14 Wend., 225. I am satisfied that the duty of the warehouseman ended with the tally of the drafts by the mate, and the discharge of the wheat from the warehouse into the outside pipe, and that the duty of the master then commenced. At that moment the delivery of the wheat was complete, and the liability of the vessel attached. The shipper had then fully parted with the possession; and having no longer any control, or right of control, over the wheat, he was in no degree responsible for its actual delivery on board.

§ 97. *Other illustrations as to a carrier's liability in receiving goods.*

Upon the same principle it was ruled, in the case of *The Bark Edwin*, 23 Law Rep., 198, that the vessel was liable for the non-delivery of bales of cotton according to contract, which were lost before reaching the vessel, in consequence of the explosion of the boiler of a lighter in which the cotton was being carried from the cotton-press to the vessel, in the possession of the master of the vessel. This case is different from a contract merely executory, where there has been no delivery of the goods to the master, nor change of possession, nor effort to deliver. When there is no delivery of the goods, the contract of the master for their transportation creates no lien. *The Schooner Freeman v. Buckingham*, 18 How., 182. There the bill of lading of goods not shipped was designed as an instrument of fraud. And in *Vandewater v. Mills*, 19 How., 82, where there was a contract for the future employment of the vessel. And in *Hannah v. The Schooner Carrington*, 2 Law Mo., 456, where the ship was withdrawn from the trade, and refused further to comply with a contract of affreightment. And in *The Joseph Grant*, 1 Biss., 193 (§§ 363-66, *infra*), it was decided that the master has no authority as such to sign a bill of lading in blank, and that the libellant as assignee of the bill of lading, filled up after the vessel sailed, acquired no lien on the vessel. The cargo on board at the time corresponded with the bill of lading as filled up, but it was delivered to a different consignee, according to the bill of lading correctly given by the master before the vessel sailed. The cases here referred to are wanting in the essential particular of delivery to the vessel, to make them precedents governing the case under consideration. The wheat lost by the negligence of the mate was delivered to the vessel as a portion of the twenty thousand bushels contracted to be received on board and transported to Buffalo; and the libellant should have a decree for its value.

HELLIWELL v. GRAND TRUNK RAILWAY OF CANADA.

(Circuit Court for Wisconsin: 7 Federal Reporter, 68-78. 1881.)

Charge by DYER, D. J.

STATEMENT OF FACTS.— This is an action brought by the plaintiffs, who compose a firm doing business in this city, against the defendant company to recover damages for the alleged failure of the defendant to transport certain quantities of flour which it undertook to carry from Milwaukee to London, England, within such time as it is claimed the same should have been transported and delivered to the consignees. From admissions contained in the answer, and from a stipulation put into the case by counsel for the respective parties, it appears that there is no controversy as to certain facts, viz.: that seven thousand five hundred and fifty-eight bags of flour, of the weight of one hundred and forty pounds each, were delivered to the defendant for transportation; that the price to be paid for such transportation was fifty-six cents gold per hundred pounds; that the flour was to be transported by the Northern Transit line from Milwaukee to Ludington; thence by the Flint & Pere Marquette Railway and the defendant's line of road to Portland; and thence by steamship to London. It is stipulated that a certain tabular statement, which has been exhibited to you, correctly states the dates of actual delivery of the several shipments of flour to the Northern Transit line at Milwaukee, the dates of departure from Milwaukee of the several steamers of that line laden with the flour, the names of such steamers, the quantity of flour by them respectively carried; the dates of arrival of the different shipments at Portland, and of the delivery of the same on board steamships bound for London; the names of such steamers, and the dates of their departure from Portland and arrival at London; and it is expressly stipulated that the steamship Argosy left Portland March 27, 1880, and arrived in London April 7th; that the steamship Bothel left Portland April 2d, and arrived in London April 22d; and that the Argosy and Bothel, and the steamships Herworth and Woodthorn, which two last-named vessels carried the flour, were all employed by the defendant in the business of transportation, and were all vessels of equal class for marine insurance. All these are uncontroverted facts in the case.

It appears that the flour was all delivered here in Milwaukee to the Transit line at various dates between February 26th, inclusive, and March 19th, inclusive; the largest portion being delivered on February 26th and March 2d. It was shipped on various days between February 26th and March 19th, both inclusive, and arrived in Portland at different dates between March 13th, inclusive, and March 30th, inclusive; the most of it so arriving on and prior to March 19th. It was all carried to London on the vessels Woodthorn and Herworth. That part carried on the Woodthorn was delivered to her April 17th, 18th and 19th, and she sailed on the 19th and arrived in London May 15th. That part of the flour carried on the Herworth was delivered to her April 27th and 28th, and she sailed on the 29th and arrived in London May 15th, on the same day that the Woodthorn arrived.

§ 98. *Contract considered under which the transportation was undertaken.*

Now, gentlemen, the first question naturally arising is: What was the contract under which the defendant undertook the transportation of this flour, and what were the rights, duties and obligations of the parties under such contract as they in fact made? The plaintiffs have contended that the flour was received by the defendant and shipped under a verbal contract alleged to have

been made on the 25th, 26th and 28th days of February, 1880, by the witness Cole, in their behalf, with the witness Young, acting in behalf of the defendant; and that this contract was that the flour should be carried to Portland by the route and on the lines named, and should be shipped thence to London by the steamship *Argosy*. It has been claimed that by this alleged agreement the defendant undertook absolutely that the flour should be carried on that vessel, and no other. This claim, of course, wholly ignores the bills of lading in evidence, and which confessedly the plaintiffs subsequently received from the defendant's agent. Upon looking into the bills of lading we find that they provide that the flour shall be shipped at Portland "upon the vessel called the '*Argosy*' (or other vessel of equal class for marine insurance)." And herein we see that the bills of lading differ from the alleged verbal contract, in that they, by their terms, give the defendant the right to ship the flour on the *Argosy* or on any other vessel of equal class for insurance. It has been contended by the plaintiffs that, with reference to the vessel on which the flour was to be shipped from Portland, the alleged verbal contract must prevail as against this provision in the bills of lading, while on the part of the defendant it has been claimed that the bills of lading constitute the contract on the subject.

§ 99. *Bill of lading supersedes oral agreement.*

Upon the undisputed evidence I am of the opinion (as already expressed to counsel), and must instruct you, that in all respects wherein the bills of lading did not limit the defendant's liability as a common carrier, they constituted the contract between the parties; and, therefore, so far as this question of the vessel on which the flour should be shipped from Portland is concerned, the defendant was not bound to ship it on the *Argosy* alone, but had the right to ship it on that vessel or any other vessel of equal class with the *Argosy* for marine insurance. The contract, then, was that the defendant should take the flour in question at Milwaukee, convey it to Ludington by the Northern Transit line, thence by the Flint & Pere Marquette Railroad and the defendant's line to Portland, and thence by the steamship *Argosy* or some other vessel of equal class for marine insurance to London. The bills of lading contained a condition that the defendant should not be liable for delays in transporting the flour occasioned by overpressure of freight; and there has been a good deal of controversy on the trial as to the effect of this condition, and as to whether the condition was binding upon the plaintiffs as part of the contract. In view, however, of the fact that in the opinion of the court that clause would, if regarded as part of the contract, give no greater exemption to the carrier than it would be entitled to by law, all question as to whether that clause was part of the plaintiffs' contract, or not, becomes of no importance in the view of both counsel and the court, and it is therefore unnecessary to submit to you questions as to the character and effect of that condition which otherwise might be material.

§ 100. *Claim of unreasonable delay in transporting.*

It is claimed by the plaintiffs that the flour in question was not transported by the defendant and delivered in London with proper dispatch; . . . that it was unreasonably detained in Portland after its arrival at that port. It is claimed that these alleged delays were attributable to the fault of the defendant, and to its neglect to furnish such means of conveyance and facilities for transportation as the company were, under its contract, bound to furnish to enable it to deliver the flour in London within a proper and reasonable time,

and that in consequence, and because of a decline in the price of flour between the time when it is alleged it should have been delivered in London and the time when it was actually delivered, the plaintiffs have been subjected to a loss which the defendant should make good to them.

§ 101. *Circumstances under which delay in transporting goods will be excused.*

It is claimed by the defendant that the flour was transported and delivered within a reasonable time under the circumstances existing at the time. It is admitted that there was delay in forwarding the flour from Portland, but it is insisted that the defendant was, when it made its contract with the plaintiffs, well supplied with the necessary equipments, facilities and means for transporting all the freight which could be ordinarily expected to seek transportation upon its route, and that the delay occurring at Portland was occasioned by a sudden and extraordinary influx of ocean freight, which was beyond the defendant's control, and which it could not foresee and anticipate, nor by the exercise of any diligence provide for; and that it ought not to be held responsible for circumstances which, as it is claimed, excuse the alleged delay in forwarding the flour. The obligations assumed by the defendant in this transaction were the usual obligations of a common carrier, among which was that of transporting this flour to the place of consignment with proper dispatch; that is, within a reasonable time after it was delivered to the defendant for shipment. This it was incumbent on the defendant to do under this contract; and, as to what is meant by reasonable time, perhaps no rule can be more satisfactorily laid down than that the transportation must be accomplished by the carrier "with all convenient dispatch with such suitable and sufficient means as he is required to provide for his business." Hutchinson on Carriers, § 328. The question of reasonable time is one of fact, and may be determined by the length of the journey, the modes of conveyance, the season of the year, the state of the weather, "and any other circumstances which may properly be taken into consideration by the jury in finding whether the carrier has been guilty of improper delay." Hutchinson on Carriers, § 329. This, then, was the general duty of defendant; that is, to convey this flour to London, and there deliver it to the consignees, within a reasonable time. Something has been said in the arguments of counsel as to the alleged failure of the defendant to have steamships at its command to receive this flour on its arrival in Portland. This was a through contract. It was therefore as much the duty of the defendant to furnish a vessel or vessels for the ocean transportation of this flour as it was its duty to furnish cars to transport it from Ludington to Portland. It was not, however, necessarily its duty to have vessels in waiting at the very moment, or on the very day, the flour should arrive in Portland; but it was its duty to provide means of conveyance by which reasonable dispatch should be afforded, and improper delay avoided. The law in such case exacts nothing unreasonable, but it does require diligence and reasonable promptness, under the circumstances, in furnishing means of conveyance. The fact that, if the defendant did not ship the flour on the *Argosy*, it had the right to ship it on any other vessel of equal class for marine insurance, did not in any manner relieve the defendant of its duty in the matter of forwarding the flour with proper dispatch. If it selected any other vessel than the *Argosy*, it was as much bound to transport the flour within a reasonable time as if the shipment was made in that particular vessel.

§ 102. *Duty of carrier to provide ordinary facilities and appliances.*

It may be well to state to you further, as a general proposition of law with

reference to the obligation of a common carrier to provide sufficient means of conveyance, that it is "the first duty of the carrier to provide himself with all the facilities and appliances for the transportation of such goods as he holds himself out as ready to engage in the carriage of. He must put himself in a situation to be at least able to transport an amount of freight of the kind which he proposes to carry equal to that which may be ordinarily expected to seek transportation upon his route," and he will not "be excused for not being provided with a sufficiency of conveyances and other means for the transportation of that which he may reasonably expect to be offered." But if there was delay in transporting any of the flour to Portland, or in forwarding it from that point, which, under ordinary circumstances, would make the defendant liable, it is claimed in its behalf that it was excusable delay, and that the defendant ought not to be held answerable therefor.

§ 103. *An unusual accumulation of freight and pressure of business will excuse delay, when.*

There is testimony tending to show that there was, at that time, an extraordinary press of foreign export traffic, and such an accumulation at Portland of freight, bound for foreign ports, as rendered it, as it is claimed, impossible to provide immediate ocean transportation. Upon this question, and as to when, or under what circumstances, an overpressure of freight will excuse delay, I instruct you that if, after the defendant took this flour for shipment, and after the performance of the contract to carry was begun, there occurred, without fault of the defendant, an extraordinary and unforeseen influx upon the defendant's lines of freight for foreign export, and that the defendant was thereby unexpectedly incapacitated for forwarding the flour with usual dispatch, and that the delay of the flour was wholly occasioned by such unusual and unexpected pressure of freight, and not in any degree by negligence of the defendant, then, and under such circumstances, the defendant would not be responsible for such delay so occasioned. It would, however, be the duty of the defendant, in such a state of the case, to forward the flour promptly after the causes of such excusable delay were removed. Putting the proposition in substantially the form of one of the instructions, which I am asked to give you: If, at the time of making the contract with the plaintiffs for the transportation of this flour, the defendant had no doubt, and if the condition of business on its lines gave it no grounds for doubting, that suitable means would be at its command within the usual and ordinary time for conveying the flour from Portland to London; and if all reasonable efforts were seasonably employed by the defendant to obtain such means, and the alleged delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines for foreign export, arising subsequently to the making of the contract with the plaintiffs, so that it was thereby rendered impossible for the defendant, without any negligence on its part, to procure a vessel or vessels to carry the flour within what would be, under usual circumstances, a reasonable time,—then the defendant would not be responsible for the consequences of such delay.

§ 104. *Circumstances under which a carrier cannot be excused for delay in transporting goods. Duty to apprise shipper of impending delay.*

On the other hand, if, at the time the defendant contracted to carry this flour, there was already an accumulation or press of business on its lines which incapacitated the defendant, or might reasonably be expected to incapacitate it, for performing its duty by delivering the flour in London within a reason-

able time, and this was known to the defendant at the time, or might have been known or ascertained by proper effort on its part, or if there were then reasonable grounds for a belief on the part of the defendant that such was the state of the case at the time, the defendant would be liable for the delay, although it was occasioned by such accumulation or press of business; for, in such case, it would be the carrier's duty, if it would avoid liability, to inform the shipper of the condition of its lines, so that he might exercise his right to select some other line for the transportation of his property; and if the carrier, under such circumstances, fails to do this, and chooses to take the property in the face of threatened inability to transport it with requisite dispatch, it must answer for the consequences of the delay. A carrier has no right to take a shipper's property for transportation, concealing from him at the time existing circumstances within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper, that may incapacitate, or may be fairly expected to incapacitate, it for the full performance of its duty in the transportation of property, and then claim exemption from liability. Whether, upon this question, the facts in this case are as claimed by the plaintiffs or as claimed by the defendant, you are to determine, and for this purpose you will look into the evidence.

§ 105. *Charge to jury accordingly.*

There is testimony on the subject of the increase of traffic on the defendant's road, and the accumulation of freight at Portland. . . . You will determine, upon all the testimony in the case, whether the alleged increase of business and accumulation of export freight was sudden, unlooked for and extraordinary, and occurring after the contract with the plaintiffs was made, or whether it existed at the time the defendant took the flour for transportation, or could have been, under all the then existing circumstances, reasonably anticipated and expected. Testimony has also been given of the efforts made by the defendant to obtain steamers to carry this flour, and, in this connection, I should say to you that the mere fact that the defendant could not get steamers sooner than it did would not relieve it from liability for delay unless such inability was solely attributable to such overpressure of freight as, within the instructions I have given you, would excuse the delay. . To aid you in passing upon the questions involved, you have, by the stipulation in evidence, as I have before stated, the dates when the flour was delivered to the defendant in Milwaukee and when the shipment on the steamers of the Transit line began; the dates of arrival in Portland; of delivery to steamships at that port, and of the sailing of the steamships, and of arrival in London, and other facts agreed upon in the stipulation of which I have already spoken; and, upon all the evidence, you will say whether this flour was delivered in London within a reasonable time after its delivery to the defendant; and, if it was not, whether the delay is excusable within the principles of law which I have stated. If the flour was delivered within a reasonable time, under the circumstances of the case, or if it was not, and the delay was excusable within the principles the court has laid down, then the defendant is entitled to a verdict. If, on the other hand, the flour was not delivered in London within a reasonable time after the defendant took it for transportation, and if the delay was not solely caused by facts and circumstances which make it excusable within the principles of law stated, then the plaintiffs ought to recover. . . . If you should find the plaintiffs entitled to a verdict, the measure of damages would be the difference between the market value of the flour which was improperly de-

layed, at the time when it should have been delivered in London, and its market value when it was in fact delivered, which was May 15, 1880. (Verdict for plaintiffs for \$1,500.)

THE BARK INNOCENTA.

(District Court, Southern District of New York : 10 Benedict, 410-415. 1879.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a libel brought by the shipper of cargo against the vessel for the sum of \$120, which is described in the libel as “demurrage of lighters.” The cargo was heavy oak and black walnut timber. The libel alleges that on the 1st day of March, 1877, the agents of the vessel contracted and engaged with the libelant that the vessel should take and receive on board at New York to be carried to London, about two hundred tons measurement of timber; that, by the terms of the contract, the timber was to be delivered and loaded on board of the vessel from lighters to be furnished by libelant, and that such delivery should be completed within the usual and customary time, after the lighters should be moored alongside the vessel and be in readiness for such delivery and loading; that the usual and customary time required in similar cases is two days, by the custom of the port of New York; that the lighters were delayed beyond that time by the slow, tedious and irregular way in which the vessel received the timber, and for this delay the libelant demands damages at the rate of twenty dollars per day, for each lighter, while so delayed beyond the customary period of two days. There was evidence tending to show that the owner of the lighters had made a claim against the libelant for this demurrage, and that the libelant had acknowledged the claim to be just as between himself and the owner of the lighters; but up to the time of the trial he had paid nothing. It is insisted by the claimants that on this account the libelant had not at the commencement of the suit sustained any damage, and therefore could not maintain the action; that it was not sufficient that he may have incurred a liability, merely. It is, however, unnecessary to decide this question. The contract between the vessel and the libelant was in writing, as follows: “Freight for London, per Italian bark ‘Innocenta,’ at pier 17, E. River, Benham & Boyeson, agents, New York, 1st March, 1877, engaged for account Andrew Brown, about one hundred tons measurement oak logs, fifty to seventy-five tons walnut, twenty-five tons white wood, at 25s. and 5p. sterling per forty cubic feet; Churchill & Sims caliper measurement; Saml. De Bow & Haughton, brokers.”

§ 106. *New terms as to delivery cannot be imposed by one party to a contract already reduced to writing.*

It is very evident that under this contract the vessel never undertook to receive the wood from lighters; nor is any evidence offered that delivery of such cargo is by the usage or custom of the port made in such way. On the day after the contract was made, the libelant notified the agents of the vessel that the wood was heavy timber, and that the vessel should be ready with corresponding tackle to take it “*off the lighters*,” as soon as they arrived alongside. But the contract being already complete and reduced to writing, it is hardly necessary to observe that the libelant could not, by such a notice, impose on the vessel a new obligation not already imposed on her by the contract itself. It was the right of the libelant to bring the wood to the ship in what way he pleased, and when alongside, whether on the pier or otherwise, it was the duty

of the ship to take it into her charge and keeping; but the shipper had no right to prescribe the time and manner in which the ship should actually take it on board. The shipper had a right to leave it on the pier, notifying the proper officer of the ship that it was there under the contract. He could not, by bringing up, as it were, another pier on the other side of the ship in the shape of a lighter, make the duty of the vessel in respect to it any different from what it would have been if he had placed it on the pier already there for the purpose. If it had been agreed that it should come by lighter, there might be an obligation implied, on the ship's part, to take it off the lighter in a reasonable time. I am of opinion, therefore, that the libelant has failed to make out the contract alleged in the libel, and that he has only himself to blame for any loss he has suffered from voluntarily converting the lighters he hired into piers, and that under this contract no action will lie against this vessel for loss sustained by the libelant in consequence of the delay of the lighters while so used.

§ 107. *Evidence of usage as to time of delivery considered.*

But the libelant has also wholly failed to prove the alleged custom of the port of New York, limiting the time within which a vessel in this port must receive cargo from a lighter to two days. Whether such a custom, if established by the evidence, would bind a foreign ship, need not be considered, for the evidence of the alleged custom is wholly insufficient. There is evidence that the "Produce Exchange," an organization of merchants, has adopted a rule somewhat to this effect; but no such association can, by a rule, make a custom of the port, however the members of it may, as between themselves, bind themselves to observe the rule. This is matter of contract. But to make a custom of the port, the rule must be so generally known and acknowledged and acted upon, as virtually to be applied by the whole of that part of the business community which it would affect. As it is said in the books, it must be "universal." In this case, of the four witnesses called on this question, who were familiar with the trade in question, two were shown to have no knowledge of any existing custom of the port outside of the rule of the "Produce Exchange," and the strongest witness to its existence doubted its actual application as a usage to a case where, from the nature of the cargo to be received, it could not be taken on board with all possible diligence and dispatch on the part of the ship within the period of two days. Yet to be worth anything as a custom, it should have been proved that it is actually applied and enforced where, but for the custom, the time allowed would be unreasonably short. Otherwise the custom adds nothing to the general rule of law which would allow a reasonable time for taking the cargo on board, having regard to all the circumstances, if the vessel had contracted to receive it from the lighter.

§ 108. *Facts stated as proving no unnecessary delay by the vessel.*

The libelant has also failed to prove any unnecessary delay or negligence on the part of the vessel. It appeared that as soon as the lighters came alongside the stevedore went to work with a suitable number of men, and the usual appliances for taking the timber on board; that the hatch by which it must be taken in was small, and the space between decks where it was to be stowed, very contracted; that there was great and unusual difficulty in taking the timber on board. I am satisfied that the vessel used all due and proper diligence to take it on board. On the third day, at noon, the work was stopped in consequence of an order given by the owner of the lighters to their masters, which prevented the stevedore from continuing the work, and this stoppage continued

about twenty-four hours. It is claimed by the libelant that the occasion for this order was, that the stevedore had positively refused to take on board at all what remained of the heavy oak logs. The libelant's agent appears to have believed that the stevedore had done so upon reports to him from the lightermen and the owner of the lighters. This led to some misunderstanding, but I am not satisfied that there had been such a refusal, and therefore I cannot charge this delay to any fault on the part of the vessel. Libel dismissed, with costs.

§ 109. **Marking goods.**—The shipper of goods as freight ought to mark the goods plainly and see that they are duly entered or received. *The Huntress*, Dav., 82 (§§ 871-876).

§ 110. **Knowledge of contents.**—A carrier is neither bound to have nor can he exact knowledge of the contents of packages delivered to him for carriage. *Parrott v. Barney*, 2 Abb., 197.

§ 111. Carriers cannot refuse to receive packages offered for carriage unless informed of contents, where the case is free from suspicion. But *semble*, it is the duty of the shipper who offers goods of a dangerous nature to give notice of their character. *Nitro-Glycerine Case*, 15 Wall., 524 (§§ 169-176). See § 184.

§ 112. **Delivery to the carrier.**—Delivery of freight to a lighter, and a receipt therefor by the master of the vessel, is a good delivery; and especially where it is proved that it is a customary and convenient mode of delivery. *Campbell v. Bark Sunlight*,* 2 Hughes, 9.

§ 113. Where the owners of a steamer lying below charters a steamboat to carry down freight and passengers from the landing and bring back the cargo, a delivery of freight to the steamboat is, under such circumstances, delivery to the latter, so as to bind the owners. And if the steamer be discharging and taking on cargo at a wharf below, delivery upon the wharf is delivery to the steamer itself. *The Oregon*,* *Deady*, 179.

§ 114. **Contract of affreightment.**—A contract of affreightment, *bona fide* and within the apparent scope of the master's authority, binds the vessel to the goods for its performance; the ownership of the vessel, and the master's being the general or special owner's agent, being wholly immaterial. *Schooner Freeman v. Buckingham*, 18 How., 182.

§ 115. The master of a vessel may, by contract of affreightment, bind the vessel, though proving faithless to the owner thereof, who gave him possession. *Jackson v. The Julia Smith*, 6 McL., 484 (§§ 1172-73); *The Julia Smith*,* *Newb.*, 61.

§ 116. Where an agent made a contract with a carrier in his own name for the transportation of lumber, and afterwards insisted on shipping it in the name of the principal, *held*, that the carrier had a right to refuse to receive it, and was not liable to an action for the increased freight paid to another vessel. *The A. Cheesebrough*,* 8 Blatch., 305.

§ 117. Whether a contract was one of affreightment or a hire of the vessel considered upon special circumstances. *The Sunswick*,* 5 Blatch., 280.

§ 118. Contract of affreightment to carry a horse to a certain place held to be insufficiently proved. *Butler v. Steamer Arrow*,* 6 McL., 470.

§ 119. An agreement to transport certain stores, "supposed to amount to about three thousand seven hundred barrels," imposes no obligation to furnish any specific number of barrels. *Robinson v. Noble*, 8 Pet., 181.

§ 120. **Delays in transporting.**—Where a cargo is received on board it will be presumed that the contract was for the vessel to proceed without unnecessary delay, and not that it depended upon a condition that a master and crew could be found. Difficulty of finding a master and crew to perform the voyage does not usually excuse the carrier; though as to whether it would under extraordinary circumstances, *quære*. *The Eliza*,* *Dav.*, 316.

§ 121. A carrier receiving freight for transportation should carry it without unreasonable delay. A delay of twenty-four hours in transporting horses by railway is unreasonable unless explained satisfactorily; and the excuse that the rolling stock was needed for the purpose of carrying passengers does not excuse the company. *Ormsby v. Union Pacific R'y Co.*,* 2 McC., 48.

§ 122. The master of a vessel having contracted to transport a cargo, performance was interrupted by the death of the master, and the freezing up of the vessel. *Held*, the contract of affreightment binds both vessel and owner. If a ship enters upon performance of its work or takes any step towards such performance, the ship becomes pledged to the complete execution of the contract. *The Ira Chaffee*, 2 Flip., 650.

III. RESPONSIBILITIES OF THE CARRIER AT COMMON LAW.

SUMMARY — *Act of God; carrier's contributory negligence*, §§ 123, 124. — *Loss by public enemy; carrier's contributory negligence*, §§ 125-127. — *Fitness of vehicle; seaworthiness of vessel, etc.*, §§ 128-131. — *Transporting grain on western rivers*, § 132. — *Changing vehicle or transferring the goods*, § 133. — *Carriage of peculiar articles likely to injure or deteriorate*, §§ 134, 135.

§ 123. Where damage to goods resulted immediately from an act of God, such as a sudden and extraordinary flood, the common carrier is not liable unless it appear that his negligence contributed to the loss. Delay in transportation, though remotely exposing to the peril, does not ordinarily charge the carrier where an act of God was the proximate cause of loss. Nor does a failure to carry by the railway train agreed upon. *Railroad Co. v. Reeves*, §§ 136-143.

§ 124. Act of God being shown by the carrier as the proximate cause of loss, it is for the party who claims contributory and culpable negligence on the carrier's part to establish it. *Ibid.*

§ 125. Where goods transported through an Indian country are destroyed by a band of Indians, the stage carrier cannot excuse the loss as having been caused by a "public enemy," where it appears that ordinary diligence to avert the mischief was wanting on his part. For transportation of so perilous a character appropriate care should be used in selecting drivers and other agents. Whether ordinary diligence has been employed, under the circumstances, to prevent the destruction, a jury may determine upon all the evidence. *Holliday v. Kennard*, §§ 144-149.

§ 126. If the carrier's negligence concur with act of a public enemy in causing a loss, such negligence operating at the time of the loss, the carrier is not exonerated. *Caldwell v. Southern Express Co.*, §§ 150-155.

§ 127. Carrier held responsible as a bailee for hire where the *status* of civil war prevented him from completing his undertaking. *Ibid.*

§ 128. A vessel should be reasonably calculated to endure the ordinary strain of the navigation in which she is engaged. For loss of goods where the vehicle is not reasonably sufficient, the carrier is answerable. *The Bark Vivid*, §§ 156-159.

§ 129. A bark, which proved to have leaked while at anchor in a harbor, is apparently unseaworthy, and it is incumbent upon the ship-owner to show stress of weather or other circumstance sufficient to account for such leak in a vessel of ordinary strength. *Ibid.*

§ 130. A vessel springing a leak soon after leaving port without encountering tempestuous weather, the presumption of unseaworthiness is furnished, which the carrier should repel or else respond for the loss of cargo. *The Planter*, §§ 159-162.

§ 131. Navigation on inland rivers, by barges carrying grain, is attended with peculiar perils, such as running aground or rubbing on a sand-bar. Seaworthiness is to be regarded with reference to the peculiar perils of a navigation; hence such barges should be reasonably strong enough to bear shocks of this character. *The Northern Belle*, §§ 163-166.

§ 132. Origin of the custom of transporting grain on our western rivers by means of barges. *Ibid.*

§ 133. A vessel selected for transportation is not to be changed and the cargo transferred without necessity. If the vessel to which without necessity a cargo was transferred is captured by the enemy, the carrier is not relieved from liability as such. Usage considered. *Trott v. Wood*, §§ 167, 168.

§ 134. Carriers are not as matter of law, and in cases free from suspicion, chargeable with notice of the dangerous properties and character of packages which they carry and handle. A carrier, innocently ignorant of the contents of a package of nitro-glycerine received in the regular course of business, may therefore place and handle it as other packages of similar outward appearance are usually handled, without being chargeable as negligently injuring another's property thereby. *Nitro-Glycerine Case*, §§ 169-176.

§ 135. Where mastic, a new article of commerce, whose peculiar properties were unknown, was stowed and transported by the carrier with reasonable care, according to what he supposed it to be, deterioration occasioned by the article's peculiar properties should be borne by the shipper rather than the carrier, if no notice of its peculiar qualities was given. *Pierce v. Winsor*, §§ 177-179.

[NOTES. — See §§ 180-185.]

RAILROAD COMPANY v. REEVES.

(10 Wallace, 176-192. 1869.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.—The Memphis & Charleston Railroad Company was sued as a common carrier for damage done to tobacco through negligence in its transportation. The tobacco arrived at Chattanooga on its way to Memphis, where it was received by defendant and placed in its cars on March 5, 1867, about 5 o'clock P. M. Plaintiff's agent testified that defendant's agent promised that the goods would go forward that evening; but this was contradicted. The freight was not sent till next morning, but owing to obstructions on the road that had taken place that night, the train returned to Chattanooga. Owing to continued rains the river rose all that day, and the next night by a sudden and unprecedented rise it flooded the town and track and damaged the tobacco. The verdict being against the defendant, it tendered a bill of exceptions commencing, "On the trial of this cause the following proceedings were had." After giving the evidence and instructions, it stated that the defendant excepted to the action of the court in refusing and giving instructions and in overruling the motion for a new trial.

Opinion by MR. JUSTICE MILLER.

A preliminary point is raised by the defendant in error that the exception was not taken at the trial, but was taken afterwards on the overruling of a motion for a new trial.

§ 136. *Practice stated as to signing and settling the formal bill of exceptions.*

It seems probable that the formal bill of exceptions was not signed or settled until after the motion was overruled, but it is a common practice, convenient in dispatch of business, to permit the party to claim and note an exception when the occasion arises, but defer reducing it to a formal instrument until the trial is over. We think the language of the bill implies that this was done in the present case, and that it is a reasonable inference from the language used at the beginning and end of this bill, that the *exceptions* were taken during the trial, as the rulings excepted to were made.

§ 137. *Point of practice as to instructions excepted to below.*

Comment is also made that the exception does not point out to which instruction it is taken, nor to any special part of the charge which was given. But the instructions prayed by defendant were not offered as a whole, but each one for itself, and the action of the court in refusing them, to which exception is taken, may be fairly held to mean each of them.

§ 138. *Exception to the charge of the court should not be general.*

As to the charge given by the court, the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient.

§ 139. *Informalities of exception overlooked, where the charge of the judge was clearly wrong.*

But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case.

§ 140. *A common carrier is not liable for damage immediately resulting from flood or storm, unless his negligence contributed to the loss.*

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words: "When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case." It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

§ 141. *Act of God being shown by the carrier in justification of the loss, proof of contributory negligence should come from the other party.*

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it. The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent and extraordinary floods ever known in that part of the country. The tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

§ 142. *Act of God being the proximate cause of the loss, delay, though remotely exposing to the peril, need not charge the carrier.*

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff. In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country. In *Morrison v. Davis*, 20 Penn. St., 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the

lame horse the remote cause, and that the maxim *causa proxima, non remota spectatur* applied as well to contracts of common carriers as to others. The court further held that when carriers discover themselves in peril by inevitable accident the law requires of them ordinary care, skill and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. In *Denny v. New York Central R. Co.*, 13 Gray, 481, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson river. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison v. Davis*. Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

§ 143. *Failure to carry on the train agreed upon does not necessarily charge the carrier, where act of God was proximate cause of loss.*

As the case must go back for a new trial there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract the failure to comply would have been only the remote cause of the loss. But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.

HOLLADAY v. KENNARD.

(12 Wallace, 254-259. 1870.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Action for the loss of a package of money. Holladay was the proprietor of a stage line running from Atchison, to Placerville in California. The package was forwarded from New York to Atchison by the United States Express Company, and there delivered to defendant's agent. The package was placed in a safe in the stage, in charge of an express agent in the employ of defendant. The stage was robbed at Julesburg on January 7, 1865, by Indians hostile to the United States. Julesburg was an express station, and about a mile further west was a military post at which about forty United States troops were stationed. The stage was attacked by Indians, and on arrival at the military post the express agent requested a military escort, which was refused, because the captain was preparing to fight the Indians, but the agent was directed to remain at the post. The stage returned to Julesburg, where the horses were put in the stable, and soon afterwards the troops were seen approaching the station followed by the Indians. The stage driver and express agent escaped on horseback to the military post, and the Indians robbed the safe. It was contended that the returning to Julesburg and unhitching the horses were acts of negligence, but this was left to the jury as a question of

fact. The court charged the jury that the Indians were a public enemy, and that the defendant was not liable unless the agents were guilty of negligence, and directed the jury to consider what "a cool, self-possessed, prudent, careful man would have done under the same circumstances."

§ 144. *Common carrier must use due diligence to prevent loss by public enemy.*

Opinion by MR. JUSTICE BRADLEY.

The effect of the charge, as delivered, was, that although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed thereto he would be liable therefor. It was not necessary, in this case, that there should have been fraud or collusion with the Indians, or wilful negligence on the part of the defendant, or his agents, to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge exacted of him was, such care and attention as he naturally would have taken of his own goods; that is, ordinary care and attention.

§ 145. *Whether there was due diligence to prevent the loss may be left to a jury.*

Surely the law requires this degree of diligence, and would make the defendant liable for the want of it; that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury.

§ 146. *A carrier whose business is exposed to Indian incursions should be prudent correspondingly in choice of his agents.*

The only point, it seems to us, on which any doubt could arise as to the entire accuracy of the charge, is as to the degree of care and attention required of the defendant himself in the selection of the agent. The court held that it was his duty to provide for this hazardous business a cool, self-possessed, prudent man, of good judgment and forethought. Now, surely, no one would think of employing a man wanting in any one of these qualifications to carry his own goods across the plains at that time. Ordinary prudence would dictate that such a man was essential for that hazardous service. Here, again, the charge really requires of the defendant to do nothing more than, as a prudent man, he would do in the transaction of his own business; in other words, it only exacts ordinary diligence and attention at his hands.

§ 147. *Ordinary diligence is a relative term.*

Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be any want of ordinary care or diligence to intrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to intrust to such a person the cleaning or repair of a watch. A man who would be perfectly competent to perform the duties of an express messenger now, on the Union Pacific Railroad, with a commodious express car at his service, might have been a very unfit and incompetent agent in 1865, when nothing but a mail-coach traversed the prairie, and roving bands of hostile Indians infested the route.

§ 148. *Whether ordinary diligence was used in selecting agent, the jury may well consider on the facts.*

Now, whether the agent in charge of the line, on this occasion, was such a man as should have been employed could only be judged of by what he did, or what he neglected to do; and it was fairly left to the jury to say whether his conduct was such as a proper and competent man would have pursued; or whether it was wanting in that respect; and the court took the pains to warn

the jury that the result is not always a true criterion whether a man pursued a prudent course or not. They must judge fairly in reference to all the circumstances.

§ 149. *Case where act of God is proximate cause of loss distinguished.*

We do not mean to be understood as laying down any different rule from that which was laid down by this court in the late case of *Railroad Co. v. Reeves*, 10 Wall., 176 (§§ 136-143, *supra*), namely, that ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause. We think that when this case, with all its circumstances, is fairly considered, this was all that the judge who tried the cause exacted of the defendant, and that the question of negligence was fairly left to the jury.

Judgment affirmed.

CALDWELL v. SOUTHERN EXPRESS COMPANY.

(Circuit Court for Tennessee: 1 Flippin, 85-92. 1866.)

STATEMENT OF FACTS.—Action to recover the value of a lot of Confederate money and Tennessee bank-notes, which defendant undertook to carry from Jackson, Tennessee, to New Orleans, Louisiana, in 1862. Before the package reached its destination New Orleans was occupied by federal troops, and when it was brought back to Jackson there were federal troops between that place and plaintiff's residence, in Henry county, so that the package could not be delivered to him. There was evidence tending to prove that the money was worth seventy-five cents on the dollar when the package was returned to Jackson. The charge excepted to was that, if the loss was occasioned by the act of the defendant as well as that of the federal army, the defendant was liable.

§ 150. *Where a loss is attributable to the concurrent negligence of the carrier and an overruling force, the carrier is liable.*

Opinion by BROWN, J.

I see no error in the first charge. The rule is well settled that when a loss is attributable to the concurrent negligence of a carrier and an act of God, the defendant is liable. To exonerate the carrier the loss must be due alone to the act of God or the public enemy, and the ingredient of negligence invalidates the defense of overwhelming force. The doctrine is illustrated in the case of *Davis v. Garrett*, 6 Bing., 716. Lime was shipped on defendant's barge to be carried from Medway to London; the master deviated unnecessarily from the usual course, and during the deviation a tempest wet the lime, which took fire and was destroyed. *Held*, that as the loss actually happened while the wrongful act was in operation and force, the defendant could not set up, as an answer to the action, a bare possibility of a loss if his wrongful act had never been done.

In the case of *Williams v. Grant*, 1 Conn., 437, salt was delivered at Providence for carriage to New York. On the way down Providence river the vessel struck a rock and bilged. Evidence being introduced to show that the vessel when she struck was out of her usual course, that the master was unacquainted with the river and employed no pilot, though it was usual to do so, the court held these facts should have been submitted to the jury. If the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excusable. See, also, *Merritt v. Earl*, 29 N. Y., 115. So in the case of *Crosby v. Fitch*, 12 Conn., 410. A carrier on a trip from New York to Norwich deviated by going outside of Long Island,

and during the deviation fifty-two bales of cotton were thrown overboard in a storm. The defense was that the sound was closed with ice, and that there was a custom in such cases to take the outside route. The court left the proof of custom with the jury, and instructed that the defendant was guilty of negligence, and liable, unless the custom was shown to their satisfaction. See, also, *Hand v. Baynes*, 4 Whart., 204; *Wilcox v. Parmelee*, 3 Sanf., 610; *Merrick v. Webster*, 3 Mich., 268; *Powers v. Davenport*, 7 Blatch., 497; *Michaels v. New York Central R. R.*, 30 N. Y., 564; *Campbell v. Morse*, 1 Harp., 468; *Parker v. James*, 4 Camp., 112.

§ 151. — *it is otherwise where the carrier's negligence ceases to operate before the loss occurs.*

The rule is different where the negligence of the carrier has ceased to be operative before the loss occurs. In such case the carrier is not chargeable with the loss. I had occasion to examine the authorities upon this point in the arguments of *Daniels v. Ballentine*, 23 Ohio St., cited by defendant, and to distinguish that case from those above cited in the fact that in *Daniels v. Ballentine* the loss occurred after the negligence had ceased to be operative. See, also, *Ingledew v. Railroad Co.*, 7 Gray, 86; *Denny v. New York Central R. Co.*, 13 Gray, 481; *Morrison v. Davis*, 20 Penn. St., 171; *Railroad Co. v. Reeves*, 10 Wall., 176 (§§ 136-143, *supra*); *Needham v. Railroad Co.*, 37 Cal., 499.

§ 152. *Defendant in this case appears to have become a bailee, and as such to have been remiss in duty.*

It seems to me in this case that, although the defendant had ceased to become responsible as carrier for the package in question, it must be held to the liability of a bailee; that it was bound to take reasonable care that it did not fall into the hands of the enemy, and when the Union army had advanced so far southward that the capture of Jackson had become imminent, that it was its duty to remove this package, as it did its other property, and in default of so doing the jury were authorized to find the loss was occasioned by its negligence.

§ 153. *Effect of act and proclamation of 1861; non-intercourse with southern states.*

The request embodied in the second charge was handed to the court as the cause was about being submitted to the jury, and no opportunity was given for an examination of the important question involved. The charge was made in much doubt of the law, feeling that an error in plaintiff's favor could be more easily rectified than if made in favor of the defendant. My impressions at that time have been strongly confirmed by a careful examination of the authorities. I have arrived at a conclusion, not from an examination of the technical question whether in this form of action a demand was necessary before the commencement of suit, but upon the ground that plaintiff's loss was occasioned, not by the default of the defendant, but by the war then existing, and by the operation of the non-intercourse act. By section 5 of the act of July 13, 1861, it is provided that "whenever the president . . . shall have called forth the militia to suppress combinations against the laws of the United States, . . . and the insurgents shall have failed to disperse, . . . it may and shall be lawful for the president, by proclamation, to declare that the inhabitants of such state, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens

thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition or hostilities shall continue, and all goods and chattels, wares and merchandise coming from said state or section into the other parts of the United States . . . shall, together with vessel or vehicle conveying the same, . . . be forfeited to the United States." Pursuant to this section, on the 16th of August, 1861, the president issued a proclamation declaring that the inhabitants of the state of Tennessee "are in a state of insurrection against the United States," declaring all commercial intercourse between them and citizens of the other states unlawful, "and that all goods and chattels, wares and merchandise coming from any of said states into other parts of the United States will be forfeited." This act and proclamation merely reiterated and applied to the civil war then existing, the laws and usages of war between independent states, recognized by all civilized nations, and enunciated in England in the case of *The Hoop*, 1 C. Rob., 196, and recognized in this country before the rebellion by a long and uniform list of authorities. See *The Rapid*, 1 Gall., 295; S. C., 8 Cranch, 155; *The Diana*, 2 Gall., 93; *The Coosa*, Newb., 393; *The Lord Wellington*, 2 Gall., 103; *The Joseph*, 1 Gall., 545; S. C., 8 Cranch, 451; *Jecker v. Montgomery*, 18 How., 110. The application of these doctrines to the late civil war, the right to institute a blockade and to treat the citizens of the insurgent states as public enemies ever since the non-intercourse act, is recognized in *The Prize Cases*, 2 Black, 635.

Instances of the application of this doctrine are numerous, though a distinction is taken between contracts made during the war which are absolutely void, and those made before the war, which are only suspended during the continuance of hostilities. *Jackson Ins. Co. v. Stewart*, 15 Am. L. Reg. (vol. 6, N. S.), 732. The carriage of passengers to an enemy's port is illegal. *The Rose in Bloom*, 1 Dod., 57. Trading under an enemy's license is illegal. *The Julia*, 1 Gall., 595; S. C., 8 Cranch, 181; *The Alexander*, 8 Cranch, 169. So, also, is the withdrawal of goods purchased before the war. *Amory v. McGregor*, 15 Johns., 24. In 1 *Parsons on Shipp.*, 329, it is said that "if a war be declared by the country to which a ship belongs against one to which it was about to carry a cargo, this war makes all commercial intercourse illegal, and thereby annuls all obligation of carrying that cargo. Or if the proper authority of the same country lays an embargo, or passes an act of non-intercourse, or of special prohibition which extends to that ship and cargo, here the contract becomes illegal." But war annuls such a contract, while an embargo or prohibition may only suspend it. In the case of *The Jackson Ins. Co. v. Stewart*, 15 Am. L. Reg. (vol. 6, N. S.), 732, it was held that the statutes of limitation were suspended during the rebellion, as to matters in controversy between citizens of the opposing belligerents; also that on a recovery after the close of the war for a debt due before its commencement, no interest should be allowed for the period covered by the war. The rule that statutes of limitation are suspended is also supported by *Wall v. Robson*, 2 Nott. & McC., 498; *Moses v. Jones*, id., 259; *Nicks v. Martindale*, Harp., 138; *Ogden v. Blackledge*, 2 Cranch, 272.

§ 154. Allowance of interest pending a civil war.

The rule that interest is not allowed pending the war has been modified by the supreme court in cases where the creditor had an agent within the hostile territory during the war, with power to collect and receive moneys. In the case of *Mrs. Alexander's Cotton*, 2 Wall., 404, it was held by the supreme court that all the people of any district that was in insurrection against the United

States, in the southern rebellion, were to be regarded as enemies, and that the court could not inquire into the personal character or loyalty of individual inhabitants of enemies' territory. It was observed: "We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people in each city or district in insurrection against the United States must be regarded as enemies until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." The leading authorities upon the subject of commercial intercourse are reviewed in the case of *Griswold v. Waddington*, 16 Johns., 438, and in the more recent case of *Kershaw v. Kelsey*, 100 Mass., 561. See, also, as to suspension by embargo, *Ford v. Cotesworth*, 3 Maritime Law Cases, 190, 463.

§ 155. *The measure of damages considered.*

In actions against carriers the measure of damages is the value of the goods at the place of delivery at the time they should have been delivered. Angell on Carriers, sec. 482, note 2, and cases there cited. Now, in this case, the original contract to carry to New Orleans was terminated, or at least suspended, during the war, by the capture of the city. It then became the duty of the company to return the property to the consignor, and it was not claimed that it had not made reasonable efforts to do so by sending the package to Jackson. By this time, however, a return of the package to the plaintiff had become not only impossible, but illegal. The company then became a bailee of the property, responsible only for the use of ordinary care. At the close of the war it was its duty to return it to the plaintiff on demand. All that the plaintiff can call upon the defendant to do is to reimburse him for the damages sustained by the neglect of the defendant. For the loss of interest during the war, and for the depreciation of the currency, the defendant is not liable; for if it had done its duty and retained the package, the same loss would have occurred; in other words, the loss of interest and the depreciation was occasioned, not by the act of defendant, but by the war. I think the jury should have been charged that the defendant was liable for the value of the package at the time when demand was made, with interest from that date. For this error the verdict and judgment must be set aside and a new trial granted.

THE BARK VIVID.

(District Court, Eastern District of New York; 4 Benedict, 319-326. 1870.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—These actions are brought to recover of the bark "Vivid" the value of certain sugars, shipped on board that vessel in Ponce, Porto Rico, to be transported to New York under bills of lading in the ordinary form, and which were destroyed under the following circumstances: The bark, a vessel ten or twelve years old, having been absent from New York without repairs for about a year, was loaded in Ponce for New York with a cargo consisting of five hundred and five boxes of sugar, one hundred and thirty hogsheads of molasses, and thirty tons of lignum vitæ wood. Her loading was completed on the 4th day of June, 1869, when at nightfall she lay at anchor in the harbor, ready for sea, drawing fifteen feet of water, and apparently tight. The next morning, at daylight, she was found to have some seven feet of water in her hold. The pumps were set to work, but it was found necessary to discharge all the cargo between decks before the leak was got under.

It was then determined to recaulk her, and, accordingly, the whole cargo was discharged, the vessel caulked above her copper, and the portion of the cargo not destroyed by the water which had come into the vessel was reladen, and the bark proceeded with it to New York, where she arrived in safety without further damage. The value of the sugars thus destroyed amounted to about \$35,000, while the value of the vessel is but about \$2,000. This loss, as far as the value of the vessel will go towards it, the libelants now seek to recover, upon the ground that the vessel, when she was loaded in Ponce, was unseaworthy, and the loss solely attributable to her weak condition. The defense is that, on the night of the 4th of June, after the cargo was in, the vessel was caused to roll and labor heavily in the trough of the sea, by reason of a heavy swell which arose, whereby the seams of the vessel were opened, and the pipe leading from the water closet to the outside of the vessel broken, and thus the water was admitted, which dissolved and destroyed the sugars; and it is accordingly insisted that the loss is attributable solely to a peril of the sea. To prove this defense, the claimants have introduced three witnesses, the mate and the steward of the bark, and a shipwright who examined her after she arrived in New York. The mate and steward both testify to a heavy sea on the night of the 4th of June, and that the bark rolled heavily in it — as the mate says, so heavily that he was afraid for his masts, and put rolling-tackle on his main-yard. The mate, steward and shipwright likewise testify to the good condition and tightness of the vessel when the cargo was taken in; and the shipwright proves that, on repairing the vessel in New York, the water-closet pipe was found partly torn away from the flange, where it is fastened to the outside of the vessel, which point was below the water-line as the bark was first loaded in Ponce, but was not below that line on the voyage to New York.

Of this evidence, a necessary part for a successful defense is that which goes to prove an excessive rolling of the bark in a heavy sea on the night of the 4th of June. But this part of the claimants' evidence is rendered doubtful, and open to the suspicion of being at least highly colored, by the other portion of the testimony of the same witnesses in regard to the condition of the vessel, wherein they all declare that no water was taken in through the seams of the vessel. This declaration is made emphatically; and, upon such evidence standing alone, it might have been inferred that the breakage of the water-closet pipe was the cause of the leak, and the vessel accordingly discharged from responsibility, upon the ground that a vessel able to endure without any other injury such a sea as the mate describes, when loaded as this vessel was, was manifestly seaworthy. And yet, in contradiction of this testimony, the answer is found to aver that the vessel's seams were opened, and water thus admitted to the cargo. The shipwright is wrong, then, when he swears that the condition of the oakum, when he examined it in New York, showed that water had not passed through the seams. And if the seams were opened, as the answer admits, it is difficult to understand how the mate and steward could have examined the vessel's seams as carefully as they describe, without finding places open. It is also probable that the break in the water-closet pipe, which was first discovered in New York, had not occurred at the time of the leak, as it would hardly have remained undiscovered when the vessel was surveyed and caulked in Ponce, after the leak, if then in existence.

The doubt thus cast upon their account of the heavy sea, which the mate and steward describe, is greatly strengthened by the fact that the protest makes no mention whatever of any heavy sea at the time of the leak, and does

not allude to any heavy rolling of the ship as the cause of the leak. Such an omission in a protest is significant; for, to use the language of Judge Hopkinson (Gilp., 10), "in protests, the seas are always mountain high, and the wind never less than a hurricane." I can conceive no reason for omitting from a protest any allusion to the fact which is now claimed to have been the cause of the loss, and to have made a protest necessary. Against witnesses thus in conflict with the answer upon a material point (the master of the vessel not being produced, or his absence accounted for), three marine inspectors are produced by the libelants, who examined the bark after her arrival in New York, when she had sustained no injury since the leak in Ponce, who declare her to have been unfit to sustain such a cargo, and unseaworthy. She was extensively repaired before any rate could be given her, and then the rate was A 2½. The condition of the timbers and planks of the vessel, as described by these witnesses, confirms the opinion which they express; and they are to some extent corroborated by the testimony of the shipwright, called by the claimants, who, while he says that no water could come through the seams, is far from being satisfied that the tear discovered in the water-closet pipe would account for the quantity of water the bark made. Upon a careful weighing of this testimony, I am of the opinion that the claimants have failed to show any stress of weather sufficient to cause the leak in question, had the bark been reasonably tight and staunch above her copper; and, in the absence of such proofs, it is the reasonable inference that the loss arose from the insufficiency of the vessel. There was, at the time, no wind of any consequence; the vessel was in a harbor, and at her anchorage. She, doubtless, was able to carry a moderate cargo, but when filled to the depth of fifteen feet with sugar and molasses, she was unable to endure, without opening her seams, what I conceive to have been no more than an ordinary occurrence, such as any vessel would be expected to endure.

§ 156. *A vessel should be reasonably sufficient for the voyage.*

The law requires of the ship-owner a vessel reasonably calculated to endure the ordinary strain of the navigation in which she is engaged. If his vessel be reasonably sufficient for the voyage, he is not to be held liable, by showing that a stouter ship would have outlived the peril. Maclachlan on Shipp., p. 459.

§ 157. *Springing a leak while in harbor raises a presumption of unseaworthiness.*

But when goods are lost by his vessel's springing a leak while at anchor in a harbor, he must show some stress of weather, or other circumstances sufficient to account for such a leak in a vessel of ordinary strength. The effort to show this, in the present case, has failed to satisfy my mind, and I must, accordingly, hold the vessel liable for the loss in question.

§ 158. *Protests, surveys, etc., whether admissible in evidence.*

In arriving at this conclusion, I have attached some importance to the fact that the protest omits any allusion to any heavy sea, and I must, therefore, add my decision upon the question of evidence, which was raised by the objection of the claimants to the introduction of the protest in evidence. The document offered is not the original protest, but is simply a paper purporting to be a copy of a protest, and it is not accompanied with any proof of its correctness as a copy. Upon this question of evidence, I remark that, because of the great distinction which prevails between the description of causes which come under the cognizance of the courts of admiralty and those of the common law (Dr. Lushington, in deciding the case of *The Peerless*, 1 Lush., 41), the strict rules

of evidence, applied in the courts of common law, often lose much of their force when invoked in a court of admiralty. Courts of admiralty are courts requiring dispatch, and the questions of fact brought before them often arise out of occurrences transpiring upon the sea, where time and opportunity of record are often wanting, where ledgers and letter-books are not kept, and where the living witnesses present are likely to be as floating and as unstable as the element itself on which they live; and often the transaction in question has taken place in a foreign or out-of-the-way place, in the presence of strange laws and customs, and among ignorant and sometimes barbarous men. It is, therefore, no uncommon thing for these courts, in cases where justice will be advanced thereby, to receive some descriptions of testimony never admitted in other courts — which can the more safely be permitted in these courts, because the whole case is before a single judge, supposed to be able to weigh with care and deliberation all portions of the evidence, and to determine the true significance of the attending and corroborating circumstances, and because, in admiralty, the first decision of the questions of fact is never conclusive, but is always subject to review, in the light of additional and explanatory testimony, which may be produced in the appellate court. Although questions of evidence rarely appear in the decisions of admiralty courts, illustrations of this feature of admiralty procedure are not wanting among the decided cases. The case of *The Peerless*, above referred to, is one where Dr. Lushington speaks of courts of admiralty as admitting in evidence “affidavits sworn almost in every way — before justices of the peace, commissioners of clearances, etc., etc., even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required.” The case of *The Estrella*, 4 Wheat., 306, where hearsay testimony was admitted as such, is another illustration; so, also, the case of *The Helgoland*, Swabey, Adm., 496, where the execution of a bottomry bond was held proved, on simply the seal of the consul. Likewise, the case of *The London Merchant*, 3 Hagg., 396, where a copy of an entry of a protest before a notary — the protest not having been sworn to or extended — was admitted on the certificate of the notary that it was a true copy. The copy protest offered in evidence here appears to me admissible, as within the spirit of the cases above cited. For, on its face, it appears to be a veritable copy of a protest, and there is no adequate motive to induce the fabrication of such a document, nor is a fabrication suggested. Moreover, it is in proof that a protest was made at the time and place where this copy purports to have been made, and that it was there signed by the mate of the vessel; and, more than all, that same mate was before me as a witness on the stand, called by the claimant, and could have disputed the verity of this copy protest, but he was not asked in relation thereto. In view of this latter circumstance, I am justified in considering the copy produced to be correct, and I admit it in evidence, leaving the party objecting to show its incorrectness, by a commission to Ponce, or otherwise, if so advised.

Copy surveys were likewise sought to be read in evidence, but they stand upon a different ground. They do not purport to be made by any one connected with the vessel, and no witness able to prove or to dispute their correctness, as copies, has been called as a witness, or shown to be within the reach of the claimants. Besides, it has been adjudged that surveys are not evidence of the facts stated therein. *Watson v. Ins. Co. of North America*, 2 Wash., 152; *Cort v. Delaware Ins. Co.*, 2 Wash., 375. I therefore reject the copy sur-

veys; but, upon the protest and other evidence in the cause, as before stated, I adjudge the libelants entitled to recover. Let decrees be entered accordingly, the form to be settled before me on notice.

THE PLANTER.

(Circuit Court for Alabama: 2 Woods, 490-494. 1874.)

Opinion by Woods, J.

STATEMENT OF FACTS. — The libelant claims that, by the contract of affreightment, there was an implied warranty of seaworthiness on the part of the master and owners of the Planter, and that at the time of the receipt of the cotton on board, and during the voyage, she was unseaworthy; (1) because she was not staunch and sound, and (2) because she was not provided with the necessary officers and crew; and that being unseaworthy, she must be held to respond in damages for the loss.

It is unnecessary to consider whether the Planter was fully manned or not, because there is no evidence that any deficiency of officers and crew contributed to the disaster, and without such proof there can be no recovery. 2 Parsons on Mar. Law, 142, 143, note 1; 151, note. I therefore proceed to consider the question, was the Planter staunch, sound and seaworthy at the time of the contract of affreightment? That she did not make the voyage and deliver her cargo according to the contract of affreightment is not disputed. Without having encountered any tempestuous weather, she suddenly sprung aleak within less than twenty hours after leaving port, so that her officers were compelled, in order to save her from sinking, to throw over more than one-third of her cargo. These facts raise the presumption that she was unseaworthy when she started, and throw on claimants the burden of proof to show that she was seaworthy. 2 Pars. Mar. Law, 138, 139; 1 Arnould on Ins., 689, 690, 691. This the claimants have attempted to prove by evidence tending to show that in coming through the canal leading from New Orleans to the lake she ran upon a snag or her wheel picked up a stump, and that in consequence one of her knuckle chains was broken, by which the seams along her keelson were opened. The evidence on this point is the merest conjecture. There is no proof that the knuckle chain was broken at that time, and the effect attributed to the breaking of the knuckle chain by the witness for claimant is denied by some of the witnesses for libelant.

It is in evidence that there were six or seven knuckle chains in the Planter. The breaking of a single chain would not, it seems to me, be sufficient to account for the results which followed. But the conclusive answer to the theory of the claimants, that the vessel sprung aleak from the breaking of one of her knuckle chains after the voyage commenced, is found in the following facts: Early in October, 1871, about one month before the voyage from New Orleans to the Australian, the Planter made a trip from Stockton, on the Tensas river, above Mobile, to New Orleans, with a quantity of wood and lumber, making a cargo of about one-third her capacity. She ran from Stockton to the obstructions at the head of Mobile bay over smooth water with no unusual leakage. She lay all night at the obstructions and next day proceeded down the bay. A stiff norther commenced to blow and the waves to run high. She had not proceeded more than ten miles down the bay when she commenced to leak rapidly; so much so that it was necessary to run her in towards the western shore in shallow and more quiet water. She was brought to anchor

with her head to the wind and all her pumps set going. After a few hours she was clear of water and proceeded on her voyage. These two voyages of the Planter demonstrate, it seems to me, that there was some material defect in her hull, from which, whenever she encountered a rough sea, she sprang leak. When the Planter was docked, a few days after her trip from New Orleans to the Australian, she was found to have a rotten plank under her fender, in which were holes of considerable size. These holes were a foot above the load water-line, and could not be discovered from the inside on account of the sheeting, nor from the outside on account of the wheel and fender. The situation of these holes appears to account for the fact that she did not leak in smooth water, and to account for her sudden leakage when she got into rough water.

§ 159. *Conclusion upon evidence that vessel was not seaworthy.*

My conclusion from the evidence is, therefore, that when the contract of affreightment was made, and the cargo received on board, the Planter was not staunch, sound and seaworthy.

§ 160. *Warranty of seaworthiness does not depend upon the fact of being a common carrier.*

It is conceded by the claimants that when a vessel is a common carrier there is an implied warranty of seaworthiness, but they say that this warranty does not arise unless the ship is a common carrier. In my judgment the authorities do not sustain this view. The warranty of seaworthiness does not depend upon the common law notions of a common carrier.

§ 161. *Maritime lien; rule binding ship to the cargo.*

The common law does not give a lien upon the instrument of carriage; there is no lien on a railroad car or wagon. The rule insisted on by libelant is the creature of the admiralty, and exists in all cases of affreightment on vessels. The vessel is hypothecated to the shipper for his security that the contract will be performed by the ship, viz.: that the ship will carry the goods in safety, in due season, and by the proper route; that she is in all respects seaworthy, and has a proper master and crew who will take good care of the cargo and properly deliver it. The vessel is subject to a lien in favor of the shipper that he may enforce this contract, as well as the goods to the vessel, for the payment of charges for carriage. 1 Parsons on Ship. & Adm'ty, 171, 172, and notes; The Keokuk, 9 Wall., 517 (§§ 84, 85, *supra*); Dupont de Nemours v. Vance, 19 How., 162; The Rebecca, 1 Ware, 188; Flander's Mar. Law, sec. 204. I am of opinion, therefore, that the fact that the Planter was not a common carrier does not relieve her owners from the implied warranty that she was staunch, sound and seaworthy.

§ 162. *Whether shipper may sue for loss, where the cargo is insured.*

It is objected by claimants that the libelant had insurance on the cotton, and, having been paid for the loss, cannot maintain this action. The record shows insurance, but does not show payment of the loss. But if libelant had been fully paid, this suit might be maintained in his name for the benefit of the underwriters by way of subrogation. 2 Phill. on Ins., secs. 1723, 1724, 1725, 1728 and 1729; Hall v. Railroad Companies, 13 Wall., 367 (§§ 1146-49, *infra*); Hart v. Western R. Corp., 13 Metc., 99; Garrison v. Memphis Ins. Co., 19 How., 312.

My conclusion is, therefore, that there must be a decree for libelant for the value of the seven bales of cotton lost, and for the damage sustained by the three hundred and fifty-two bales jettisoned and recovered, deducting therefrom the amount due as freight upon the cotton actually delivered to the Australian.

THE NORTHERN BELLE. (a)

(9 Wallace, 526-531. 1869.)

APPEAL from U. S. Circuit Court for Wisconsin.

STATEMENT OF FACTS.—A cargo of wheat was being carried in the barge Pat Brady, on the upper Mississippi. The barge sunk, and the insurance company, having paid the loss on the wheat, filed a libel in admiralty against the steamer and barge. Soon after the accident the barge was placed on the ways for repairs, and the testimony of persons who examined her was to the effect that many of the timbers were rotten.

Opinion by MR. JUSTICE MILLER.

As the decision of the cause turns upon the fitness of the barge for the purpose of the voyage, or, in the language of the admiralty, on its seaworthiness (a question which, as applicable to the peculiar condition of this navigation, is before us for the first time), we propose to examine into some of the principles on which that question must be decided. For many years the grain which was transported by steamboats on the western rivers was first put in sacks, and then placed in the hold of the vessel, or, if that was filled, was laid around on the decks. But as this commerce in the cereals increased in importance, including, as it does, the wheat, corn, rye, oats, barley, etc., of that immense agricultural region, it became a necessity to have the freight as cheap as possible. The cost of the sacks in which the grain was carried and the labor of filling and securing them, and loading and unloading, was a heavy item in transportation. The railroads, which had become active competitors for this carrying trade, did not use sacks, but placed the grain in bulk in cars adapted to the purpose. To facilitate the loading and unloading of grain these railroad companies introduced on their lines, and at the termini of their roads on the rivers, immense buildings called grain elevators. In these buildings the grain was carried by machinery up into bins, and then by its own gravity let down through conductors into the cars, which were thus loaded in a few minutes. The introduction of this mode of loading and carrying grain by the railroads, and the competition which they presented to river transportation, introduced in the latter the use of barges, in which grain was carried in bulk, without sacks, and loaded from elevators, as was done by the railroads. This mode of river transportation, which is often auxiliary to the railroads, has superseded almost entirely the old mode of carrying by sacks in the hold of the vessel, and its present importance and future growth can hardly be overestimated. It is, therefore, of great consequence to determine, upon sound principles, the rights and liabilities of the carrier and the owner of the cargo in these cases, in regard to these barges, so far as they are open for consideration.

The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to, and making part of, the particular boat in connection with which they are used; though quite often an individual or corporation owning several boats, running in a particular trade, have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.

§ 163. *How far does the requirement of seaworthiness apply to barges on inland rivers carrying grain.*

The question that arises in the case before us has reference to the extent of

(a) Affirming the Northern Belle,* 1 Biss., 529.

the duty or obligation which the law imposes upon the owners of such a steamboat in regard to the condition of the barge in which grain is so carried in bulk, as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire. This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it.

§ 164. *Fitness for voyage involves peculiar considerations in river navigation.*

When we come to consider what shall constitute fitness or unfitness for the voyage, we must take into account the nature of the service which she is to perform and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river from what it is in open seas or lakes, or their bays and inlets. The necessities of river navigation require steamboats and barges to pass through narrow and crooked channels, and to venture on very shallow water — a water which is constantly varying in its depth, and a channel which often changes its course in a few days, very materially. The consequence of this is that both steamboats and barges often get aground temporarily, and are soon got off and resume their voyage. Often they rub the bottom of the river for many feet on crossing a sand-bar at low water, and pass on without injury or interruption. These large steamboats, having a barge or barges in tow, lashed to them loosely, as they must be, are often brought against their sides with much force. They land for the purposes of their ordinary business at every ten or twelve miles of their voyage at the towns and landings on the river, and, in doing so, must necessarily impinge, with more or less force, against the barge which is between the boat and the shore. These are the daily and hourly external forces to which the barge is subjected in the ordinary course of navigation.

§ 165. *The carrier should see that his barge is capable of resisting the forces to which she is exposed.*

It is the duty of the carrier to see that his barge is capable of resisting these forces without subjecting the cargo to injury. She must be so tight that the water will not reach the cargo, so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this she is seaworthy; if she is not, she is unfit for the navigation of the river. No other test can be given, and this must be determined by the facts in each particular case.

§ 166. *Barge should be able to withstand the ordinary shock of a sand-bar or running aground.*

In the one now under consideration, if regard be had to the evidence as to the condition of the *Pat Brady*, there is not much difficulty. It is argued by the claimants that the barge struck a sunken rock or snag with such force as to tear open her planks, and that the sinking was one of the unavoidable dangers of the river. But, without attempting any nice criticism of that phrase, we are entirely satisfied that there was no shock or force which a strong, well-built barge would not have sustained without injury. The slight character of the shock, the rotten condition of the barge, the additional fact that she was an old barge which had been repaired and had her name changed a year or so

before the accident, all prove this. No snag or rock was proved to exist there. It was, in all probability, an ordinary rub over a sand-bar, which the barge, in her decayed condition, could not stand without leaking.

Decree affirmed.

TROTT v. WOOD.

(Circuit Court for Rhode Island: 1 Gallison, 442-444. 1813.)

STATEMENT OF FACTS.—The question in this case had reference to the right of a carrier to tranship, or change the vessel before the end of the voyage. After the contract of carrying was partly performed, the goods were transferred to another vessel and were captured by the enemy.

§ 167. *A carrier by water cannot tranship except in case of necessity.*

Charge by STORY, J.

That when goods are shipped on board of a vessel, to be sent to another port, the owner of the vessel has no right to change the vehicle of conveyance without necessity. That great inconvenience might arise from a contrary decision to the commercial world, as every merchant might well be presumed to ship his property in a particular vessel, not only from his knowledge or information of her character as to sailing and seaworthiness, but also from his confidence in the master and owner of the ship. If, in the course of the voyage, the ship is disabled or needs repairs, the master is bound to have the ship refitted, if it can be done within a reasonable time. But if the ship is incapable of repairs within a reasonable time, then he may transport the goods in another ship to the place of destination and thereby earn his whole freight. In every such case the master is justified in the change of the ship, by necessity only; and if done without necessity, the owner is responsible for all losses consequent thereon. And this is founded in good reason; for the shipper would, by the change of the ship without necessity, lose the security which he might otherwise derive from any insurance made on the voyage. *Roccus de Assec.*, N. 28; *Santerna*, p. 3, n. 35; *Pelly v. Royal Exch. Co.*, 1 Burr., 351; *Plantamour v. Staples*, 1 Term R., 611, note; 1 *Emerig.*, 424, 425. That in the present case, if the jury believe the evidence, there is no such necessity as authorized the transshipment.

§ 168. *A usage to tranship must be uniform and general in order to vary the rule.*

As to the question of usage, in order to support that defense, it is not sufficient that a few instances could be produced in which masters in the trade had transhipped goods and no objection had been made. The course of the trade must be uniform and general, to entitle it to be considered as a legal defense. It should be so well settled that persons engaged in the trade must be considered as contracting with reference to the usage; and as the proof of such usage lay on the defendant, the jury ought not to change the general principles of the law, as to the rights of the parties, unless the usage were fully proved to be uniform, and independent of the consent of particular shippers.

Verdict for the plaintiffs.

THE NITRO-GLYCERINE CASE.—PARROT v. WELLS, FARGO & CO.

(15 Wallace, 524-539. 1872.)

ERROR to U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—Wells, Fargo & Co., express carriers, occupied certain buildings owned by Parrot, for the purposes of their business as bankers and

expressmen. There were covenants in the lease to the effect that they would not receive on the premises gunpowder, alcohol, or any other articles dangerous from their combustibility, and that they would occupy the premises solely for the business of their calling. At the time of the injuries complained of in this case they were holding over after the expiration of their lease. Other parts of the building were occupied by other tenants.

The defendants received at New York a case of nitro-glycerine to be carried to California on the line of the Pacific Mail Steamship Company. The case appeared to be in good condition, and no questions were asked and no information given as to its contents. On arrival at San Francisco it was found that the contents were leaking; the case was taken to defendant's building, and in attempting to open it with a mallet and chisel, to ascertain where the responsibility rested as between the defendants and the steamship company (on whose vessel the case was carried), the contents exploded, causing injury to the buildings occupied by the defendants. The question involved was whether the defendants were liable for injuries to portions of the building occupied by other tenants. The court below held that they were not liable.

Opinion by MR. JUSTICE FIELD.

It appears from the record that the court finds that neither the defendants, nor any of their employees, nor any of the employees of the Pacific Mail Steamship Company, who had anything to do with the case of nitro-glycerine, knew the contents of the case, or had any means of such knowledge, or had any reason to suspect its dangerous character, and that they did not know anything about nitro-glycerine, or that it was dangerous. And it also appears that the court finds that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents; and in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, that there was no negligence in the handling of the case at the time of the explosion. The question presented to us is, whether upon this state of facts the plaintiff is entitled to recover for the injuries caused by the explosion to his buildings, outside of that portion occupied by the defendants under their lease. For the injuries to that portion the defendants admit their liability, as for waste committed, under the statute. Immediately after the accident they repaired that portion with the sanction of the plaintiff, and placed the premises in a condition as good as they were previously. It appears, however, that a part of the expenses incurred were by mistake paid by the plaintiff in settling for repairs on other buildings. For the part thus paid the court gave judgment for the plaintiff under the first count, and the defendants take no exception to its action in this respect.

§ 169. *Whether carrier is chargeable at law with negligence in handling nitro-glycerine.*

To fasten a further liability on the defendants, and hold them for injuries to that portion of the buildings not covered by their lease, it was contended in the court below, and it is urged here, that, as matter of law, they were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing and handling the box containing the nitro-glycerine.

§ 170. *Carrier is not conclusively charged with knowledge of contents of package.*

If express carriers are thus chargeable with notice of the contents of pack-

ages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine would be attended in practice with great inconvenience, and would seldom lead to any good.

§ 171. — *nor can he, in cases free from suspicion, require information as to contents.*

Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them. This was ruled directly by the common pleas in England in the case of *Crouch v. London & Northwestern R'y*, 14 Com. B., 291. The proposition that a carrier is, in all cases, entitled to know the nature of the goods contained in the packages offered to him for carriage is there stated to be unsupported by any authority, and one that would not stand the test of reasoning. In *Brass v. Maitland*, 6 Ell. & Bl., 485, it was held by the queen's bench that it was the duty of the shipper, when he offered goods which were of a dangerous nature to be carried, to give notice of their character to the owner of the ship, the chief justice, in delivering the opinion of the court, observing that "it would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package." The case cited from the common pleas recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character. It is only when such ground exists, arising from the appearance of the package or other circumstances tending to excite his suspicions, that the carrier is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered as a condition of receiving them for carriage.

§ 172. *No presumption of law that carrier knows contents of package carried.*

It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as matter of law with notice of the properties and character of packages thus received. The first proposition of the plaintiff, therefore, falls, and the second, which depends upon the first, goes with it.

§ 173. *Carrier being innocently ignorant of contents of package may handle the same as others of similar outward appearance.*

The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled.

§ 174. — *negligence in such a case to be determined by facts and attendant circumstances.*

"Negligence" has been defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and

reasonable man would not do." *Blyth v. Birmingham Water Works*, 11 Exch., 734. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances. *Shearman & Redfield*, § 6.

§ 175. *Illustration of doctrine.*

The case of *Pierce v. Winsor*, 2 Cliff., 18 (§§ 177-179, *infra*), decided by Mr. Justice Clifford, in the circuit court of the district of Massachusetts, furnishes a pertinent illustration of this doctrine. There a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court held the shipper and not the charterer liable, and observed that "the storage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be, when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods."

§ 176. *Gist of action is negligence; not contract as carrier.*

This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants; unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases — in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one. The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his

own interests were to be affected, and the whole risk were his own. *Hoffman v. Tuolumne County Water Co.*, 10 Cal., 413; *Wolf v. St. Louis Indep. Water Co.*, id., 541; *Todd v. Cochell*, 17 id., 97.

And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided. In *Brown v. Kendall*, 6 Cush., 295, which was before the supreme court of Massachusetts, the action was in trespass for an assault and battery. The defendant was trying to part two dogs, fighting, and in raising his stick for that purpose accidentally struck the plaintiff in his eye, injuring it severely. The court, Mr. Chief Justice Shaw delivering the opinion, held that the defendant was doing a lawful and proper act, which he might do by the use of proper and safe means; and that if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor, and that the burden of proof was on the plaintiff to establish a want of due care on the part of the defendant. In *Harvey v. Dunlop*, 11 Ill. & D., 193, which was before the supreme court of New York, the action was trespass for throwing a stone at the plaintiff's daughter, by which her eye was put out. It did not appear that the injury was inflicted by design or carelessness, but on the contrary that it was accidental, and it was held that the plaintiff could not recover. "No case or principle can be found," said Mr. Justice Nelson, in denying a new trial, "or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part;" and in this conclusion we all agree.

Judgment affirmed.

PIERCE v. WINSOR.

(Circuit Court for Massachusetts: 2 Clifford, 18-28. 1861.)

STATEMENT OF FACTS.—Admiralty appeal. The suit was brought by the owner of a ship against the charterers for damages which he had been obliged to pay to other shippers and for extra expense in discharging. The charterers had shipped a lot of mastic by the vessel. Mastic was then a new article of commerce. In consequence of the heat it had damaged the goods of other shippers, and had run out and hardened in such a manner that it was difficult and expensive to get it out of the ship.

There was a decree in the district court in favor of the libellant. Further facts appear in the opinion of the court.

§ 177. *The case is not one of inevitable accident, nor was the carrier actually at fault.*

Opinion by CLIFFORD, J.

Two propositions may be assumed as beyond dispute: first, that the case is not one of inevitable accident; and secondly, that the owner of the ship is without any actual fault arising out of any act of his own, or that of the master or his agents. Inevitable accident is not pretended, and if the pretense were set up, it could not be supported for a moment. *Union Steamship Co. v. New York & Va. Steamship Co.*, 24 How., 313. Some attempt was made to impute fault to the owner of the vessel, because she was delayed in Boston for the purpose of repairs, but the explanations are satisfactory, and the position wholly unsupported.

§ 178. *Facts stated, showing that neither party knew that the article was dangerous.*

Neither party had any knowledge of the dangerous character of the article, so that it may be said that there was no actual fault on either side, except such, if any, as the law implies from the nature of the transaction. The charterers put up the ship as a general ship, and under the terms of the charter-party the ship was at their sole use and disposal, to ship such lawful goods as they might think proper; and it was expressly stipulated that their stevedore should be employed by the owner, in Boston. The stowage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge or means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods. The proper precautions in respect to loss in the vessel, therefore, had been taken, if the goods had not been of a dangerous character, which was wholly unknown to the master or the owner of the ship, or his agents. But damage was occasioned, and loss and expense were incurred, and the only question is, Who must suffer? Where the owners of a general ship undertook that they would receive the goods, and safely carry and deliver them at the destined port, it was held in *Brass v. Maitland*, 6 Ell. & Bl., 481, that the shippers undertook that they would not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the ship-owner might not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they were of a dangerous nature. Such was the principle laid down in that case, but the reasoning of the court in support of the rule is even more applicable to the present case. Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers, says Lord Campbell, have such means, and it seems more just and expedient that, although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should fall upon the shippers than upon the ship-owner. Accordingly, he held that the shippers, and not the ship-owners, must suffer, if from the ignorance of the former a notice was not given to the latter, which they were entitled to receive, and from the want of notice a loss had arisen, which must fall on either the shipper or the owner of the vessel.

§ 179. *Where damage is sustained and neither party was at fault, he should suffer who had the necessary knowledge for avoiding the difficulty.*

Undoubtedly that rule, as is well contended by the libellant, rests upon the same principle as that which is applied in other commercial transactions of an analogous character. Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss shall fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty. Baron Parke applied that rule in the case of *Gibson v. Small*, 24 Eng. L. & Eq., 40, with great force and vigor, in the case of a voyage policy, holding that the law did not regard exceptional cases, but wisely laid down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do before the

commencement of the voyage. Judge Sprague approved the rule, upon the ground that it ordained that the loss should fall upon the party who generally had the best means of informing himself as to the condition of the article to be shipped, which undoubtedly is the foundation principle on which the liability rests. Were the rule otherwise, it might, as was well said by the district judge, encourage negligence, and even induce the general shipper or charterer to try experiments with articles unknown to commerce, at the expense of his ship-owner. In view of the whole case, I am of the opinion that there is no error in the record. The decree of the district court is accordingly affirmed, with costs.

§ 180. *General rule of liability.*—A common carrier, independently of special contract, is, upon familiar principle, accountable for any damage or loss that may happen to the goods in the course of the conveyance, unless arising from inevitable accident; in other words, the act of God or the public enemy. (Per MR. JUSTICE NELSON.) *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How., 344 (§§ 220-242); *Crosby v. Grinnell*,* 9 N. Y. Leg. Obs., 281.

§ 181. A carrier is not technically an insurer, though often loosely so called. *Hall v. Railroad Company*, 13 Wall., 367 (§§ 1146-1149).

§ 182. If the shipper's negligence contributed materially to produce the loss or injury occasioned on the transit he cannot recover. *Ormsby v. Union Pacific R'y Co.*,* 2 McC., 48.

§ 183. *Barge on inland river.*—Carrier held liable where barge on a western river sprung a leak, and the evidence showed unfitness for the peculiar perils of such navigation; also carelessness of the carrier in loading up heavily, in failing to have inspection of the barge before the trip, in running at too great a speed, and neglecting duty on discovering the leak. *Kellogg v. La Crosse Packet Co.*,* 3 Biss., 496.

§ 184. *Transportation of cattle.*—Cattle should be transported with a humane regard to their health and safety. *May v. The Powhatan*,* 5 Fed. R., 375; *The Powhatan*, 12 Fed. R., 876; *Boyce v. Anderson*,* 2 Pet., 150.

§ 185. *Injury by nitro-glycerine.*—In order to hold a carrier liable for injury to the occupant of premises adjoining his store-house, through the explosion of nitro-glycerine held for transportation, it must appear that the carrier introduced the article with a knowledge of its dangerous character, or was negligent in the care and handling of it. *Parrott v. Barney*, 2 Abb., 197, 225; 1 Saw., 423, 448. And see § 184.

IV. CARRIER'S RESPONSIBILITIES AS SPECIALLY MODIFIED.

1. *Modification by Legislation.*

SUMMARY — *Liability of ship-owners limited; act of 1851, §§ 186-188.*

186. Act of congress of March 3, 1851 (9 Stats. at Large, 635), limiting liability of ship-owners, construed, and applied with reference to exemption for loss by fire. *Held*, that the proviso which excepts vessels used in "rivers or inland navigation" from the benefits of this act does not include a steamboat navigating the waters of our great northern lakes on the Canada border. (MR. JUSTICE CATRON dissenting.) *Moore v. American Transportation Co.*, §§ 189-194.

§ 187. The decision of the supreme court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344, subjecting the carrier to responsibility where his vessel was burned upon Long Island Sound, led to the passage of this act of 1851. *Ibid.*; *Walker v. Transportation Co.*, §§ 195-199.

§ 188. Under the act of 1851, ship-owners are not liable for the misconduct or negligence of officers and mariners inducing loss by fire; the owners must have personally participated in order to be responsible. *Walker v. Transportation Co.*, §§ 195-199.

[NOTES.— See §§ 200-211.]

MOORE v. AMERICAN TRANSPORTATION COMPANY.

(24 Howard, 1-41. 1860.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the supreme court of the state of Michigan. The suit was brought by the plaintiffs in the court below

against the defendants, a company incorporated under the laws of New York, and owners of the steam propeller M. B. Spaulding. The goods in question were put on board of the propeller at Buffalo on the 30th October, 1856, for transportation to Detroit, and on the next day they took fire, and vessel and goods were entirely consumed, without any default or negligence of the master or crew, or any knowledge of the defendants, their officers or agents. The propeller was of more than twenty tons burden, and was enrolled and licensed for the coasting trade, and engaged in navigation and commerce as a common carrier between ports and places in different states upon the lakes and navigable waters connecting the same.

The defendants relied, in their defense, upon the act of congress passed March 3, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes." The first section provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please. The second section provides against any liability of the owner of the vessel, in case of precious metals, etc., unless notice and entry on the bill of lading. The third section provides against liability of the owner, in cases of embezzlement or loss, etc., by the master, officers, etc., of any property shipped on board, or for any loss by collision, etc., without the privity or knowledge of the owner, exceeding the value of his interest in the ship and freight. The fourth section provides for an apportionment of the proceeds, in case of the sale of the vessel, among the several freighters or owners of the goods, if these and the freight should not be sufficient to pay each loss. The sixth section saves the remedy against the master and hands, in case of embezzlement or loss, or for any negligence or malversation by these persons. The seventh section, after providing a penalty for shipping oil of vitriol and such dangerous materials, without notice to the master, is as follows: "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

§ 189. "*Inland navigation*," in the act of 1851, does not include navigation on the great American lakes.

It is insisted, on the part of the plaintiffs, that the navigation of Lake Erie, and also of all the other lakes in connection therewith, is within the exception to this act, as falling within the words "inland navigation." The question thus raised is not without difficulty, as we have no clear or certain guide to lead us to the true meaning attached to these words by congress. Looking at them in a very general sense, and without much regard to the reasons or policy of the law, it may with some plausibility be urged, as has been on behalf of the plaintiffs, that the phrase, "inland navigation," was used as contradistinguished from navigation upon the ocean; and that all vessels navigating waters within headlands, and after they have passed out of the ocean, come within the designation. But a construction thus broad can hardly be maintained, for it would be unreasonable to suppose that congress intended to apply one rule of responsibility to the owner in respect to the same vessel upon the ocean, and another upon the bays or rivers, in the course of the same voyage. Besides the absence of any good reason for such a distinction as to the rule of responsibility,

it would have seriously embarrassed all parties engaged in commerce of this description in respect to their securities against accidents, and losses by means of insurance, bills of lading, charter-parties, etc. The connection in which this term "inland navigation" is used in the act, we think, may throw some light upon the intent of the law-makers. It is declared that the act shall not apply to the owner of any canal-boat, barge or lighter, or to any vessel of any description used in rivers or inland navigation. It will be seen that certain craft is excepted from the act *eo nomine*, and then a class of vessels without any designation other than by a reference to the waters or locality in which used.

§ 190. *Words ejusdem generis aid in the interpretation of a statute.*

But the character of the craft enumerated may well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the law-makers, which are designated by the place where employed. This class may well be regarded *ejusdem generis*, and thus aid us in interpreting the true meaning of the words of the act, namely, vessels "used in rivers or inland navigation."

§ 191. *Comparison with corresponding English act, 53 Geo. 3.*

Many of the provisions of this act were taken from the 53 Geo. 3, c. 159, as also the exception to the enacting clause. The exception in the English act is as follows: that nothing in this act shall extend to the owner of any "lighter, barge, boat or vessel of any description whatsoever, used solely in rivers or inland navigation."

§ 192. *Carrier's liability on rivers, etc., may well differ from carrier's liability on our great lakes.*

The language of this exception is more specific than that used in ours; but the meaning intended to be conveyed we think substantially the same. The words in ours are, "any vessel of any description whatsoever, used in rivers or inland navigation." This word *used* means, in the connection found, *employed*, and doubtless, in the mind of congress, was intended to refer to vessels solely employed in rivers or inland navigation. It was this species of navigation—that is, on rivers and inland—which was intended to be withdrawn from the limitation of the liability of the owner; and the addition of the term "inland navigation," as an alternative to rivers, was doubtless designed, speaking in a general sense, to embrace all internal waters, either connected with rivers, but which did not, in a geographical or popular sense, fall under that name, or which might not be connected with rivers, but fell within the reason or policy of the exception, such as bays, inlets, straits, etc. Vessels, whatever may be their class and description, solely employed upon these waters, are usually employed in the trade and traffic of the localities, carried on chiefly by persons residing upon their borders, and connected with the local business, and without the formalities and precautions observed in regular commercial pursuits, with a view to guard against accidents and losses, such as insurance, bills of lading, etc. It was fit and proper, therefore, in this description of trade and traffic, that the common law liabilities of the carrier should remain unaltered. But the business upon the great lakes lying upon our northern frontiers, carried on between the states, and with the foreign nation with which they are connected (and this is the only business which congress can regulate, or with which we are dealing), is of a very different character. They form a boundary between this foreign country and the United States for a distance of some twelve hundred miles, and are of an average width of at least one hundred miles; and

this, without including Lake Michigan, of itself three hundred and fifty miles in length and ninety in breadth, which lies wholly within the United States. The aggregate length of these lakes is over fifteen hundred miles, and the area covered by their waters is said to be some ninety thousand square miles. The commerce upon them corresponds with their magnitude. According to the best official statistics, the value of the property annually, the subject of this commerce, exceeds \$600,000,000, employing more than sixteen hundred vessels, with an aggregate tonnage exceeding four hundred thousand tons. The vessels are duly licensed for the foreign trade as well as for that carried on coastwise. This commerce, from its magnitude, and the well-known perils incident to the lake navigation, deserves to be placed on the footing of commerce on the ocean; and we think, in view of it, congress could not have classed it with the business upon rivers or inland navigation, in the sense in which we understand these terms. These lakes are usually designated by public men and jurists, when speaking of them, as great inland waters, inland seas or great lakes; and if congress intended to have excluded them from the limitation of the liabilities of owners, it would have been most natural and reasonable, and, indeed, almost a matter of course, to have referred to them by a more specific designation.

§ 193. *Decision in "The Lexington" led to the act of 1851.*

The decision in the case of *The Lexington*, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. 6 How., 344. The sound is but one hundred and ten miles in length, and from two to twenty in breadth. The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian or the Black Sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red Sea, the North Sea or German Ocean, the Sea of Marmora, and of Azoff. And, like the lakes, all of these seas, with the exception of the North Sea, are tideless. The marine disasters upon these lakes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, are immense. According to the report of a committee in the house of representatives in 1856, the destruction of property upon Lake Michigan in the year 1855 exceeded \$1,000,000. The appalling destruction of life in the loss of the *Erie* upon Lake Erie, and of the *Superior* and *Lady Elgin* upon Michigan, are still fresh in the recollections of the country. The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight.

§ 194. *Lakes lying within a state are not regulated by congress.*

It has been suggested that our construction of the act may embrace within the limitation of the liability of the owners western lakes lying within a state, such as the Cayuga, Seneca, and the like. But the answer is, that commerce upon the lakes, and all others similarly situated, is not within the regulation of congress. The act can apply to vessels only which are engaged in foreign commerce, and commerce between the states. The purely internal commerce and

navigation of a state is exclusively under state regulation. We think the court below was right, and that the judgment should be affirmed.

MR. JUSTICE CATRON dissented, holding that navigation on the great lakes is "inland navigation," within the meaning of the act of congress.

WALKER v. THE TRANSPORTATION COMPANY.

(3 Wallace, 150-155. 1865.)

STATEMENT OF FACTS.—Wheat was shipped at Chicago for Buffalo, and on the voyage the ship and cargo were burned. The owners of the wheat filed a libel in the district court of northern Illinois against the owners of the vessel for damages. It was resisted on the ground that by statute (9 Stats. at Large, 635) the carriers were relieved of responsibility for fire, and upon other grounds. The libel was dismissed, and the case came up by appeal. Two questions are presented: (1) Whether the owner of a vessel employed on the lakes is liable for a loss by fire happening through the negligence of the officers or agents. (2) Whether the special contract set up was founded on a custom which the law would support.

§ 195. *The act of 1851, limiting the liability of ship-owners, and former decisions, stated.*

Opinion by MR. JUSTICE MILLER.

1. The answer to the first of the two questions above presented, and which we have to consider, depends upon the construction to be given to the act of congress. That the owners of vessels were liable at common law in the case stated in the question had been decided by this court in the case of *The New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344. That decision led to the enactment of the statute. The statute has been the subject of consideration in this court before, in the case of *Moore v. American Transportation Co.* The policy of the act, its relation to the act of 53 George III., and other British statutes, are there discussed; and it is decided — that being the principal question before the court — that the act embraces vessels engaged in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship-owner's common law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the ship-owner from liability for loss by fire to which he has not contributed either by his own design or neglect.

§ 196. — *under this act owners are not liable for negligence of officers and mariners inducing loss by fire, where they themselves do not participate.*

By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect. When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners. If, however, there could be any doubt upon the construction of this section, standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers or mariners of such vessel, for negligence, fraud or other

malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud. We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

§ 197. — *this act permits parties to make special contract for carriage extending owner's liability.*

2. But there is a proviso to the first section of the act, which says "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It is asserted by the libelants that the answer of the defendant sets out a contract which makes the owners liable in case of loss by fire from the negligence of their officers and agents; and that, by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence; a question on which testimony was taken on both sides.

§ 198. — *but bill of lading which exempts from loss by "perils of navigation, perils of the sea," etc., does not extend liability as to fire negligently caused.*

The respondent undoubtedly does set out, in one article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship-owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defenses we have mentioned, by libelants in the district court, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the circuit court, after the case of *Moore v. Transportation Co.* had decided that the act of 1851 was applicable to the lake trade, the libelants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it. No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated, and the libelants admit the contract and the construction given to it by custom.

§ 199. — *nor can prior usage be alleged to overcome the statute exemption in such a case.*

It is obvious, however, that there is nothing in the language of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the negligence of his servants in case of loss by fire. Can usage add to words which do not express it a liability from which the act of congress declares the ship-owner to be free? It was the common law, or immemorial usage, which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom;

§§ 200-211. CARRIERS.—RESPONSIBILITIES AS SPECIALLY MODIFIED.

in other words, an express contract. We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libelants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851. The construction which we have already given to that act requires that the judgment of the circuit court, dismissing the libel, shall be affirmed with costs.

§ 200. *Liability of ship-owners limited.*—Act of 1851, limiting liability of ship-owners, discussed in a case where loss occurred from collision. *Norwich Company v. Wright*, 13 Wall., 104; *The Niagara v. Cordes*, 21 How., 7 (§§ 438-450); *The City of Norwich*,* 3 Ben., 575.

§ 201. Valuation assessed where a steamboat, colliding with a schooner, caught fire and was burned, the cargo being utterly consumed and lost. Petition of the owners for the benefit of a limitation of liability, under act of March 3, 1851, considered. *In re* Petition of *Norwich, etc., Co.*, 17 Blatch., 221.

§ 202. The exemption of ship-owners, *semble*, has been the only important modification of a common carrier's liability which, in this country, has been effected by legislative interference. And the policy of the act of 1851 still leaves the ship-owner liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own personal negligence. *Mr. Justice Bradley, in Railroad Co. v. Lockwood*, 17 Wall., 357 (§§ 1379-1400).

§ 203. Under the United States act of March 3, 1851, § 1, exempting ship-owners from liability for the loss of goods on board from fire not caused by their design or neglect, a libel *in rem* against a vessel for damages, alleged to have been caused by the negligence of the master, only, who was a part owner, is not maintainable. *Keene v. Bark Whistler*, 2 Saw., 348.

§ 204. Fire on a wharf after goods are landed does not bring a case within the operation of the act of March 3, 1851. *Salmon Falls Man. Co. v. The Bark Tangier*, 1 Cliff., 396 (§§ 845-847). See § 730.

§ 205. Under act of March 3, 1851, limiting the liability of ship-owners, one who intrusts a quantity of gold coin to the master without taking a bill of lading or delivering a note in writing cannot hold the vessel liable, even though the delivery and loss occur before the vessel starts. *The Island Queen*,* 1 Brown, 279.

§ 206. *Limiting number of passengers, etc.*—Whether the act of August 30, 1852, respecting the number of passengers which vessels may carry, applies to steamers navigating inland rivers, *quære*; and *semble* that where loss of goods by an excepted casualty is claimed, the question is, whether violation of this act by the carrier contributed to the loss. *Union Ins. Co. v. Shaw*,* 2 Dill., 14, 21.

§ 207. A neglect to obtain from the collector of customs a certified copy of the certificate of the board of inspectors as to seaworthiness, condition of machinery, passenger accommodations, etc., of a steamboat as required by the ninth section of the act of August 30, 1852 (10 U. S. Stats. at Large, 71), creates a liability only for the penalty of \$100 imposed in the twenty-fifth section for failure to post such a copy in a conspicuous place, and not for the penalty of \$500 imposed by the first section for navigating a steam vessel with passengers on board without complying with the provisions of the act. *United States v. Steamboat Manhattan*, 3 Blatch., 270. See § 1486.

§ 208. *Revenue laws.*—Common carrier, in transporting empty barrels with uncanceled revenue stamps, *held* liable for the penalty under the U. S. Rev. Stats., § 3324. *United States v. Goodrich Trans. Co.*, 8 Biss., 224.

§ 209. *Stowage of combustibles.*—Construction of act July 25, 1866, § 5, which regulates the stowage of combustibles, such as cotton, hemp, hay and straw, carried by a passenger steamer. *Union Ins. Co. v. Shaw*,* 2 Dill., 14, 21.

§ 210. *Local legislation.*—The Maine statute restricts liability of ship-owners to their interest in the ship and freight. *Stinson v. Wyman, Dav.*, 172.

§ 211. An Illinois statute which prohibits common carriers from limiting their liability does not apply to a case where the consignor is requested to state the value of the commodity presented for transportation and refuses. *Mather v. American Express Co.*,* 9 Biss., 293.

For additional cases on the limitation of the liability of ship-owners, see MARITIME LAW.

2. Modification by Special Contract and Usage.

SUMMARY — *Special contract of ship-owners*, §§ 212, 213.—*Carrier cannot stipulate for immunity from negligence or misconduct*, § 214.—*Whether of himself or his agents, etc.*, §§ 215, 216.—*Stipulations limiting the value of the thing transported*, § 217.—*Stipulations limiting the time for presenting claims*, § 218.—*Special contract, how evinced*, § 219.

§ 212. Act of 1851 permits of special contracts, so that by mutual consent the liability of ship-owners may be extended beyond the scope of the act. But apt and explicit language must be used for such purpose; and no such special contract is inferable from a prior usage applied to general terms expressed in a bill of lading. *Walker v. Transportation Co.*, §§ 188, 195-199, *supra*.

§ 213. A steamboat company carried specie under special contract with an expressman, who transacted business for his own customers. The steamboat took fire and the specie was lost. It appeared that the steamboat was not provided with the proper appliances against fire; that goods were carelessly stowed; and that the gross negligence of the steamboat company's servants contributed to the loss. *Held*, that the steamboat company was liable for the loss, and that the owner of the specie might bring a libel in admiralty accordingly. *New Jersey Steam Navigation Co. v. Merchants' Bank*, §§ 220-242. (DANIEL, J., dissents.) See *supra*, § 187.

§ 214. A carrier's common law liability may be qualified by special contract with the customer, except as to damage or loss accruing from the negligence or misconduct of the carrier. Liability for loss by fire may be excluded accordingly; so that the carrier's responsibility becomes reduced to the standard of ordinary bailee for hire. *York Company v. Central Railroad*, §§ 243-248.

§ 215. A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence or misconduct of himself or his servants. Authorities reviewed. *Railroad Company v. Lockwood*, 17 Wall., 357 (§ 1483). And see as to express companies, *Express Company v. Kountze Brothers*, 8 Wall., 842; *Bank of Kentucky v. Adams Express Company*, 3 Otto, 174 (§§ 1481, 1482).

§ 216. A common carrier cannot, by special stipulation against liability for loss by fire, exonerate himself where the loss is occasioned by the negligence or misconduct of himself or his agent. Express company held liable accordingly, where, through the negligence of a railway which it employed in transporting, a trunk was destroyed by fire. *Muser v. Holland*, §§ 249-253.

§ 217. Stipulations amounting to an agreed valuation of trunk and contents received by the carrier, unless the actual value is expressly stated, are not void, if the limitation itself be not unreasonable. A limitation to \$50 held not unreasonable, and no greater value having been stated, the owner of a lost trunk and contents was not permitted to recover a greater sum. *Ibid. Contra*, *The Steamboat City of Norwich*,* 4 Ben., 271.

§ 218. A special stipulation that the shipper shall, in case of loss or damage, assert his claim in ninety days is not contrary to public policy, in the case of carriers, such as an express company doing an extensive business. *Express Company v. Caldwell*, §§ 254-262.

§ 219. Carrier's general liability as approximately an insurer cannot be modified by a mere published notice. But he may modify to a certain extent by a special contract with the customer. The burden is upon him, however, to establish such a special contract. *New Jersey Steam Navigation Co. v. Merchants' Bank*, §§ 220-242.

[NOTES.— See §§ 263-286.]

NEW JERSEY STEAM NAVIGATION COMPANY v. MERCHANTS' BANK OF BOSTON.

(6 Howard, 344-437. 1847.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is an appeal from the circuit court of the United States, held in and for the district of Rhode Island, in a suit originally commenced in the district court in admiralty, and in which the Merchants' Bank of Boston were the libelants, and the New Jersey Steam Navigation Company the respondents. The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in *The Lexington*, one of the steamers of the respondents running between New York and Providence, which took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about four miles off Huntington light-house, and between forty and fifty miles from the former city. The district court dismissed the libel *pro forma*, and entered a decree accordingly. An appeal was taken to the circuit court, where this decree of dismissal was reversed, and a decree entered for the libelants for the sum of \$22,224, with costs of suit.

The case is now before this court for review.

William F. Harnden, a resident of Boston, was engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to hire him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of \$250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers, between New York and Providence, a wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st of December following, subject to these conditions: 1. The crate with its contents to be at all times exclusively at the risk of the said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, etc., to be conveyed or transported by him in said crate, or otherwise in the boats of said company. 2. That he should annex to his advertisements published in the public prints the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading: "Take notice. William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time." This arrangement expired on the 31st of December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question. A few days previous to the loss of *The Lexington*, the libelants employed Harnden, in Boston, to collect from the banks in the city of New York, checks and drafts to the amount of about \$46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect and send home the same in the usual way. Eighteen thousand dollars of this sum was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libelants, and was on board at the time she was lost on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libelants to recover: 1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made. 2. That if the suit can be maintained in the name of the libelants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and 3. That the district court had no jurisdiction, the contract of affreightment not being the subject of admiralty cognizance.

§ 220. *Contract between an expressman and a carrier by water as to the carriage of specie cannot defeat the real owner's right to sue the carrier for a loss, in admiralty proceedings.*

We shall examine these several objections in their order.

1. As to the right of the libelants to maintain the suit. They had employed Harnden to collect checks and drafts on the banks in the city of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with the respondents for its conveyance, except what was derived from the possession in the execution of his agency. The general property remained in the libelants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the ship-

ment would fall upon them. This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of this description of goods, the result would not be changed, so far as relates to the right of property. The carrier has a lien on the goods for his freight, if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. Story on Bailm., § 93, g. The carrier, says Buller, J., is considered in law the agent or servant of the owner, and the possession of the agent is the possession of the owner. 4 Term R., 490. Under these circumstances, the contract between Harnden and the respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libelants; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names. It would be otherwise, in a court of law, if the contract was under seal. Story on Ag., § 160. It rested in parol in this case, at the time of the loss.

§ 221. *Right of general owner or undisclosed principal to sue illustrated.*

In *Sims v. Bond*, 5 Barn. & Ad., 393, the court observed that it was a well established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or principal may sue on it, the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. The same doctrine is affirmed by Baron Parke, in delivering the judgment of the court in *Higgins v. Senior*, 8 Mees. & W., 834, 844, in the court of exchequer. In that case, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing by the statute of frauds. The rule is, also, equally well established in this country, as may be seen by a reference to the cases of *Beebee v. Robert*, 12 Wend., 413; *Taintor v. Prendergast*, 3 Hill, 72; and *Sanderson v. Lamberton*, 6 Binn., 129. The last case is like the one before us. It was an action by the owners directly upon the subcontract made by the first with the second carrier, for the conveyance of the goods, in whose hands they were lost. The cases are numerous in which the general owner has sustained an action of tort against the wrong-doer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuitry of action, saving, at the same time, to the defendant, all the rights belonging to him if the suit had been in the name of the agent. We think, therefore, that the action was properly brought in the name of the libelants.

§ 222. *General owner should sue as upon the contract thus made with expressman.*

2. The next question is as to the duties and liabilities of the respondents, as carriers, upon their contract with Harnden. As the libelants claim through it, they must affirm its provisions, so far as they may be consistent with law.

§ 223. *Carrier's general liability is that of insurer, except as to act of God.*

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident; in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted,

were it not for the special agreement under which the goods were shipped. The question is, To what extent has this agreement qualified the common law liability?

§ 224. *Carrier cannot exonerate himself by mere published notice.*

We lay out of the case the notices published by the respondents, seeking to limit their responsibility, because —

1. The carrier cannot in this way exonerate himself from duties which the law has annexed to his employment; and

2. The special agreement with Harnden is quite as comprehensive in restricting their obligation as any of the published notices.

§ 225. — *but he may by special agreement, to a certain extent.*

A question has been made whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of *Gould v. Hill*, 2 Hill, 623, and the conclusion arrived at that he could not. See, also, *Hollister v. Nowlen*, 19 Wend., 240, and *Cole v. Goodwin*, 19 Wend., 272, 282. As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous, and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.

§ 226. — *admitting this right to restrict, his public notice or sole act is not sufficient.*

But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister v. Nowlen* that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

§ 227. *The burden is upon the carrier to show a special contract modifying his public responsibilities.*

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these

duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.

§ 228. *Special contract not assumed to intend stipulating for less than ordinary care.*

The special agreement in this case under which the goods were shipped provided that they should be conveyed at the risk of Harnden, and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailm., § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. 13 Wend., 611, 627, 628. Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods and in their delivery, and to provide proper vehicles and means of conveyance for their transportation. This rule, we think, should govern the construction of the agreement in question. If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of the goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties.

§ 229. *Burden is on claimant to overcome force of special contract.*

The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libelants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case with a view to the question.

§ 230. *Facts discussed and held to establish gross negligence; proper safeguards not taken against fire and combustible material badly stowed.*

There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along-side of the boiler deck, and around the steam chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck. The fire broke out in the cotton next the steam chimney, between the two decks, at about half-past seven o'clock in the evening, and was discovered before it had made much progress. If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard a-port for the purpose of heading her to the land. In

this act one of the wheel-ropes parted, being either burnt or broken, in consequence of which the hands had no longer any control of the boat. Some of them then resorted to the fire-engine, but it was found to be stowed away in one place in the vessel, and the hose belonging to it, and without which it was useless, in another, and which was inaccessible in consequence of the fire. They then sought the fire buckets. Two or three, only, in all, could be found, and but one of them properly prepared and fitted with heaving lines; and, in the emergency, the specie boxes were emptied, and used to carry water.

The act of congress (5 Stats. at Large, 306, § 9) made it the duty, at the time, of these respondents to provide, as a part of the necessary furniture of the vessel, a suction-hose and fire-engine, and hose suitable to be worked in case of fire, and to carry the same on every trip in good order; and further provided that iron rods or chains should be employed and used in the navigation of steamboats instead of wheel or tiller ropes. This latter provision was wholly disregarded on board the vessel during the trip in question; and the former, also, as we have seen, for all practical or useful purposes. We think there was great want of care, and which amounted to gross negligence, on the part of the respondents in the stowage of the cotton; especially regarding its exposure to fire from the condition of the covering of the boiler-deck and the casing of the steam chimney. The former had been on fire on the previous trip and a box of goods partly consumed. Also, for the want of proper furniture and equipments of the vessel, as required by the act of congress, as well as by the most prudential considerations. It is, indeed, difficult, on studying the facts, to resist the conclusion that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested.

§ 231. — *carrier held liable accordingly, notwithstanding special contract.*

We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.

§ 232. *Jurisdiction of this case in admiralty considered.*

3. The remaining question is as to the jurisdiction of the court. By the second section of the third article of the constitution, it is declared that "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction." The ground of objection to the jurisdiction, in this case, rests upon the assumption that this provision had reference to the jurisdiction of the high court of admiralty in England, as restrained by the statutes of 13 and 15 Richard II., or as exercised in the colonies by the courts of vice-admiralty, which, as their decisions were subject to the appellate power of the high court at home, with few exceptions, and those by act of parliament, were confined within the same limits. This is the foundation of the argument in support of the restricted jurisdiction, and which, it is claimed, excludes the contract in question. Under the statutes of Richard, as expounded by the common law courts, in cases of prohibition against the admiralty, its jurisdiction over contracts was confined to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas. If made on land, or within the body of an English county, though to be executed, or the service to be performed, upon the sea, or if made upon the sea, but to be executed upon the land, in either case it was held by the common law courts that the admiralty had no jurisdiction. In the first, because the place where the contract was made, and in the second, where it was to be performed, was within the body of the county, and,

of course, within the cognizance of the common law courts, which excluded the admiralty. It is not to be denied, therefore, if the grant of power in the constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it, that the present suit cannot be maintained, as the district court of Rhode Island had no jurisdiction.

But, in answer to this view, and to the ground on which it rests, we have been referred to the practical construction that has been given to the constitution by congress in the judiciary act of 1789 (1 Stats. at Large, 73), which established the courts of admiralty and assigned to them their jurisdiction; and also to the adjudications of this, and of the circuit and district courts, in admiralty cases, which not only reject the very limited jurisdiction in England, but assert and uphold a jurisdiction much more comprehensive, both in respect to contracts and torts, and which has been exercised ever since the establishment of these courts. And it is insisted, that, whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed. We are inclined to concur in this view, and shall proceed to state some of the grounds in support of it. By the ninth section of the judiciary act of 1789, which established the admiralty courts, it is declared that the district courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

§ 233. *Distinction between the admiralty jurisdiction of the courts of England and the United States.*

The high court of admiralty in England never had original jurisdiction of causes arising under the revenue laws, or laws concerning the navigation and trade of the kingdom. They belong, exclusively, to the jurisdiction of the court of exchequer, in which the proceedings are conducted as at common law. That court exercises an appellate power over the decisions of the vice-admiralty courts in revenue cases in the colonies; even that power was doubted, till affirmed by the court of delegates, on an appeal from a decision of the vice-admiralty court in South Carolina, in 1754. Since then, it has been exercised; but this is the extent of its power over revenue cases, or cases arising under the navigation laws. Thus it will be seen that a very wide departure from the English limit of admiralty jurisdiction took place within two years after the adoption of the constitution; and that, too, by the congress called upon to expound the grant with a view to the establishment of the proper tribunals to carry it into execution.

§ 234. *The ninth section of the judiciary act of 1789 is constitutional.*

The constitutionality of this act of congress, and, of course, the true construction of the grant in the constitution, became a subject of discussion before this court, at a very early day, on several occasions, and received its particular consideration. The first case that involved the question was the case of *The Vengeance*, in 1796, nine years after the adoption of the constitution. 3 Dal., 297. The vessel was seized by the marshal in the port of New York, as forfeited under an act of congress, prohibiting the exportation of arms (1 Stats.

at Large, 369), and libeled and condemned in the district court. On appeal, the circuit court reversed the decree and dismissed the proceedings, upon which an appeal was taken to this court. On the argument, the attorney-general took two grounds for reversing the decree. The second was, that, even if the proceeding could be considered a civil suit, it was not a suit of admiralty and maritime jurisdiction; and therefore the circuit should have remanded it to the district court, to be tried before a jury. He referred to the ninth section of the judiciary act, which declared that "the trials of issues of fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury," and insisted that a libel for a violation of the navigation laws was not a civil suit of admiralty jurisdiction; that the principles regulating the admiralty jurisdiction in this country must be such as were consistent with the common law of England at the period of the revolution; that there admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county; that the act of exporting arms must have commenced on land, and if done part on land and part on the sea, the authorities held that the admiralty had no jurisdiction. The court took time to consider the question, and on a subsequent day gave judgment, holding that the suit was a civil cause of admiralty and maritime jurisdiction, and therefore rightfully tried by the district court without a jury; that the case was one coming within the general admiralty powers of the court; and, for a like reason, it was held that the appeal to the circuit court was regular and properly disposed of. It will be observed that the seizure, in this case, was in the port of New York, and within the body of the county, which extends to Sandy Hook.

The next case that came before the court was the case of *United States v. Schooner Sally*, 2 Cranch, 406, in 1805, which arose in the Maryland district, and involved the same question as in the case of *The Vengeance*, and was decided in the same way. But the most important one, as it respects the question before us, was the case of *United States v. Schooner Betsey & Charlotte*, in 1808 (4 Cranch, 443). This vessel was seized for a violation of the non-intercourse act (2 Stats. at Large, 351), between the United States and St. Domingo, in the port of Alexandria, in this district. She was condemned in the district court; but on appeal, the circuit court reversed the decree, from which an appeal was taken to this court. Mr. Lee, who had argued the case of *The Vengeance*, appeared for the claimant, and requested permission to argue the point again more at large, namely, whether the case was one of admiralty and maritime jurisdiction; and in this argument will be found the ground and substance of all the arguments which have been since urged in favor of the limited construction of the admiralty power under the constitution. He referred to the terms of the grant in the constitution, and denied that congress could make cases of admiralty jurisdiction; nor could it confer on the federal courts jurisdiction of a case which was not of admiralty and maritime cognizance at the time of the adoption of the constitution. That the seizure of a vessel within the body of a county, for a breach of a municipal law of trade, was not of admiralty cognizance; that it was never so considered in England; that all seizures in that country for a violation of the revenue and navigation acts were tried by a jury, in the court of exchequer, according to the course of the common law; that the high court of admiralty in England exercised no jurisdiction in revenue cases; and insisted that if the ninth section of the judiciary act was to be construed as including revenue cases and seizures under the navigation acts as civil causes of admiralty and maritime jurisdiction, the act was

repugnant to the constitution and void. The court rejected the argument, and held that the case was not distinguishable from that of *The Vengeance*, and which they had already determined belonged properly to the jurisdiction of the admiralty. They observed that it was the place of seizure, and not the place of committing the offense, that determined the jurisdiction, and regarded it as clear that congress meant to discriminate between seizures on waters navigable from the sea, and seizures on land or on waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction. Similar objections were taken to the jurisdiction of the court in the cases of *The Samuel* and *The Octavia*, 1 Wheat., 9 and 20, and received a similar answer from the court.

We have been more particular in referring to these cases, and to the arguments of counsel, because they show: 1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after full consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the constitution; and 2. They affirm the practical construction given to the constitution by congress, in the act of 1789, which, we have seen, assigns to the district courts, in terms, a vast field of admiralty jurisdiction unknown to that court in England. The jurisdiction in all these cases is maintained on the broad ground that the subject-matter was of admiralty cognizance, as the causes of action arose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide, expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and, therefore, out of the limits of the admiralty.

In answer to an argument that was pressed, that the offense must have been committed upon land, such as in case of an exportation of prohibited goods, the court say that it is the place of seizure, and not the place of committing the offense, that decides the jurisdiction,—a seizure upon the high seas or within tide waters, although the tide waters may be within the body of a county. All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction, within the words of the constitution, and, as such, were properly assigned to the district court, in the act of 1789, as part of its admiralty jurisdiction. They were so regarded, as well in respect to the subject-matter as in respect to the place where the causes of action had arisen. The clause in the act of 1789, “saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it,” was referred to on the argument in support of the restricted jurisdiction. And it was insisted that the remedy is thus saved to both parties, plaintiff and defendant, and is, in effect, an exception from the admiralty power conferred upon the district courts, of all causes in which a remedy might be had at common law. The language is certainly peculiar, and unfortunate, if this was the object of the clause; and besides, the construction would exclude from the district court cases which the sternest opponent of the admiralty will admit properly belonged to it. The common law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or contract (with the exception of proceedings *in rem*), which, upon the construction contended for, would be transferred from the admiralty to the exclusive cognizance of these courts. The meaning of the clause was

think apparent. By the constitution, the entire admiralty power of the country is lodged in the federal judiciary, and congress intended by the ninth section to invest the district courts with this power, as courts of original jurisdiction. The term "exclusive original cognizance" is used for this purpose, and is intended to be exclusive of the state, as well as of the other federal courts. The saving clause was inserted probably from abundant caution, lest the exclusive terms in which the power is conferred on the district courts might be deemed to have taken away the concurrent remedy which had before existed. This leaves the concurrent power where it stood at common law. The clause has no application to seizures arising under the revenue laws, or laws of navigation, as these belong exclusively to the district courts. *Slocum v. Mayberry*, 2 Wheat., 1; *Gelston v. Hoyt*, 3 Wheat., 246. If the thing seized is acquitted, then the owner may prosecute the wrong-doer for the taking and detention, either in admiralty or at common law. The remedy is concurrent. *Ibid.*

2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship carpenters and material men, for repairs and necessities made and furnished to ships, whether foreign or in the port of a state to which they do not belong, or in the home port, if the municipal laws of the state give a lien for the work and materials. 1 Pet. Adm., 227, 233, note; *Bee*, 106; 4 Wash., 453; 1 Paine, 620; *Gilp.*, 203, 473; 1 Wheat., 96; 4 id., 438; 9 id., 409; 10 id., 428; 7 Pet., 324; 11 id., 175. The principle stated in the case of *The General Smith*, 4 Wheat., 438, and which has been repeated in all the subsequent cases, is, that where repairs have been made, or necessities furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to enforce his right. But as to repairs or necessities in the port or state to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied, unless recognized by that law. But if the local law gives the lien, it may be enforced in admiralty. The jurisdiction in these cases, as will be seen from the authorities referred to, appears to have been exercised by the district courts from the time of their earliest organization, and which was affirmed by this court the first time the question came before it. The district court of South Carolina, in 1796, in the case of *North v. The Brig Eagle*, *Bee*, 79, maintained a libel for supplies furnished a foreign vessel, and considered the question as a very clear one at that day. See, also, *Pritchard v. The Lady Horatia*, *Bee*, 169, decided in 1800. Judge Winchester, district judge of the Maryland district, maintained the jurisdiction in a most able opinion, at a very early day. 1 Pet. Adm., 233, note. The same opinion was also entertained by Judge Peters, of the Pennsylvania district. 1 Pet. Adm., 227. Since then, the jurisdiction appears to have been undisputed. We refer to these opinions, not so much for the authority they afford, though entitled to the highest respect as such, but as evidence of the line of jurisdiction exercised at that early day by learned admiralty lawyers, in direct contradiction to the theory that the constitutional limit is to be determined by the jurisdiction in England. They are the opinions of men of the revolution, engaged in administering admiralty law, as understood in the country soon after the adoption of the constitution, fresh from the discussions which every provision and grant of power in that instrument had undergone. The opinions may be well referred to, as affording the highest evidence of the law on this subject in their day.

§ 235. *Constitutional grant of admiralty jurisdiction distinguished from that of English jurisdiction.*

3. Another class of cases in which jurisdiction is entertained by the courts in this country on contracts, but which is denied in England, are suits for pilotage. 10 Pet., 108. It is denied in England on the ground of locality, the contract having been made within the body of a county. We shall pursue the examination no further. The authorities, we think, are decisive against expounding the constitutional grant according to the jurisdiction of the English admiralty, and in favor of a line of jurisdiction which fully embraces the contract in question. Before jurisdiction can be withheld in the case, the court must not only retrace its steps, and take back several of its decided cases, but must also disapprove of the ground which has heretofore been taken, and maintained in every case, as the proper test of admiralty jurisdiction.

Some question was made on the argument, founded on the circumstance that this was a suit *in personam*. The answer is, if the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance. On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract; whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea or tide waters, although it had commenced and had terminated beyond the reach of the tide. If it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract is to be performed beyond tide waters, or if the contract relates exclusively to the interior navigation and trade of a state, jurisdiction is disclaimed. 10 Wheat., 428; 7 Pet., 324; 11 id., 175; 12 id., 72; 5 How., 463. The exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power. It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide waters, with foreign countries and among the several states. Contracts growing out of the purely internal commerce of the state, as well as commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts. Upon the whole, without pursuing the examination further, we are satisfied that the decision of the circuit court below was correct, and that its decree should be affirmed.

TANEY, C. J., and McLEAN and WAYNE, JJ., concurred.

§ 236. *Right of libellant to sue conceded.*

Opinion by MR. JUSTICE CATRON.

1. In my judgment, the New Jersey Steam Navigation Company were entitled to all the benefits of Harnden's contract with them, in regard to the

property of others with which he (Harnden) was intrusted, for the purpose of transporting it in his crate. And though the company can rely on all the defenses which they could have relied upon if Harnden had sued them, still, I think the libelants can maintain this suit. Had a trover and conversion been made of the money sued for, or an open trespass been committed on it by throwing it overboard, by the servants or agents of the company, then either Harnden, the bailee of the bank, might have sued the company, or the bank might have sued. As to the right to sue, in the case put by the bank, there can be no doubt, as such acts were never contemplated by the contract, nor covered by it.

§ 237. *Notwithstanding the contract with expressman, the carrier by water is liable for gross negligence.*

The navigation company were responsible to Harnden, and to those who employed him, notwithstanding the contract, for acts of gross negligence in transporting the property destroyed; as, for instance, if the servants of the company, in navigating the vessel, omitted to observe even slight diligence, and failed in the lowest degree of prudence, to guard against fire, then they must be deemed in a court of justice to have been guilty of gross negligence; by which expression I mean that they acted reckless of consequences as respected the safety of the vessel, and the lives and property on board and in their charge, that such conduct was contrary to common honesty, and that the master and owners were liable for loss by reason of such recklessness as they would have been in case of an affirmative and meditated fraud that had occasioned the same loss, and that this burning was a tort. Whether it is evidence of fraud in fact, as Sir William Jones intimates, or whether it is not, as other writers on bailments declare, is not worthy of discussion. The question is this: Is the measure of liability the same where a ship is burned because the master and crew did not observe the lowest degree of prudence to prevent it, and in a case where she is wilfully burned? This is the question for our consideration. In the civil law, I apprehend no distinction in the cases put exists; nor do I believe any exists at common law. But, by the laws of the United States, such gross and reckless negligence as that proved in the case before us was a fraud and a tort on the shippers, and the fire that occurred, and consequent loss of life, a crime on the part of the master. By the twelfth section of the act of 1838, c. 191, every person employed on any steamboat or vessel, by whose negligence to his respective duty the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and subject to conviction and imprisonment at hard labor for a time not exceeding ten years. 5 Stats. at Large, 306. Here the legislature have put gross negligence in the category of crimes of a high grade, and of frauds of course; nor can this court assume a less stringent principle, in a case of loss of property, than congress has recognized as the true one, if life be destroyed by such negligence. From the facts before us, I feel warranted in saying, that, had the captain survived the destruction of the ship and the loss of many lives by the disaster, he would have been clearly guilty according to the twelfth section.

§ 238. *Acts amounting to gross negligence.*

One single circumstance is decisive of the culpable negligence. By section 9 of the above act, it is made "the duty of the master and owner of every steam vessel employed on the sea, to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose, suitable to be worked on said boat

in case of fire, and carry the same upon each and every voyage, in good order." This vessel had something of the kind; but it was in no order for use, and a mere delusion, and a sheer fraud on the law and the public. Had there been such an engine and hose, the fire could have been extinguished in all probability, as I apprehend.

2. There was only a single rigged bucket on board, and nothing else to reach the water with, and the money of libelants was thrown from the boxes, and they used to lift water.

3. The flue from the furnace ran through three decks, and was redhot through the three decks, and the cotton was stowed within eighteen inches on all sides of this redhot flue, and the bales pressed in three tiers deep, from the boiler-deck to the next deck, so that it would have been with much difficulty that the cotton could have been removed should a fire occur; there the fire did occur, and the cotton was not removed,—wherefore the vessel was burnt. And from the mode of stowage a fire could hardly be avoided, and was to be expected and guarded against.

§ 239. *A tort on the high seas is a subject of admiralty jurisdiction.*

Then as to the jurisdiction. The fire occurred on the high sea. It was a tort there. The case depends not on any contract, but on mere tort standing beyond the contract. The locality of the tort is the *locus* of jurisdiction. Locality is the strict limit. 2 Bro. Adm. Law, 110; 3 Bl. Comm., 106. The conflict between *The Luda* and *De Soto*, in Louisiana, 1847, *Waring v. Clarke*, 5 How., 441. But especially 2 Bro. Adm. Law, 144, which lays down the true doctrine, as follows: "We have now done with the effect of the master's contracts or violence, as to his owners, and proceed to consider how he and they are affected by his negligence. And, first, as soon as merchandises and other commodities be put on board a ship, whether she be riding in a port or haven or upon the high sea, the master is chargeable therewith; and if the same be lost or purloined, or sustain any damage, hurt or loss, whether in the haven or port before, or upon the seas after, she is upon her voyage, whether it be by mariners or by any other through their permission, the owner of the goods has his election to charge either master or owners, or both, at his pleasure,—though he can have but one satisfaction,—in a court of common law, if the fault be committed *infra corpus comitatus*; in the admiralty, if *super altum mare*; and if it be on a place where there is *divisum imperium*, then in one or the other, according to the flux or reflux of the sea. I think the libel in this case covers my view of it. It sets out the facts of how the money was shipped in general terms, but avers it was lost by fire, and by reason of an insufficient furnace, insufficient machinery, furniture, rigging and equipments, and the careless, negligent and improper management of said steamboat *Lexington* by the servants and agents of the navigation company. If this technical objection had been addressed to the court below, it could have been easily remedied, and cannot be favorably heard here, now, no doubt, made for the first time. I, therefore, think there was jurisdiction in the circuit court to try the libel; and secondly, that the decree was proper, and ought to be affirmed, without alteration.

§ 240. *Dissent as to taking admiralty jurisdiction in this case.*

Dissenting opinion by MR. JUSTICE DANIEL, MR. JUSTICE GRIER concurring.

The inquiries presented for consideration in this cause resolve themselves into two obvious or natural divisions; the one involving the rights of the parties as growing out of their alleged undertakings, the other the right of the libellant

to prosecute his claim in the mode adopted in the court below, and the power of the court to adjudicate it in that or in any other mode whatever. This latter inquiry, embracing as it does the nature and extent of the admiralty powers of the government of the United States, and by consequence the construction of that article of the constitution by which alone those powers have been invested, challenges the most solemn, deliberate and careful investigation. I approach that investigation with the diffidence which its wide-spread interest and importance, and a deep conviction of my own deficiencies, cannot but awaken. The foundation, nay, the whole extent and fabric, of the admiralty power of the government are to be found in that portion of the second section of the third article of the constitution, which declares that the judicial power shall extend, amongst other subjects of cognizance there enumerated, "to all cases of admiralty and maritime jurisdiction." The distribution of this admiralty power so created by the constitution, with reference to the tribunals by which, and the modes in which, it shall be executed, is contained in the act to establish the judicial courts of the United States of 1789, section 9, which constitutes the district courts of the United States courts of exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of certain seizures under the laws of imposts, concluding or qualifying this investment of power with these plain and significant terms: "Saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it."

Looking now to the provisions of the third article of the constitution, and to those of the ninth section of the judiciary act, we recur to the inquiry, what is this civil and maritime jurisdiction derived from the constitution, and vested by the judiciary act in the district courts,—what the standard by which its scope and power, its "space and verge," are to be measured,—what the rules to be observed in the modes of its execution? Although the constitution and act of congress do not precisely define nor enumerate the former, nor prescribe in forms and precedents the latter, yet it will hardly be pretended that either the substance or the forms of admiralty jurisdiction were designed by the founders of our jurisprudence to be left without limit, to be dependent on surmise merely, or controlled by fashion or caprice. They were both ordained in reference to some known standard in the knowledge and contemplation of the statesman and legislator, and the ascertainment of that standard by history, by legislative and judicial records, must furnish the just response to the inquiry here propounded.

In tracing the origin, existence and progress of the colonial institutions, or in seeking illustrations or analogies requisite for the comprehension of those institutions down to the period of separation from the mother country, it is to the laws and policy of the latter that we must chiefly look as guides to anything like accurate results in our investigations. For the necessity here intimated, various and obvious causes will at once be perceived. As instances of these may be exemplified,—1st, similarity of education and opinion, strengthened by intercourse and habit; 2d, national pride, and the partiality which naturally creates in the offspring admiration and imitation of the parent; 3d, identity of civil and political rights in the people of both regions; 4thly, and chiefly, perhaps, the jealousy of the mother country with regard to her national unity, power and greatness,—a principle which has ever prompted her to bind, in the closest practicable system of efficient uniformity and conformity, the various members of her extended empire. These causes have had their full effect in

regulating the rights of person and of property amongst British subjects everywhere within the dominions of England. There is not, and never has been, a question connected with either in which we do not find every Englishman appealing to the common law, or to the charters and statutes of England, as defining the nature, and as furnishing the best protection, of his rights. He uniformly clings to these as constituting at once his birthright, his pride and his security. *Vide* 1 Bl. Comm., 127, 128. Would it not be most strange, then, with this strong tenacity of adherence to their peculiar national polity and institutions, that we should suppose the government of the people of England disposed to yield their cherished laws and customs in matters which peculiarly affect them in a national point of view, to wit, the administration of their maritime and commercial rights and interests? It would seem to me equally reasonable to expect that the admiralty courts of England, or of any part of the dominions of England, in order to define or settle their jurisdiction, would as soon be permitted to adopt, as the source and foundation and measure of their power, the ordinances, if such there be, of China or Thibet, as those of France, Genoa or Venice, or of any other portion of the continent of Europe, whether established by the several local governments on the continent or based upon the authority of the civil law. With respect to the realm of England, the origin and powers of the court of admiralty are placed upon a footing which leaves them no longer subjects of speculation or uncertainty. Sir William Blackstone, in his Commentaries, vol. iii, c. 5, p. 69, informs us,—upon the authority of Sir Henry Spelman, Glossary, 13, and of Lambard, Archeion, 41,—that the court of admiralty was first erected by King Edward III. Sir Matthew Hale, in his History of the Common Law, vol. i, p. 51, London edition of 1794, by Runnington, speaking of the court of admiralty, says: “This court is not bottomed or founded upon the authority of the civil law, but hath both its powers and jurisdiction, by the law and custom of the realm, in such matters as are proper for its cognizance.” And in a note (*m*) by the editor to the page just cited it is said: “The original jurisdiction of the admiralty is either by the connivance or permission of the common law courts. The statutes are only in affirmance of the common law, and to prevent the great power which the admiralty had gotten in consequence of the laws of Oleron. That, generally speaking, the courts of admiralty have no jurisdiction in matters of contracts done or made on land; and the true reason for their jurisdiction in matters done at sea is because no jury can come from thence; for, if the matter arise in any place from which the *pais* can come, the common law will not suffer the subject to be drawn *ad aliud examen*.” And for this doctrine are cited 12 Rep., 129; Roll. Abr., 531; Owen, 122; Brownlow, 37*a*; Roll., 413; 1 Wils., 101; Hob., 12; and Fortescue, De Laudibus, 103, ed. 1775. Again, Lord Hale, vol. i, pp. 49–51, speaking of the jurisdiction of the admiralty, lays down the following limits to its power: “The jurisdiction of the admiralty court, as to the matter of it, is confined by the laws of the realm to things done upon the high sea only; as depredations and piracies upon the high sea; offenses of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties or contracts made even upon the high sea,—touching things that are not in their own nature maritime, as a bond or contract for the payment of money; so, also, of damages in

navigable rivers within the bodies of counties, things done upon the shore at low water, wreck of the sea, etc.,—these things belong not to the admiral's jurisdiction. And thus the common law and the statutes of 13 Richard II., cap. 15, and of 15 Richard II., cap. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea."

In this cursory view of Lord Hale of the admiralty jurisdiction there is one feature which cannot escape the most superficial observation, and that is the extraordinary care of this learned judge to avoid every implication from uncertainty or obscurity of terms which might be wrested as a pretext for the assumption of power not clear, well founded and legitimate. In the extract above given it will be seen that the sea, as the theater of the admiralty power, is mentioned in eight different instances, in every one of which it is accompanied with the adjunct *high*. *Altum mare* is given as the only legitimate province of the admiral's authority; and then, as if to exclude the possibility of improper implication, are placed in immediate and striking contrast the transactions and the situations as to which, by the common law and the statutes of England, the interference of the admiralty was utterly inhibited. "But," he proceeds to say, "touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties or contracts made even upon the high sea,—touching things that are not in their own nature maritime, as a bond or contract for the payment of money; so, also, of damages in navigable rivers within the bodies of English counties, things done upon the shore at low water, wreck of the sea, etc.,—these things belong not to the admiral's jurisdiction."

Sir William Blackstone, treating of the cognizance of private wrongs (Book 3, c. 7, p. 106), speaks of injuries cognizable by the maritime or admiralty courts. "These courts," says this writer, "have jurisdiction and power to try and determine all maritime causes, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea." He then cites the statutes 13 and 15 Rich. II. (Co. Litt., 260, Hob., 79, and 5 Reports, 106) for the positions thus asserted. I shall, in the progress of this opinion, have occasion further to remark upon this language, "courts maritime or admiralty courts," here used by this learned commentator, when I come to speak of an interpretation placed upon the second section of the third article of the constitution, as implying an enlargement of the powers conferred, from a connection of the terms admiralty and maritime in the section just mentioned. What I would principally advert to here is the description of the causes denominated maritime, and as falling solely and peculiarly within the admiralty jurisdiction, and to the reason why they are thus denominated maritime, and as such assigned to the admiralty. They are, says this learned commentator, "maritime, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea, and not within the precincts of any county." Here, then, is the explicit declaration, that it is the theater, the place of their origin and performance, exclusively, not their relation to maritime subjects, which determines their forum; for they are causes, says he,

which in their nature may be of common law cognizance. In this connection, it seems not out of place to advert to the discrimination made by the same author between the pretensions to power advanced by certain tribunals which subsisted and grew up rather by toleration than as forming any fundamental and regular portions of the British constitution. Thus, in Book 3, c. 7, pp. 86, 87, speaking of the ecclesiastical, military and maritime courts, and the courts of common law, he says: "And, with regard to the first three, I must beg leave, not so much to consider what hath at any time been claimed or pretended to belong to their jurisdiction by the officers and judges of those respective courts, but what the common law allows and permits to be so. For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted and what forbidden to be discussed or drawn in question before them. It matters not what the pandects of Justinian or the decretals of Gregory have ordained; they are of no more intrinsic authority than the laws of Solon or Lycurgus; curious, perhaps, for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws, which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts, as concerning wills and successions to intestates' chattels; and perhaps we may, in our turn, prohibit them from interfering in some controversies which, on the continent, may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of our courts; and if any tribunals whatsoever attempt to exceed the limits so prescribed to them, the king's courts of common law may and do prohibit them, and in some cases punish their judges." So far, then, as the opinions of Hale and Blackstone are entitled to respect,—so far as the writings and decisions of the venerable expounders of the British constitution to which they refer may be regarded as authority,—the origin and powers of the admiralty in England, the subjects permitted to its peculiar cognizance, the control exerted to restrict it to that peculiar cognizance by the common law tribunals, would seem not to be matters of uncertainty. Sir William Blackstone, too, is a writer of modern date, and, as such, his opinions may claim exemption from the influence of conflict of bigotry or prejudice, which the advocates of the admiralty seem disposed to attribute to the opinions of the times of Spelman, of Fortescue and Coke.

Passing from the testimony of the writers already mentioned, let us call in a witness as to the admiralty powers and jurisdiction, as existing in England for a century past, at least, whom no one will suspect of disaffection to that jurisdiction. I allude to Mr. Arthur Browne, professor of civil law in the University of Dublin, in whose learned book scarcely any assertion of power ever made by the admiralty courts, however reprobated and denied by the common law tribunals, is not commended, if not justified, and scarcely one retrenchment or denial of power to the former is not as zealously disapproved. Let us hear what this witness is compelled, though *nullo cum gemitu*, to admit with respect to the jurisdiction of the instance court in cases civil and maritime,—

cases identical in their character with that now under consideration. After dilating upon the resolutions of 1632, and upon what by him are designated as the irresistible arguments of Sir Leoline Jenkins in favor of the powers of his own court, Professor Browne is driven to the following concessions. Of the common law courts he says (vol. ii, p. 74): "Adhering on their part to the strict letter of the rule that the business of the admiralty was only with contracts made upon the sea, they here took locality as the only boundary, though in the instances before mentioned of contracts made on sea, they refused this limit; and having insisted, as, indeed, Judge Blackstone has even of late done, that contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on land, were not cognizable by the admiralty, they left to it the idle power of trying contracts made upon the sea to be also executed on the sea, of which one instance might not happen in ten years." Again (p. 85), speaking of what he characterizes as "the torrent of prohibitions which poured forth from the common law courts," he tells us that "little was left for the authority of the admiral to operate upon in the subject of contracts amidst those curbs so eagerly and rapidly thrown upon him in the last century, save express hypothecations of ship or goods made at sea or in foreign ports and suits for seamen's wages." At the close of this chapter on the jurisdiction of the instance courts, Mr. Browne presents his readers with the general conclusion to which his investigations on this head had conducted him in the following words: "The result of our inquiries in the present chapter as to the extent of the jurisdiction of the instance court of admiralty, which is at present seemingly allowed by the common law courts, is that it is confined in matters of contract to suits for seamen's wages (on all hands admitted to be an exception to the rule restricting the admiralty to the sea), or to those on hypothecations. In matters of tort, to actions for assault, collision and spoil, and in *quasi* contracts, to actions by part-owners for security, and actions of salvage; but if a party," says he, "institute a suit in that court on a charter-party, for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to retain it."

In this concluding passage from Mr. Browne's chapter on the jurisdiction of the instance courts there are two circumstances which impress themselves upon our attention as seemingly, indeed palpably, irreconcilable with the law or with each other. The first is the concession (a concession said to be made upon a general survey of the subject) as to the limit imposed by the common law tribunals upon the admiralty; the second, the opinion, in the very face of this concession, that the admiralty, if it should not be actually prohibited, if it could only escape the vigilance of the common law courts, might proceed, might make an incursion within this established, this prohibited, nay, conceded boundary. Opinions like these evince an adherence to the admiralty apparently extreme and almost contumacious, and it may be owing to this devotion that decisions have been pressed into its support, which, to my apprehension, do not come directly up to the point they are called to fortify, or, if they did, are too few in number and too feeble to remove the firmly planted landmarks of the law. Thus the case of *Menetone v. Gibbons*, 3 Term R., 267, is cited as authority that the admiralty has cognizance over contracts, though executed on land and under seal. This case, it is true, is somewhat anomalous in its features, but yet it is thought that no fair exposition of it can warrant the conclusions attempted to be deduced from it. Notwithstanding some expressions which may have fallen from some of the judges *arguendo*, it is certainly true

that every justice who decided that case put his opinion essentially upon these foundations: That the case was one of a hypothecation of the ship, in the course of a foreign voyage, by the master, who had a right to hypothecate; that the contract provided for or gave no remedy except *in rem*, whereas the common law courts proceed against the parties only; that if the court should decide against the admiralty jurisdiction (and this, too, after a sentence of condemnation and sale of the ship), being unable to give any redress under the contract by proceeding *in rem*, the party making the advances would be irreparably injured. This case should be expounded, too, in connection with that of *Ladbroke v. Crickett*, decided by the same judges twelve months previously (2 Term R., 649), in which a natural distinction is taken between the extent of the right to prohibit the jurisdiction of the admiralty before sentence and the right to impeach its proceedings after they are consummated and carried into execution without interference. In the latter case Buller, whose remarks have been quoted from *Menetone v. Gibbons*, says (p. 654): "There is a great difference between applications to this court for prohibitions to the admiralty pending the suit and after sentence: in the first case, this court will examine the whole case, and see the grounds of the proceedings in the admiralty; but the rule is quite the reverse after sentence is passed; in such a case, they will not look out of the proceedings, for the party who applies for a prohibition after sentence must show a nullity of jurisdiction on the face of the proceedings; therefore the plaintiff in this case could not go into evidence at the trial to impeach the decree of the court of admiralty. The case states, in general terms, that that court did pronounce a decree for the sale of the ship in question, and that a warrant issued out of that court for seizing and selling the ship. So that we must take it that they had jurisdiction, for nothing appears on the face of the decree to show that they had not." Showing conclusively that this case determined nothing as to the original legitimate powers either of the common law or admiralty tribunals, but positively refusing to institute a comparison between them. The next case adduced by Mr. Browne, and the last which I shall notice, is that of *Smart v. Wolff*, 3 Term R., 323. The first remark which is pertinent to this case is, that it was a case of prize, one of a class universally admitted to belong peculiarly and exclusively to a court of admiralty; and the question propounded in it, and the only question, was as to the proceeding practiced by the court for carrying into effect this its undoubted jurisdiction. There the goods had been, by an interlocutory order, delivered to the captors, upon a stipulation to respond for freight, if allowed on the final decree; and the amount of freight ultimately allowed being greater than that covered by the stipulation, the court, by a proceeding substantially *in rem*, ordered the captors to bring in so much of the cargo as would be equal to the excess of the allowance beyond the amount of the stipulation. A rule for a prohibition obtained from the king's bench was, upon full argument, discharged, and the grounds of the court's decision are fully disclosed in the opinion of all the judges, in accordance with the reasoning of Mr. Justice Buller, who is here particularly quoted because he has been referred to as favorable to the doctrines of Mr. Browne, and who thus expresses himself: "Every case that I know on the subject is a clear authority to show that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction. After the cases of *Lindo v. Rodney*, *Le Caux v. Eden*, and *Livingston v. McKenzie*, it would only be a waste of time to enter into reasons to show that this court has no jurisdiction over those subjects. Still less reason is there for say-

ing that the admiralty shall be prevented from proceeding after it has made an interlocutory decree; because that would be to say, that the admiralty has jurisdiction at the beginning of the suit, and not at the end of it." The case of *Smart v. Wolff*, then, is assuredly no direct authority, if authority at all, to sustain the theory or the partialities of Professor Browne. Indeed, the utmost that can be drawn from this case in favor of those theories is an expression of belief, by Justice Buller, that my Lord Coke entertained not only a jealousy of, but an enmity against, the admiralty; a belief which, whether well or ill founded, must be equally unimportant,—equally impotent to impugn an inveterate, a confirmed, nay, an admitted course and body of jurisprudence. Upon a review of all the authorities to which I have had access, the conclusion of my mind is certain and satisfactory that, with some temporary deviations or irregularities, such as the resolutions of 1632, the jurisdiction of the instance court of the admiralty, both by the common law and by the statutes of 13 and 15 Richard II., down to the period at which, during the reign of the present queen, that jurisdiction was enlarged, was, in matters of contract (with the known exception of seamen's wages), limited to maritime contracts made and to be executed upon the high sea, and to cases of hypothecation of the ship upon her voyage; and in matters of civil tort, to cases also occurring upon the sea, without the body of the county. But this restriction upon the jurisdiction of the instance courts of England, so uniformly maintained by the common law courts of that country,—acknowledged, however condemned, by Mr. Browne, and admitted in argument in this case,—it is contended, does not apply to the powers and jurisdiction of the like courts in the United States, and did not apply at the period when the federal constitution was adopted, but that a jurisdiction more varied and enlarged, as practiced in the British colonies of North America, and under the general confederation at the adoption of the constitution, was in the contemplation of the framers of this constitution, and must therefore be referred to as the measure of the powers conferred in the language of the second section of the third article, "all cases of admiralty and maritime jurisdiction." In testing the accuracy of these positions, it would be asking too much of this court to receive as binding authority the decisions of tribunals inferior to itself, further than they rest upon indisputable and clear historical truths in our colonial history; truths, too, which shall sustain a regular and recognized system of jurisdiction. It will not be sufficient to allege some obscure, eccentric or occasional exertions of power, if they could be adduced, and upon these to attempt to build up an hypothesis, or a system,—nay, more, to affirm them to be conclusive proofs of a system established, general, well known to and understood by the framers of the constitution, and therefore entering necessarily into their acceptation of the terms "admiralty and maritime jurisdiction." The danger of yielding to such scanty and inadequate testimony must be obvious to every mind. The still greater danger of theorizing upon words not of precise or definite import, freed from the restraints of settled acceptation, has been exemplified in our own time and country, in an able, learned and ingenious effort to confer on the admiralty here powers not merely co-extensive with the most ambitious pretensions of the English admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient or modern Europe, and covering not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description, namely, ship-wrights, material-men and insurers (*vide* 2 Gall., 397); and this

upon the assumption that the term maritime implied more than the word admiralty, when unassociated with it, and that this was so understood by the framers of the constitution, who designed it as an enlargement of the admiralty power. Yet if we turn to the language of Mr. Justice Blackstone, vol. iii, p. 106, he tells us that the courts maritime are the admiralty courts, using the term maritime and admiralty as convertible; and that the injuries triable in the admiralty (or maritime causes) are such as are of common law cognizance, yet, being committed on the high seas, are therefore to be tried by a peculiar court. Again, p. 68, he says: "The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty and its court of appeal." So, likewise, Sir Matthew Hale, p. 50, in characterizing maritime contracts to be those made and to be executed upon the sea, certainly excludes any implication beyond these; and this must be taken as the English interpretation of the term maritime, by which it is understood as identical with admiralty.

And here it seems proper to remark that I cannot subscribe to the opinion, either from the bench or the bar, that the decisions of inferior courts, which it is not merely the right, but the duty of this tribunal to revise, should, by their intrinsic authority as decisions, be recognized as binding on the judgment of this court. They are entitled to that respect to which their accuracy, when examined, may give them just claims; but it is surely a perversion of our judicial system to press them as binding merely because they have been pronounced. If these decisions can be appealed to upon the mere force of their language, I would quote here the words of Judge Washington, in the case of *The United States v. McGill*, 4 Dal., 429, where he declares that "the words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England, from whose code and practice we derive our systems of jurisprudence and obtain the best glossary." Nor am I disposed to consider the doctrine of the civil law which has been mentioned, to escape from the silence of our own code or that of England upon the subject.

I do not contest the position that the established, well-defined, regular and known civil jurisdiction of the admiralty courts of England, or of the vice-admiralty courts of the American colonies, was in the contemplation of the men who achieved our independence, and was adopted by those who framed the constitution. I willingly concede this position. That which I do resist is what seems to me an effort to assert, through the colonial vice-admiralty courts, powers which did not regularly inhere in their constitution; powers which, down to the date of the quarrel with the mother country, were never bestowed on them by statutory authority; powers which to their superior — from whom they emanated, and to whom they were inferior and subordinate, the high court of admiralty — had long been conclusively denied, as has been already abundantly shown. With respect to the establishment and powers of these courts, we are informed by Browne, 2 Civ. & Adm. Law, 490, that "all powers of the vice-admiralty courts within his majesty's dominions are derived from the high admiral, or the commissioners of the admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commission, the lords of the admiralty are authorized to erect vice-admiralty courts in North America, the West Indies, and the settlements of the East India Company;" "and, in case any person be aggrieved by sentence or interlocutory decree having the force of a sentence, he may appeal to the high court of admiralty."

Blackstone also says, vol. 3, p. 69: "Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction." Stokes, in his *View of the Constitution of the British Colonies in North America*, speaking of the vice-admiralty courts, says, c. 13, p. 271: "In the first place, as to the jurisdiction exercised in the courts of vice-admiralty in the colonies, in deciding all maritime causes, or causes arising on the high seas, I have only to observe that it proceeds in the same manner that the high court of admiralty in England does." Again, p. 275, he says: "From the courts of vice-admiralty in the colonies, an appeal lies to the high court of admiralty in England." Mr. Browne, in his second volume of *Civ. & Adm. Law*, p. 491, accounts for the jurisdiction of the vice-admiralty courts in America, in revenue causes, by tracing it to the statute of 12 Charles II., commonly called the navigation act, and to statutes 7 and 8 of William III., c. 22, and designates this as totally foreign to the original jurisdiction of the admiralty, and unknown to it. With this view of the origin and powers of the vice-admiralty courts of the colonies, showing them to be mere branches, parts of the admiralty, and emanating from and subordinate to the latter, it would seem difficult to perceive on their part powers more comprehensive than those existing in their creator and superior, vested, too, with authority to supervise and control them. The existence of such powers certainly cannot rest upon correct logical induction, but would appear to be at war equally with common apprehension and practical execution. Power can never be delegated which the authority said to delegate itself never possessed, nor can such power be indirectly exercised under a pretext of controlling or supervising those to whom it could not be legitimately delegated. The colonial vice-admiralty courts, as regular parts of the English admiralty, created by its authority, could, by their constitution, therefore, be invested only with the known and restricted jurisdiction of the former. If a more extended jurisdiction ever belonged to, or be claimed for, these colonial tribunals, it must rest on some peculiar and superadded ground, which it is incumbent on the advocates of this jurisdiction clearly to show. Has anything of the kind been adduced in the argument of this cause? Beyond the provisions of the statutes of Charles II. and William III., relative to cases of revenue, has there been shown any enlargement by statute of these vice-admiralty powers, any alteration by judicial decision in England of the constitution and powers of the vice-admiralty courts, as emanating from and limited by the jurisdiction of the admiralty in the mother country? Strongly as authority for the affirmative of these inquiries has been challenged, nothing satisfactory to my mind, nothing, indeed, having the appearance of authority, has been adduced; because, I take it for granted, from the distinguished ability of the counsel, such authority was not attainable.

The learned and elaborate investigations of the counsel for the appellants have brought to light a series of proofs upon the jurisdiction of the vice-admiralty courts, all in strict accordance with the positions laid down in Blackstone, Stokes and Browne, and exemplifying beyond these the actual and practical extent and modes to which and in which that jurisdiction was permitted and carried into operation in the colonies. These developments are valuable as illustrations of our early history, but they are still more so to the jurist seeking to ascertain the boundaries of right amidst contested limits of power. A recapitulation of them here would require an inconvenient detail. They well deserve, nevertheless, to be preserved and remembered, as showing incontest-

ably, with the exception of revenue cases arising under the statutes of Charles and of William, and designated on all hands as "totally foreign to the original jurisdiction of the admiralty, and unknown to it," that the constitution and functions of the vice-admiralty courts, from the earliest notices of their existence in the American colonies, were modeled upon and strictly limited to those of the mother country (of which they were branches or portions); that, so far from there having grown up a more enlarged and general jurisdiction in the colonial vice-admiralty courts,—a jurisdiction known and acquiesced in,—every effort on their part to transcend the boundary prescribed to their superior in the mother country was watched with jealousy by the common law tribunals, and by them uniformly suppressed. Coming down to the periods immediately preceding the revolutionary conflict, and embraced by the war, and during the existence of the confederation, the volumes of testimony poured forth in the forms of essays, speeches and resolutions, prove that the pretensions then advanced by the British government, through the medium of the admiralty jurisdiction, extending that jurisdiction beyond its legitimate province as an emanation from the admiralty at home, so far from being regarded as pertaining to a known and established system, were received as novelties and oppressions,—as abhorrent to the genius of the people, to the British constitution itself, and worthy to be repelled even by an appeal to arms. It would seem, then, reconcilable neither with reason nor probability that the men who made these solemn protests,—that a community still warm from the contest induced by them,—should, upon their emancipation from evils considered intolerable, immediately, by a species of political suicide, rivet those same evils indissolubly upon themselves. Much more reasonable does it appear to me, that the statesmen who framed our national charter, when conferring the admiralty and maritime jurisdiction, had in their contemplation that jurisdiction only which was familiar to themselves and their fathers, was venerable from time, and in practice acceptable to all; they could not have intended to sanction that whose very existence they denied. This view of the question is further fortified by the opinion of two able American jurists, both of them contemporaneous with the birth of our government. I allude to the opinion of Chancellor Kent, expressed at page 377 of the first volume of his Commentaries, 5th edit., and to that of Mr. Dane, found in volume 6 of his Abridgment, p. 353. It is in close conformity to and congenial with the seventh amendment of the constitution, and with the saving, in the judiciary act, of the right to a remedy at common law, wherever the common law should be competent to give it. An able illustration of the construction here contended for may also be seen in the elaborate opinion of the late Justice Baldwin, in the case of *Bains v. The Schooner James and Catharine*, Bald., 544, where the learned judge, in support of his conclusions, with great strength of reasoning, and upon authority, expounds the term "suits at common law," in the seventh amendment of the constitution, and the phrase, "the right to a common law remedy where the common law is competent to give it," contained in the saving in the ninth section of the judiciary act, showing their just operation in limiting the admiralty within proper bounds. I deem it wholly irregular to attempt to adduce general admiralty powers from the cognizance vested in the courts as to seizures; these are purely cases of revenue, are treated in England as anomalous, and as not investing general admiralty jurisdiction, but as unknown to it; or jurisdiction in cases of contract, as between private persons. This interpretation disposes at once of all the conclusions which it is attempted to draw from the several cases of seiz-

ure decided in this court. The *obiter dictum* in the case of *The General Smith* ought not to be regarded as authority at all, much less as laying the foundation of a system. From the best lights I have been able to bring to the inquiry before us, reflected either from the jurisprudence of the mother country, from the history of the colonial government, or the transactions of the general confederation, I am satisfied that the civil, admiralty and maritime jurisdiction conferred by the second section of the third article of the constitution was the restricted jurisdiction known to be that of the English admiralty, insisted upon and contended for by the North American colonies, limited in matters of contract (seamen's wages excepted) to things agreed upon and to be performed upon the sea, and cases of hypothecation, and in civil torts to injuries occurring on the same theater, and excluded as to the one and the other from contracts made, or torts committed, within the body of a county.

It has been urged in argument that the restriction here proposed is altogether unsuited to and unworthy the expanded territory, and already great and increasing commerce of our country. To this may be replied the fact that it was thought sufficiently broad for a nation admitted even at this day to be the most commercial on the globe. In the next place, I am by no means prepared to concede that the interests of commerce, and certainly other great interests in society, are to be benefited by incursions upon the common law jurisprudence of the country. Recurring, as a test, to the institutions and to the condition of various nations, a very different and even opposite conclusion would be impressed by it. But even if it be admitted that a power in the admiralty, such as would permit encroachments upon the venerable precincts of the common law, would be ever so beneficial, the reality of such advantage, and the right or power to authorize it, are essentially different concerns. An argument in favor of power founded upon calculations of advantage, in a government of strictly delegated powers, is scarcely legitimate when addressed to the legislature; addressed to the judiciary, it seems to be especially out of place. In my view, it is scarcely reconcilable with government in any form, so far as this term may signify regulated power, and ought to have influence nowhere. If a restricted admiralty jurisdiction, though ever so impotent for good or prolific of inconvenience, has been imposed by the constitution, either or both those evils must be of far less magnitude than would be attempts to remedy them by means subversive of the constitution itself, by unwarranted legislative assumption, or by violent judicial constructions. The pressure of any great national necessity for amendments of that instrument will always insure their adoption.

To meet the objection urged in this case to the jurisdiction deduced from the character of the contract sued on, it has been insisted that the foundation of this suit may be treated as a marine tort, which, having been committed on Long Island Sound, and therefore not within the body of any county, is exempt from objection on the score of locality. If the pleadings and proofs in this cause presented a case of simple or substantial tort, occurring without the body of a county, no just objection could be made to the jurisdiction. It is therefore proper to inquire whether a case of marine tort, in form or in substance, is presented upon this record. There is a class of cases known to the common law in which a plaintiff, having a right of action arising upon contract, may waive his remedy directly upon the contract in form, and allege his *gravamen* as originating in tort, produced by a violation or neglect of duty. The cases in which this alternative is permitted are, in the first place, those in which, independently of the rights of the plaintiff arising from express stip-

ulations with the defendant, there are duties or obligations incumbent on the latter resulting from the peculiar position he occupies with respect to the public, giving the right to redress to all who may suffer from the violation or neglect of these public obligations. Such are the instances of attorneys, surgeons, common carriers and other bailees. The wrong in these instances is rather the infringement of these public and general obligations than the violation of the private direct agreement between the parties; and agreement, contract, is not the foundation of the demand, nor can it be properly taken as the measure of redress to be adjudged; for, I presume it is undeniable that, if the relations of the parties are the stipulations of their contract exclusively or essentially, their remedies must be upon such stipulations strictly. Secondly, they are cases in which a kind of *quasi* tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract. The contract, therefore, must be referred to and substantially shown, to ascertain the rights of the parties, and to measure the character and extent of the redress to either of them. It can in no material feature be departed from. This I take to be the *rationale* of the practice, and the view here taken appears to be sustained by authority. Thus, in *Boorman v. Brown*, 3 Ad. & Ell. (N. S.), 525, Tindal, C. J., delivering the opinion of all the court, says: "That there is a large class of cases in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently in *assumpsit*, or in case upon tort, is not disputed." Again, p. 526, the same judge says: "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-performance, is a ground of action upon tort." In the case of *Winterbottom v. Wright*, 10 Mees. & W., 114, Lord Abinger thus states the law: "Where a party becomes responsible to the public by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent; so, in cases of public nuisances, whether the act was done by the party or a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. These, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance.

"There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract; but there is no instance in which a party who was not a privy to the contract entered into with him, can maintain any such action." And Alderson, baron, in the same case, says: "The only safe rule is, to confine the right to recover to those who enter into the contract. If we go one step beyond that, we may go fifty." So, too, in *Tollit v. Sherstone*, 5 Mees. & W., 283, a case in tort, Maule, baron, says: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action arising out of the contract." In further proof that these actions in form *ex delicto*, founded on breach of contract, are essentially actions of contract, it is clear that in such actions an infant could not be debarred the privilege of his nonage, nor could the operation of the statute of limitations upon the true cause of the action be avoided; both these defenses would apply, according to the real foundation of the action. With respect to these cases *ex delicto quasi ex contractu*, as they

have been called, it has been ruled that if the plaintiff states the custom, and also relies on an undertaking general or special, the action is in reality founded on the contract, and will be treated as such. *Vide* Orange County Bank v. Brown, 2 Wend., 158.

If the practice of the common law courts above considered be at all applicable to suits in the admiralty, how would it operate upon the case before us? Is this case, as presented on the face of the libel, or upon the proofs adduced in its support, either formally or substantially a case founded solely on public duty, or upon contract between the parties? It would seem to be difficult, in any form of words, to state a contract more express than is set out in the libel in this cause. It is true that in the first article there is a statement that the respondents were common carriers of merchandise between the city of New York and the town of Stonington in Connecticut, but it is nowhere alleged that the property of the complainants was delivered to the respondents as common carriers, or was received by them in that character, or under any custom or obligation binding them as carriers. So far from this, it is averred in the second article of the libel that the complainants contracted on a particular day, and at a particular place, and that at that very place, and on that very day, the respondents contracted with the libelants, for a certain reward and hire to be paid, to transport the said merchandise, etc., mutual and express stipulations set forth. Is this the statement of a general custom, a responsibility accruing from implied public duties, or is this not rather the exclusion of everything of the kind? Again, article third of the libel avers that on the day and at the place mentioned in the second article, namely, on the 13th day of July, 1840, at the city of New York, the libelants delivered to the respondents their merchandise, and it was received by the latter, to be transported according to the agreement between them. If, then, the power of proceeding in tort for a breach of the contract, known to the common law courts, can be extended to the admiralty, it would still, as in the former tribunals, according to the authorities, present every question for decision as a question of contract, between parties (and because they were so) to the contract, by the stipulations according to which alone the rights and wrongs of all must be adjusted. This election of the proceeding in tort arising *ex contractu*, if permitted to the admiralty, would leave the subject of jurisdiction just where it would stand independently of such election. In the exercise of such election, you are necessarily driven to the contract to ascertain the existence, the nature and extent of the assumed tort, in other words, the infraction or fulfilment of the contract, and the investigation develops inevitably an agreement of which, with respect to parties, to locality, or subject-matter, or to all these, the admiralty can have no cognizance.

But after all, I would inquire for the authority under which the admiralty has been allowed to assume, under an artificial rule of common law pleading, jurisdiction of matters not falling naturally, directly and appropriately within its cognizance. Indeed, its admirers and advocates, from Sir Leoline Jenkins to Professor Brownne, have zealously defended it against every imputation of attempts at assumption, insisting that the subjects claimed for its cognizance, and its modes of claiming them, were such only as naturally and appropriately belonged to it. They have as zealously complained of abstractions by the common law courts, by means of uncandid and unreasonable fictions, of matters naturally and familiarly belonging to the admiralty. If a single precedent exists, showing that, by the artificial rules of pleading practiced in the common

law courts, partaking in some degree of fiction, the admiralty has ever obtained jurisdiction over matters which otherwise would not have fallen within its cognizance, that precedent is unknown to me; and it is equally certain that I am unwilling to create one. And it is remarkable, that, in direct opposition to this effort to give jurisdiction to the admiralty by borrowing a license from the common law courts, we have the explicit declaration of Professor Browne himself, amidst all his partiality, that in matters of tort the jurisdiction of the admiralty is limited to "actions for assault, collision and spoil," instances of pure tort, excluding every idea of fiction, and equally excluding one single attribute of contract. *Vide* vol. ii, chap. 4, p. 122.

I am extremely diffident as to the wisdom and safety of enlarging a jurisdiction, and especially by the force of implication, which, from the earliest traces of its existence, whatever has been said in this case about the power of reform in this respect, has always been exercised by rules and principles less congenial with our institutions than are the principles and proceedings of the common law; which, by the mere force of implication in the terms "admiralty and maritime," overrides the seventh amendment of the constitution, and the important saving in the ninth section of the judiciary act; which, by a like implication, frees itself altogether from all restriction imposed, both by the second section of the third article of the constitution, and by the eleventh section of the judiciary act (1 Stats. at Large, 78), with respect to controversies between citizens of the same state. A jurisdiction substituting, too, for the invaluable safeguard to truth secured by confronting the witness with court and jury, a machinery by which the aspect and the force of testimony are graduated rather by the address and skill of the agents employed to fabricate it, than by its own intrinsic worth, and transferring the trial of facts resting upon credibility to a tribunal often remote and inconvenient, and constrained to decide on statements that may be merely colorable, often entirely untrue.

Again, to decide this case upon the ground of liability of the owners for a tort committed by the master, would present this strange incongruity. Although, by the common law, owners of vessels were responsible for losses occasioned by the misconduct of masters, as their agents, to the full amount of such losses, yet as long since as the statute of 7 George II., passed in 1734, nearly forty years before our independence, this responsibility was expressly limited in extent to the value of the vessel and the freight. The laws of Oleron and Wisby, we are told by Lord Tenterden (*vide* Treatise on Shipping, p. 395), contain no provision on this subject, though this writer informs us, upon the authority of Vinnius, that such a provision was contained in the laws of Holland, and that by the laws of Rotterdam, as early as 1721, the owners were exempted from liability for the acts of the master done without their order further than their part of the ship amounted to. By the French Ordonnance of the Marine, Book 2, tit. 8, art. 2, the rule is thus given: "Les propriétaires des navires seront responsables des faits du maître; mais ils en demeureront déchargés en abandonnant leur bâtiment et le fret." So, too, Boulay Patty, in his work entitled *Cours de Droit Commercial Maritime*, vol. 1, pp. 270 *et seq.*, after interpreting the word *fait* or act of the master as inclusive of *delicta quasi delicta*, acts of negligence or imprudence, as well as his contracts or engagements, upon a comparison of the opinions of various authors, Valin, Emerigon, Pothier, etc., comes to the following conclusions: "Maintenant, disons donc que le capitaine, soit par emprunt, soit par vente de marchandises, soit par *délit* ou *quasidélit*, n'a que le pouvoir d'engager le navire et le fret, sans qu'il lui soit possible de com-

promettre la fortune de terre de ses armateurs. Ceux-ci se dégagent de toutes les obligations contractées par le maître, en cours de voyage, par l'abandon du navire et du fret." This same writer, pages 275 and 276, lays down the following doctrines, which he quotes from Grotius, from Emerigon, from Pothier, and from the Consulat de la Mer: "L'obligation où les propriétaires sont de garantir les *faits* de leur capitaine, est plus réelle que personnelle. . . . Pendant le cours du voyage, le capitaine pourra prendre deniers sur le corps, mettre des appareils en gage, ou vendre des marchandises de son chargement. Voilà tout. Son pouvoir légal ne s'étend pas au-delà des limites du navire dont il est maître, c'est-à-dire administrateur; il ne peut engager la fortune de terre de ses armateurs qu'autant que ceux-ci y ont consenti d'une manière spéciale. . . . De sorte que si le navire périt, ou qu'ils abdiquent leur intérêt, ils ne sont garans de rien. . . . En effet, le Consulat de la Mer, cap. 33, après avoir dit que l'intérêt que les armateurs ont sur le corps, est engagé au paiement des dettes contractées par le capitaine, en cours de voyage, ajoute que la personne ni les autres biens des copropriétaires ne sont obligés, à moins qu'ils ne lui eussent donné, à ce sujet, un pouvoir suffisant. Au c. 236 il est dit que si le navire périt, c'est assez que cette perte soit pour le compte des quirataires."

From this view of the law as existing in England and on the European continent it is manifest that, in the former country, the responsibility of the owners, prior to the statute of 7 Geo. II., was a common law liability, and was acknowledged and allowed to the full extent that the demand could be proven, embracing both the persons and all the property of the owners; that since the statute of Geo. II. this liability is limited to the value of the ship and freight, but still to be enforced in the courts of common law or equity; that, by the maritime law of the continent, the liability of the owners was always limited to the ship and freight, and that from this restricted liability the owners were entirely released by an abandonment of ship and freight, or by a total loss of the former at sea, whether the claim was made on account of the contract or tort, or *delictum* of the master. But, in this case, the court have sanctioned a liability resting upon common law principles, irrespective of any limit imposed either by statute or by the rules of the maritime law, and this by means, too, of artificial or fictitious constructions, practiced upon only in the courts of common law, relative to the forms of actions prosecuted in those courts; and, for the accomplishment of this object, have permitted the adoption of modes and proceedings peculiarly and solely appertaining to the maritime law,—a system of jurisprudence essentially dissimilar, a system which recognizes no such claim as the present, but under whose authority the owners would be wholly absolved by the total loss of the vessel, and under which they would be permitted to stipulate for their own exemption from liability on account of the barratry or dishonesty of their agents. *Vide* Abbott on Shipp., p. 294. The incongruity here pointed out might have been avoided by confining the parties to their proper forum.

My conclusions, then, upon the question of jurisdiction, are these: that the case presented by the libel is palpably a proceeding *in personam* upon an express contract, entered into between the parties in the city of New York; that it is, therefore, a case properly cognizable at a common law court, for any breach of that contract which may have been committed, and consequently is not a case over which the admiralty court can, under the constitution and laws of the United States, have jurisdiction, either *in personam* or *in rem*.

§ 241. *Dissent as to liability upon the special contract shown.*

Having felt myself bound to treat at some extent what seemed to me the decisive, and what may, too, be called the public or constitutional question involved in this cause,—the question of jurisdiction,—as to what may be the merits of this controversy, the obligations sustained by the parties to each other, and the extent to which these have been fulfilled or violated, I shall content myself with simply giving the conclusions to which my mind has been conducted, without pretending to reason them out fully upon the facts or the law of the case, because those conclusions would not be the grounds of a formal dissent, though disaffirmed by a majority of my brethren.

Whilst I am impressed with the strong necessity that exists for guarding against fraud or neglect in those who, by holding themselves forth as fitted to take charge of the lives, the health or the property of the community, thereby invite the public trust and reliance, I am not prepared to say that there can be no limit or qualification to the responsibility of those who embark in these or similar undertakings,—limits which may be implied from the inherent nature of those undertakings themselves, or which may result from express stipulation. It seems to me undeniable that a carrier may select the particular line or description of business in which he engages; and that, so long as he with good faith adheres to that description, he cannot be responsible for anything beyond or inconsistent with it. The rule which makes him an insurer against everything but the act of God or the public enemy makes him an insurer as to performances only which are consistent with his undertaking as carrier. A common carrier of travelers is bound to the preservation of the accustomed baggage of the traveler, because of the known custom that travelers carry with them articles for their comfort and accommodation, and the price for which the transportation is undertaken is graduated on that presumption; but the carrier would not therefore be responsible for other articles, of extraordinary value, secretly transported upon his vehicle, because by this secrecy he is defrauded of a compensation commensurate with the value of the subject transported, and with the increased hazards to which it is attempted to commit him without his knowledge or assent. But to render him liable, he must have received the article for transportation, and it must be a subject falling fairly within the scope of his engagement. Within this range he is an insurer, with the exceptions above stated. But a carrier may, in a given case, be exempted from liability for loss, without fraud, by express agreement with the person for whom he undertakes; for I cannot well imagine a principle creating a disability in a particular class of persons to enter into a contract fraught with no criminal or immoral element,—a disability, indeed, extending injuriously to others, who might find it materially beneficial to make a contract with them. A carrier may also be exempted from liability by the conduct of the owner of property, in keeping the exclusive possession and control of it, and thereby withholding it from the care and management of the carrier. Upon applying the principles here succinctly stated to the evidence in this cause, it is not made out in proof, to my mind, that the respondents ever received, as carriers, from the libelants, or indeed in any other capacity, property of any species or description, or ever knew that property of the libelants was, directly or indirectly, within the possession of the respondents, or on board their vessel. It is not in proof that Harnden, in his contract with the respondents, acted as the agent of the libelants, or for their benefit, or that, at the time of the agreement or of the shipment made by Harnden, the libelants and respondents were

known to each other by transactions as shipper and carrier. It is established by proof, that Harnden contracted, in his own name and behalf alone, with the respondents for a separate compartment on board their vessel, to be, with its contents (the latter unknown to the respondents), at all times under his exclusive control; that the property alleged to have been lost was, if in this separate compartment, placed there without certain knowledge of its character or value on the part of the respondents, was under the exclusive direction of Harnden, who accompanied it, and who, up to the time of the conflagration of the vessel, held the property under lock and key, and could alone without violence and a breach of the engagement, have had access to it. Were this controversy directly between Harnden and the respondents, from the peculiar nature of the contract between these parties, and from the possession of the subject reserved to and exercised by the former, any liability of the respondents, even then, might be a matter of doubt; but there should, I think, be no difficulty in concluding that no kind of liability could attach to the respondents in favor of persons for whom they had undertaken no duty, and who, in reference to the transaction in question, were strangers entirely unknown to them. Upon the merits of this case, as well as upon the question of jurisdiction, I think the decree of the circuit court ought to be reversed, and the libel dismissed.

Opinion by MR. JUSTICE WOODBURY, concurring with the majority.

On most of the facts involved in this libel, little controversy exists. It is certain that the respondents took the property of the plaintiffs on board their steamboat, *The Lexington*, to carry it, on her last calamitous voyage, the 13th of January, 1840, from New York to Stonington. It is equally certain that it was lost on that voyage, in Long Island Sound, at a place where the tide ebbed and flowed strongly, and several miles from shore, and probably without the limits of any state or county. It is certain, likewise, that the property was lost in consequence of a fire which broke out in the boat in the night, and consumed it, with most of the other property on board. The value of it is also sufficiently certain, and that it was put on board, not by an officer of the bank, but by Harnden, a forwarding agent for the community generally, and under a special contract between Harnden and the respondents, that the latter were not to run any risk, nor be responsible for any losses of property thus shipped by him.

But some other facts are not so certain. One of that character is whether the fire occurred by accident, without any neglect whatever by the respondents and their agents, or in consequence of some gross neglect by one or both. It would not be very material to decide this last fact, controverted as it is and in some degree doubtful, if I felt satisfied that the plaintiffs could recover anywhere, and more especially in admiralty, on the contract made by Harnden with the respondents, for the breach of the contract to carry and deliver this property. The first objection to such a recovery on the contract anywhere is, that it was made with Harnden and not with the bank. *Butler v. Basing*, 2 Carr. & P., 613; 15 Mass., 370; 2 Story, 32. Next, that he was acting for himself in this contract, on his own duties, liabilities and undertakings, and not for them; and that the bank, so far as regards any contract, looked to him and his engagement with them, and not to the respondents or their engagement with him. 6 Bing., 131. Next, that the articles, while on board the boat, were to be in the care and control of Harnden, and not of the master or owners; and hence no liability exists on the contract even to him, much less the

bank. Story on Bailm., p. 547, § 582. And this same conclusion is also urged, because Harnden, by his contract, made an express stipulation that the property carried should be at his risk, as well as in his care. See 5 East, 428; 1 Vent., 190, 288. It is contended further, that, if the bank can sue on Harnden's contract made with the respondents, it must be on the principle of his acting in it as their agent, and not for himself alone, and if so, and they, by suing on it, adopt its provisions, they must be bound by the stipulation in it made by him, not to hold the respondents liable for any risk or loss. It is, however, doubted, whether, with such a stipulation, the respondents are not, by public policy, to be still liable on a contract like this, in order to insure greater vigilance over all things intrusted to their care (*Gould v. Hill*, 2 Hill, 623), and on the ground that the parties could not mean by the contract that the carriers were to be exonerated for actual misbehavior, but only for accidents otherwise chargeable on them as *quasi* insurers. *Atwood v. Reliance Transp. Co.*, 9 Watts, 87; 2 Story, 32, 33.

It is insisted, next, that, as the unusual nature of the property carried, in this case, was not made known to the carriers, nor a proportionate price paid for its transportation, the owner cannot recover beyond the usual value of common merchandise of such a bulk. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 32; 25 Wend., 459; *Gibbon v. Paynton*, 4 Burr., 2301. But, giving no decisive opinion on the validity of any of these objections, as not necessary in the view hereafter taken, yet they are enumerated to show some of the difficulties in sustaining a recovery on this contract, notwithstanding their existence.

Another important objection remains to be considered. It is, that no jurisdiction exists over this contract in a court of admiralty where these proceedings originated. The contract was made on land, and of course within the body of the county of New York. It was, also, not a contract for a freight of goods abroad, or to a foreign country, the breach of which has been here sometimes prosecuted in courts of admiralty. *Drinkwater v. The Spartan*, 1 Ware, 149, by a proceeding *in rem*, 155; *De Lovio v. Boit*, 2 Gall., 398; *The Volunteer*, 1 Sumn., 551; *Logs of Mahogany*, 2 Sumn., 589; 6 Dane's Abr., 2, 1, Charter-parties. See a case *contra*, in the records of Rhode Island, A. D. 1742. But the law of England is understood to be, even in foreign charter-parties, against sustaining such suits, *ex contractu*, in admiralty. 3 Durn. & E., 323; 2 Ld. Raym., 904; 1 Hagg., Adm., 226, and cases cited in 12 Wheat., 622, 623. By agreement of the judges in A. D. 1632, admiralty was not to try such cases, if the charter-party was contested. *Dunlap's Adm.*, 14; 4 Instit., 135; *Hob.*, 268. It seems, however, to be doubted by Browne (2 Browne's Civ. and Adm. Law, 122, 535), whether the libellant may not proceed in admiralty, if he goes to recover freight only, and not a penalty. It is also believed, that, in this country, contracts to carry freight between different states, or within the same state, if it be on tide water, or at least on the high seas, have sometimes been made the subject-matter of libels in admiralty. *Dunlap's Adm.*, 487; 1 Sumn., 551; 3 Am. Jur., 26; 6 Am. Jur., 4; *King v. Shepherd*, 3 Story, 349 (§§ 532-537, *infra*), in point; *Gilp.*, 524; *Conkling, Pra.*, 150; *De Lovio v. Boit*, 2 Gall., 448. I am inclined to the opinion, too, that, at the time the constitution of the United States was adopted, and the words "cases of admiralty and maritime" were introduced into it, and jurisdiction over them was subsequently given in civil proceedings, in the act of 1789, to the district courts, the law in England had in some degree become changed in its general principles in respect to jurisdiction in admiralty over contracts. Their courts had become inclined to hold that

the place of performance of a contract, if maritime in its subject, rather than the place of its execution, was the true test as to its construction and the right under it. This conformed, also, to the analogy as to contracts at common law. See cases in *Towne v. Smith*, 1 Woodb. & M., 135.

It is not unusual for the place to which the parties look for fulfilling their duties to be not only different from the place of making the contract, but for the parties to regard other laws and other courts, applying to the place of performance, as controlling and as having jurisdiction over it. *Bank of United States v. Donnally*, 8 Pet., 361; *Wilcox v. Hunt*, 13 Pet., 378; *Bell v. Bruen*, 1 How., 169. Hence, for a century before 1789, Lord Kenyon says, admiralty courts had sustained jurisdiction on bottomry bonds, though executed upon the land; because, "if the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders on absurdity." See *Menetone v. Gibbons*, 3 Durn. & E., 267-269; 2 Ld. Raym., 982; 2 H. Bl., 164; 4 Cranch, 328; Paine, 671. On this principle, the admiralty has gradually been assuming jurisdiction over claims for pilotage on the sea, both the place of performance and the subject-matter being there usually maritime. 10 Wheat., 428; 7 Pet., 324; 10 Pet., 108; 11 Pet., 175; 1 Mason, 508. Because, on the general principle just referred to, as to the object of the contract, if "it concerned the navigation of the sea," and hence was in its nature and character a maritime contract, it was deemed within admiralty jurisdiction, though made on land. *Zane v. The Brig President*, 4 Wash., 454; 4 Mason, 380; *The Jerusalem*, 2 Gall., 191, 465, 448; *The Sloop Mary*, Paine, 671; Gilp., 184, 477, 429; 2 Sumn., 1. This is the principle, at the bottom, for recovering seamen's wages in admiralty. *Howe v. Nappier*, 4 Burr., 1944. Not that the consideration merely was maritime, but that the contract must be to do something maritime as to place or subject. *Plummer v. Webb*, 4 Mason, 380; *Bains v. The James & Catherine*, 1 Bald., 549, 552; "A New Brig," Gilp., 473. But we have already seen there are several direct precedents in England against sustaining these proceedings in admiralty on the contract, such as a charter-party or bill of lading, and strong doubts from some high authorities against it in this country. Chancellor Kent seems to think a proceeding in admiralty, on a charter-party like this, cannot be sustained, except by what he calls "the unsettled doctrine laid down in *De Lovio v. Boit*," 3 Kent, Comm., 162. See, likewise, Justice Johnson's opinion to the like effect in *Ramsey v. Allegre*, 12 Wheat., 622. Looking, then, to the law as held in England in 1789, and not considering it to be entirely clear in favor of sustaining a suit in admiralty on a charter-party like this, and that it is very doubtful whether any more settled or enlarged rule on this subject then prevailed in admiralty here, or has since been deliberately and generally adopted here, in respect to charter-parties or bills of lading, I do not feel satisfied in overruling the objection to our jurisdiction which has been made on this ground.

The further arguments and researches since *Waring v. Clarke*, 5 How., 441, tend also, in my view, to repel still more strongly any idea that admiralty jurisdiction had become extended here, at the revolution, in cases either of contracts or torts, more broadly than in England. But it is not necessary now to go into the new illustrations of this cited in the elaborate remarks of the counsel for the respondents, or discovered by myself, in addition to those quoted in the opinion of the minority in *Waring v. Clarke*, and in *United States v. New Bedford Bridge*, 1 Woodb. & M., 401. Among mine is the declaration by Lord Mansfield himself, December 20, 1775, that the colonies wished "that the ad-

miralty courts should never be made to extend there," instead of wishing their powers enlarged; 6 American Archives, 234; Annual Register for 1776, pp. 99, 100; and there is likewise the protest of the friends of America, the same year, in the house of lords, that the increase of admiralty power by some special acts of parliament was a measure favored at home rather than here, and was not acceptable here, but denounced by them as an inroad on the highly prized trial by jury. 6 American Archives, 226. Among those cited is the conclusive evidence, that in some of the colonies here before the revolution, the restraining statutes of Richard II., as to the admiralty, were *eo nomino* and expressly adopted, instead of not being in force here. See in South Carolina, 2 Statutes at Large, 446, in 1712, and in Massachusetts, Dana's Defense of New England Charters, 49-54; in Virginia, "the English Statutes" passed before James I., 9 Hening's Statutes, 131, 203; Commonwealth v. Gaines, 2 Virg. Cases, 179, 185; in Maryland, 1 Maryland Statutes, Kilty's R., 223; and in Rhode Island, her records of a case in 1763, at Providence.

But I pass by all these, and much more, because notwithstanding the course of practice here the last half century in some districts, and the inattention and indifference exhibited in many others as to the true line of discrimination between the jurisdiction belonging to the common law courts and that in admiralty, enough appears to induce me, as at present advised, not to rest jurisdiction in admiralty over a transaction like this on contract alone. I shall not do it, the more especially when a ground less doubtful in my apprehension exists and can be relied on for recovering all the loss, if the damage was caused by a tort. I have turned my attention to ascertain whether the facts in this case exhibit any wrong committed by the respondents, of such a character as a tort, and in such a locality as may render our jurisdiction in admiralty clear over it, looking to the principles of admiralty law in England, and also in this country, so far as can now be discovered to have existed at the time of our revolution. First, as to this, it is argued that, in point of fact, gross negligence existed in the transportation of this property. If so, this conduct by the respondents or their agents may be sufficient to justify a proceeding *ex delicto* for the non-feasance or misfeasance constituting that neglect, and causing the loss of this property, entirely independent of the contract or its form, or the risks under it, or the want of notice of the great value of the property. Particularly might this be sufficient if the injury was caused in a place and under circumstances to give a court of admiralty undoubted jurisdiction over it as a marine tort.

The question of fact, then, as to neglect here, and the extent of it, may properly be investigated next, as in one view of the subject it may become highly important and decisive of the right to recover, and as it is our duty to settle facts in an admiralty proceeding, when they are material to the merits. As before intimated, it is here virtually conceded that the property of the plaintiffs, while in charge of the respondents as common carriers on the sea, was entirely lost by the burning of the boat in which it was transported. The first inference from these naked facts would be that the fire was produced by some cause for which the owners were responsible, being generally negligence, and that *prima facie* they were chargeable. 6 Mart., 681; Story on Bailm., §§ 533, 538. Indeed, the common carrier who receives property to transport, and does not deliver it, is always held *prima facie* liable. Abbott on Shipp., c. 3, § 3; 1 Vent., 190; 6 Johns., 169; 8 Johns., 213; 19 Wend., 245; Story on Bailm., § 533; 3 Kent, Comm., 207, 216; 3 Story, 349, 356; 5 Bing., 217, 220;

4 Bing., 218. If they would have this inference or presumption changed, so as to exonerate themselves, it must be done by themselves, and not the plaintiffs, and by proof removing strong doubts; or, in other words, turning the scales of evidence in their favor in this attempt. This idea is fortified by the express provision establishing a presumption, by the act of congress, in case of damages by explosions of steam. 5 Stats. at Large, p. 305, § 13. Independent of this presumption, when we proceed to examine the evidence on both sides as to the contested points of fact connected with the loss, it is found to be decidedly against the conduct of the respondents and their agents; and, so far from weakening the presumption against them from the actual loss, it tends with much strength to confirm it. There had, to be sure, been recent repairs, and certificates not long before obtained of the good condition of the boat. But, on the proof, she does not seem to have been in a proper state to guard against accidents by fire when this loss occurred. Her machinery was designed at first to burn wood, and had not long before been changed to consume anthracite coal, which created a higher heat. And yet there was a neglect fully to secure the wooden portions of the boat, near and exposed to this higher heat, from the natural and dangerous consequences of it. So was there an omission to use fire-brick and new sheet-iron for guards, nigh the furnace. On one or two occasions, shortly before this accident, the pipe had become reddened by the intense heat, so as to attract particular attention; and, shortly before, the boat actually caught fire, it is probable from some of those causes, and yet no new precautions had been adopted.

In the next place, the act of congress (5 Stats. at Large, pp. 304, 305) requires the owners of steamboats "to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose suitable to be worked in said boat in case of fire, and carry the same upon each and every voyage, in good order." § 9. And it imposes, also, a penalty of \$500 for not complying with any condition imposed by the act. § 2. The spirit of this requisition is as much violated by not having the hose and engine so situated as to be used promptly and efficiently, as by not having them at all, or not having them "in good order." The hose and engine were not kept together, and hence could not be used on that fatal night. One was stowed away in one part of the boat, and the other elsewhere, so as not to be in a situation to be brought promptly into beneficial use.

Again, it was an imperative provision in the act of congress before referred to (§ 9) — and the neglect of it was punished by a fine of \$300, on the owner as well as master — "that iron rods or chains shall be employed and used in the navigating of all steamboats, instead of wheel or tiller-ropes." Yet this was not complied with, and renders their conduct in this respect not only negligent, but illegal. Though, in fact, this accident may not have proved more fatal than otherwise from this neglect, the non-compliance with the provision was culpable, and throws the burden of proof on the owners to show it did not contribute to the loss. *Waring v. Clarke*, 5 How., 463. It is true that congress, some years after, March 30, 1845, dispensed with a part of this provision (5 Stats. at Large, 626), under certain other guards. Yet in this case, even those other guards were wholly omitted. Nor does there appear to have been any drilling of the crew previously how to use the engine in an emergency, or any discipline adopted, to operate as a watch to prevent fires from occurring, or, after breaking out, to extinguish them quickly. Indeed, the captain on this occasion checked the efforts of some to throw the ignited cotton overboard, so

as to stop the flames from spreading, by peremptorily forbidding it to be done. The respondents, to be sure, prove that several buckets were on board. But the buckets, except in a single instance, were not rigged with heaving lines, so as to be able to draw up water and help to check promptly any fire which might break out. And, in consequence of their fewness or bad location, some of the very boxes containing the specie of the plaintiffs were broken open and emptied, in order to hold water. Lastly, when discovered, the officers and crew do not appear generally to have made either prompt or active exertions to extinguish the fire, or to turn the vessel nearer shore, where this property and the passengers would be much more likely to be preserved, eventually, than by remaining out in the deep parts of the sound.

The extent and nature of the liability thus caused are well settled at law. The property of the plaintiffs was destroyed by fire through great neglect by the defendants and their agents. Common carriers are liable for losses by fire, though guilty of no neglect, unless it happen by lightning. 1 Durn. & E., 27; 4 Durn. & E., 581; 3 Kent Comm., 217; 5 Durn. & E., 389; *Gilmore v. Carman*, 1 Smodes & M., 279; *King v. Shepherd*, 3 Story, 349; 2 Browne, Civ. and Adm. Law, 144; 2 Wend., 327; 21 Wend., 190. These respondents were common carriers in the strictest and most proper sense of the law. *King v. Shepherd*, 3 Story, 349. See other cases, *post*. They would, therefore, be liable in the present case without such neglect, if this view of it applied to a recovery on the ground of a tort as well as of a contract. But as it may not, the next inquiry is if the facts disclose a breach of duty, a culpable neglect, either by the officers or owners of the vessel, amounting to a tort, and for which the defendants are responsible.

It is well settled that a captain is bound to exercise a careful supervision over fires and lights in his vessel, ordinarily. *Malynes*, 155; *The Patapsco Ins. Co. v. Coulter*, 3 Pet., 228, 229, 237; *Busk v. The Royal Ex. Assur. Co.*, 2 Barn. & Ald., 82. He is required in all things to employ due diligence and skill (9 Wend., 1; *Rice*, 162); to act "with most exact diligence" (1 Esp. Ca., 127), or with the utmost care (*Story on Bailm.*, § 327). But how much more so in a steamboat, with fires so increased in number and strength, and especially when freighted with very combustible materials, like this, chiefly with cotton! His failure to exert himself properly to extinguish any fire amounts to barratry. 3 Pet., 228, 234; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet., 213; 10 Pet., 507. And if the property be insured against barratry, the owners may then recover. To be sure, in one case the owners of a steamboat were exonerated from paying for a loss by fire. But it was only under the special provision of the local laws, rendering them exempt, if the fire occurred "by accidental or uncontrollable events." See Civil Code of Louisiana, 63d article; *Hunt v. Morris*, 6 Mart., 681. So the written contract for freight, as well as that for insurance, sometimes does not cover fire, but specially exempts a loss by it. 3 Kent Comm., 201-207. In such case there may be no liability for it on the insurance, and doubtfully on the charter or bill of lading, unless it was caused by gross neglect, *crassa negligentia*. But in case of such neglect, liability exists even there. 3 Kent Comm., 217; 3 Pet., 238; 1 Taunt., 227. In this view the owners seem liable for all damages which they or their servants could have prevented by care. 8 Serg. & R., 533. As an illustration of what is meant by such damages, they are those which happen, if on land, from unskilful drivers, "from vicious and unmanageable horses, or when occasioned by over-

loading the coaches, as these would imply negligence or want of care." *Beckman v. Shouse*, 5 Rawle, 183.

From the above circumstance, the conclusion is almost irresistible that what constitutes a gross neglect by the respondents and their agents, as to the condition of the boat and its equipments, existed here, and by the deficiencies and imperfection of them contributed much to the loss of this property; and beside this, that want of diligence and skill on board, after the fire broke out, as well as want of watchfulness and care to prevent its happening or making such progress, was manifest. If any collateral circumstance can warrant the exaction of greater vigilance than usual, on occasions like these, or render neglects more culpable, it was that the lives of so many passengers were here exposed by them, and became their victims. This last consideration is imperative, in cases of vessels devoted both to freight and passengers, to hold the owners and their servants responsible for the exercise of every kind of diligence, watchfulness and skill which the principles of law may warrant. Beside the great amount of property on board on this occasion, they had in charge from one to two hundred passengers, including helpless children and females, confiding for safety entirely to their care and fidelity. All of these, except two or three, were launched into eternity during that frightful night by deaths the most painful and heartrending. Had proper attention been devoted to the guards against fire, such as prudence and duty demanded, or due vigilance and energy been exercised to extinguish it early, not only would large amounts of property probably have been saved, but the tragic sufferings and loss of so many human beings averted.

In view of all this, to relax the legal obligations and duties of those who are amply paid for them, or to encourage careless breaches of trusts the most sacred, or to favor technical niceties likely to exonerate the authors of such a calamity, would be of most evil example over our whole seaboard, and hundreds of navigable rivers and vast lakes, where the safety of such immense property and life depends chiefly on the due attention of the owners and agents of steamboats, and is, unfortunately, so often sacrificed by the want of it. To relax, also, when congress has made such neglect, when followed by death, a crime, and punishable at least as manslaughter, would be unfaithfulness to the whole spirit of their legislation and to the loudest demands of public policy. Their enactment on this subject is in these words (see statute before cited, § 12): "That every captain," etc., "by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person on board said vessel may be destroyed, shall be deemed guilty of manslaughter," etc.

Showing, then, as the facts seem to do here, wrongs and gross neglect by both the owners and officers of the boat, the next step in our inquiries is whether any principles or precedents exist against their being prosecuted in admiralty as a tort, and by a proceeding which sounds *ex delicto*, and entirely independent of any contract. The recovery, in cases like this, on the tort, counting on the duty of the carrier and its breach by the negligent loss of the property, is common, both in this country and abroad, in the courts of common law. Whether it be redressed there in trespass or case, when suing *ex delicto*, is immaterial, if, when case is brought, the facts, as here, show neglect or consequential damage, rather than those which are direct and with force. And if case lies at common law on such a state of facts, there seems to be no reason why a libel in admiralty may not lie for the wrong, whenever, as here, it was

committed on the sea, and clearly within admiralty jurisdiction over torts. For the admiralty is governed by like principles and facts, as to what constitutes a tort, as prevail in an action at law for damages, and its ingredients are the same, whether happening on land or water. But case will lie at law, on facts like those here, for reasons obvious and important in the present inquiry. Indeed, on such facts the ancient action was generally in case, and counted on the duty of the carrier to transport safely the property received, and charged him with tortious negligence in not doing it. 1 Price, 27; 2 Kent Comm., 599; 3 Wend., 158. In such proceedings at common law, the difference was in some respects, when *ex delicto*, more favorable to the owners, as then some neglect, or violence, or fraud, or guilt of some kind, must be shown, amounting to a breach of public duty by the carrier or his servants. *Hinton v. Dibbin*, 2 Ad. & Ell. (N. S.), 646; 2 New R., 454; 2 Chitt., 4. While in the action of *assumpsit*, more modern, but by no means exclusive, the promise or contract alone need be shown, and a breach of that, though without any direct proof of neglect, as carriers are, by their duties, in law, insurers against all losses except by the king's enemies and the act of God. 3 Brod. & B., 62, 63; 19 Wend., 239; *Forward v. Pittard*, 4 Durn. & E., 27; 1 Esp. Ca., 36; 2 Chitt., 1; *Ashmole v. Wainwright*, 2 Ad. & Ell. (N. S.), 837. So it is well settled that these rules of law, and all others as to common carriers by land, apply to those by water, and to those boats carrying freight, as this one did. 10 Johns., 1; 1 Wils., 281; 3 Esp. Ca., 127; 2 Wend., 327; 3 Story, 349.

What, then, in principle, operates against a recovery? Some would seem to argue that a proceeding *ex delicto* must be trespass, and that case is not one. But when it proceeds, as here, for consequential damages, and those caused by gross neglect, and not a mere branch of contract, it sounds *ex delicto* as much as trespass itself. 1 Chitt. Pl., 142; 3 East, 593; 2 Saund., 47, *b*. The misconduct complained of here amounted to a tort as much as if it had been committed with force. A tort means only a wrong, independent of, or as contradistinguished from, a mere breach of a contract. The evidence here, in my apprehension, shows both misfeasance and non-feasance, and a consequential loss from them, which it is customary to consider as tortious. It was here, to be sure, not a trespass *vi et armis*, and perhaps not a conversion of the property so as to justify trover, though all the grounds for the last exist in substance, as the plaintiffs have lost their property by means of the conduct of the defendants, into whose possession it came, and who have not restored it on demand, nor shown any good justification for not doing it. It is altogether a mistake, as some seem to argue, that force and a direct injury are necessary to sustain proceedings in tort, either at law or in admiralty, for damages by common carriers. So little does the law regard, in some cases, the distinction between non-feasance and misfeasance in creating a tort and in giving any peculiar form of action for it, that in some instances a non-feasance is considered as becoming misfeasance; such as a master of a vessel leaving his register behind, or his compass, or anchor. 3 Pet., 235. And "torts of this nature," as in the present case, may be committed either by "non-feasance, misfeasance or malfeasance," and often without force. 4 Durn. & E., 484; 1 Chitt. Pl., 151; *Bouvier's Dict.*, Tort. And even where *mala fides* is necessary to sustain the proceeding, gross negligence is evidence of it. 4 Ad. & Ell., 876; 1 How., 71; 1 Spence's Eq. Jur., 425; *Jones on Bailm.*, 8; *Story on Bailm.*, §§ 19, 20. The action, in such case, is described as "upon tort," and arises *ex delicto*. 2 Kent Comm., 599. In most instances of gross negligence,

misfeasance is involved (2 Crompt. & M., 360); as a delivery to a wrong person, or carrying to a wrong place, or carrying in a wrong mode, or leaving a carriage unwatched or unguarded. 2 Crompt. & M., 360; 8 Taunt., 144. Where case was brought for damage by overloading and sinking a boat, it was called an action "for a tort," and sustained, though the injury was wholly consequential. 1 Wils., 281.

Again, it has been argued that if direct force be not a necessary ingredient to recover in this form of action, it must in some degree rest on the contract which existed here with Harnden, and be restrained by its limitations. But the books are full of actions on the case where contracts existed, which were brought and which count entirely independent of any contract, they being founded on some public duty neglected, to the injury of another, or on some private wrong or misfeasance, without reference to any promise or agreement broken. 12 East, 89; 4 How., 146; Chitt. Pl., 156; *Forward v. Pittard*, 1 Durn. & E., 27; 2 N. Hamp., 291; 2 Kent Comm., 599; 3 East, 62; 6 Barn. & Cress., 268; 5 Burr., 2825; 6 Moore, 141; 9 Price, 408; 5 Barn. & Cress., 605-609. Some of the cases cited of this character are precisely like this, being for losses by non-delivery of property by common carriers and sued for as torts thus committed. 5 Durn. & E., 389. They go without and beyond the contract entirely. Nor is intent to do damage a necessary ingredient to sustain either case or trespass. 2 New R., 448. Though the wrong done is not committed by force or design, it is still treated as *ex delicto* and a tort, if it was done either by a clear neglect of duty, by an omission to provide safe and well-furnished carriages or vessels, by carelessness in guarding against fires and other accidents, by omitting preparations and precautions enjoined expressly by law, or by damages consequent on the negligent upsetting of carriages, or unsafe and unskilful navigation of vessels. See cases of negligent defects in carriages and vessels themselves. 2 Kent Comm., 597, 607; 6 Jurist, 4; *The Rebecca*, 1 Ware, 188; 10 East, 555; 1 Johns., 134; 5 East, 428. Or in machinery. *Camden & Amboy Railroad v. Burke*, 13 Wend., 611, 627; 5 East, 428; 9 Bing., 457. Even if the defect be latent. 3 Kent Comm., 205. See those of careless attention. *The Rebecca*, 1 Ware, 188. See those of non-conformity to legal requisitions, as hose and engine here not in good order. *Waring v. Clarke*, 5 How., 441. See those consequent on negligent driving. 4 Barn. & Cress., 223; *Bretherton v. Wood*, 3 Brod. & B., 54. If damage or loss happen by neglect or wrong of a servant of a common carrier, the principal is still liable. 13 Wend., 621; *Story on Partnership*, § 489; *Dean v. Angus, Bee*, 369, 239; *Story on Bailm.*, § 464; 2 Browne, Civ. & Adm. Law, 136. This is necessary to prevent fraud, if such neglect be not evidence of fraud or misfeasance. The owner should be liable for employing those negligent. *Story on Ag.*, § 318, and note.

There is another important consideration connected with this view of the subject, and relieving it entirely from several objections which exist to a proceeding founded wholly on a contract rather than a tort. It is this. Where the injury is caused by a tort or fraud, no question arises as to any special agreement or notice, as with Harnden here, not to assume any risk. In short, the agreement of that kind here does not exonerate, if "malfeasance, misfeasance or gross negligence" happens by owners or their servants. 13 Wend., 611; 19 Wend., 234, 251, 261; 5 Rawle, 179, 189; 2 Crompt. & M., 353; 2 Kent Comm., § 40; *Brooke v. Pickwick*, 4 Bing., 218; 3 Brod. & B., 183. Because the wrong is then a distinct cause of action from the breach of

the contract, and the exception in it as to the risk was intended to reach any loss not happening through tortious wrong. "Even with notice, stage proprietors and carriers of goods would be liable for an injury or loss arising from the insufficiency of coaches, harness or tackling, from the drunkenness, ignorance or carelessness of drivers, from vicious and unmanageable horses, or when occasioned by overloading the coaches, as these would imply negligence or want of care." 5 Rawle, 183. It is further settled, in this class of cases, that the principle of not being liable for jewels, money, and other articles of great value, unless notice was given of it, and larger freight paid in consequence of it, does not apply. 4 Bing., 218; 5 Bing., 223; 2 Crompt. & M., 353. Because here the liability is not that of an insurer against many accidents and many injuries by third persons of the property carried, and which it may be right to limit to such values as were known and acted upon in agreeing to carry. But it is for the wrong of the carrier himself, or his agents; their own misfeasance or non-feasance, and hence gross neglect, renders them responsible for the whole consequential damages, however valuable the property thus injured or lost. 2 Barn. & Ald., 356; 8 Taunt., 174; 4 Binn., 31; 2 Ad. & Ell., 659; 5 Barn. & Ald., 341, 350; 16 East, 244, 245. Some think the neglect in such case, so as to be liable for valuables, must amount to misfeasance. 2 Ad. & Ell., 659; 2 Myl. & C., 358. It must be "misfeasance or gross negligence." 2 Kent Comm., 607, note; 13 Price, 329; 12 B. Moore, 447; 5 Bing., 223-225; 8 Mees. & W., 443. By a recent statute in England, under William IV., though the carrier has been exonerated from the liability and care of valuables, without notice, yet he cannot be if gross neglect happens. 2 Ad. & Ell. (N. S.), 646.

All this being established at law, what is there to prevent this wrong from being deemed a tort, in connection with maritime matters,—or, in other words, "a marine tort,"—and subject to be prosecuted in admiralty? I am not aware that a marine tort differs from any other tort in its nature or incidents, except that it must be committed, as this was, on the high seas. See cases cited in *Waring v. Clarke*, 5 How., 441. There it was held sufficient to constitute a marine tort, and one actionable in admiralty, if the wrong was committed only on tide water.

We have already suggested, also, as to the gist of the wrong, that gross neglect, the elements and definition of it, are the same on the water as on land, and consequential or direct damages by a wrong are regarded in the same light on both. The actions of case, as well as trespass, at common law, in illustration of this, are numerous, as to torts on the water. See *ante*. Force, too, is no more necessary to constitute this kind of tort at sea than on land, or in admiralty than in a common law court. 3 Story, 349. That is the gist of this branch of the case. It is true, that most of the libels in admiralty for torts are for such as were caused by force, like assaults and batteries (4 Rob. Adm., 75); or for collision between ships on the sea, to the injury of person or property (2 Browne's Civ. & Adm. Law, 110; Dunlap's Adm., 31; Moore, 89); or for wrongful captures (10 Wheat., 486; Bee, 369; 1 Gall., 315; 3 Cranch, 408); or for carrying off a person *in invitum* (Dunlap's Adm., 53); or for any "violent dispossession of property on the ocean." 1 Wheat., 257; *L'Invincible*, 1 Wheat., 238; 3 Dal., 344. And though, where trespass is brought at common law, or a tort is sued for in admiralty as "a marine trespass," there must usually have been force and an immediate injury (1 Chitt. Pl., 128; 11 Mass., 137; 17 Mass., 246; 1 Pick., 66; 8 Wend., 274; 3 East, 293; 11 Wheat., 36, *argu.*; 4 Rob. Adm., 75), yet it need not be implied or proved in trespass on the case at

law, or in a libel in admiralty for consequential damages to property. Such a libel lies as well for a tort to property as to the person, on the sea (2 Browne's Civ. & Adm. Law, 109, 202; Doug., 594, 613, note; 4 Rob. Adm., 73-76; Martins v. Ballard, Bee, 51, 239); and for consequential injury by a tort there, as well as direct injury. Sloop *Cardolero*, Bee, 51, 60; 3 Mason, 242; 4 Mason, 385-388; 2 Browne's Adm., 108; 2 Story, 188; 2 Sir Leoline Jenkins, 777. It was even doubted once, whether, for such torts at sea, any remedy existed elsewhere than in admiralty. 2 Browne's Civ. & Adm. Law, 112. Indeed, 1 Browne's Civ. & Adm. Law, 397, shows that, beside rights arising from contract, there were "obligations or rights arising to the injured party from the torts or wrongs done by another." And these were divided into those arising *ex delicto* and those *quasi ex delicto*; and the former included "damage" to property, as in this case. It meant injury to property by destroying, spoiling or deteriorating it, and implied "faultiness or injustice" (401), but not necessarily force. Either trespass or case sometimes lies for a marine tort, even in the collision of vessels, where at times the only force is that of winds and tides, and the efforts of the master were to avoid, rather than commit, an injury. 1 Chitt. Pl., 145; 2 Story, 188; 11 Price, 608; 3 Carr. & P., 554. Damages by insufficient equipments, ropes, etc., must be paid by the owners of the vessel to the merchant, even by the Laws of Oleron, art. 10. Sea Laws, 136; Laws of Wisby, art. 49. And nothing is more consequential, or less with force, than that kind of injury.

Finally, the principles applicable to the definition of the wrong or tort being here in favor of a recovery in admiralty, and there being no precedents in opposition, but some in support of it, the inference is strong that this destruction of the property of the plaintiffs may well be regarded and prosecuted in admiralty as a marine tort. Though I admit there are no more cases in point abroad, in 1789, for sustaining a suit for a consequential injury by a carrier as a tort, than on the contract, in admiralty, yet the principles are most strongly in favor of relying on the tort, without any opposing decision, as there is to a libel on the contract. Beside this, other difficulties are avoided, and more ample justice attained, by the libel here for the tort, than by one for the contract.

A moment to another objection: that the libel in this case does not contain allegations in proper form to recover damages in admiralty, as if for a maritime tort. This libel is in several separate articles, rather than in a single count. In none of them is any contract specifically set out, though in one of them something is referred to as "contracted." The libel avers that the respondents were common carriers; that a public duty thus devolved on them; that they received the property on board to transport it, and so negligently conducted, it was lost. The breach is described throughout, not of what had been "contracted" or promised, but as a wrong done, or tort, and specifies several misdoings. It is in these words: "Yet the respondents, their officers, servants and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants and agents, so carelessly, improperly and negligently managed and conducted the said steamboat Lexington, during her said voyage, that by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging and equipments, and of such careless, improper and negligent conduct, the said steamboat, together

with the gold coin and silver coin to the libelants belonging, were destroyed by fire on the high seas, and wholly lost."

Where contract and tort, in the forms of declaration at common law in actions of the case, are with difficulty discriminated, the general test adopted is, if specific breaches are assigned, sounding *ex delicto*, it is case on the tort *Jeremy on Carriers*, 117. Here this is done. The same technical minuteness is not necessary in a libel as in a declaration at common law. 5 Rob. Adm., 322; Dunlap, Adm., 438, 439; 1 Ware, 51. Only the essential facts need be alleged, without regard to particular forms, either in contract or tort. Hall's Prac., 207, 138; Dunlap, Adm., 427. And in the same libel between the same parties, unlike the rule at common law, it is held by some that both contract and tort may be joined, though it is proper to state them in separate articles in the libel, like separate counts. *Semble*, in 3 Story, 349; Dunlap, Adm., 89. And in some cases it is clearly better not to unite them. 1 Ware, 427. Here, if the libel is considered as but separate paragraphs of one article, it is a good one in tort. Dunlap, Adm., 114, 115; 4 Mason, 541. And if as separate articles, one of them is valid in tort. The forms of libels for maritime torts includes those which caused only consequential damages, as well as those which caused direct damages. Dunlap, Adm., 49; 3 Story, 349, one count seems to be for the wrong. There are cases of this kind merely for improper usage to passengers, by bad words, and neglect; but no force existed, or was alleged. 3 Mason, 242. Others are libels for seducing or carrying away a minor son of the plaintiff to his damage, like the actions on the case at common law. *Plummer v. Webb*, 4 Mason, 380. Yet they are called, as they are in law, "tortious abductions." So a libel lies for loss of goods "carelessly and improperly stowed." 1 Ware, 189. But if the libel here was less formal in tort, the liberality practiced in admiralty pleadings, regarding the substance chiefly, as in the civil law, would allow here any necessary amendments. Dunlap, Adm., 283; 4 Mason, 543; 3 Wash., 484. Or would allow them in the court below, by reversing the judgment, and sending the case back with directions to permit them there. 4 Wheat., 63, 64; 4 How., 154; 1 Wheat., 264, 13; 9 Pet., 483.

The amount of damages which can be awarded in admiralty, in a case like this, has been agitated by some of the court, but was not argued at the bar. It is not without difficulty, but can in a minute or two be set right. By the ancient practice in admiralty, in case of contracts of freight made by the master, it is true that the owners were liable, whether *ex contractu* or *ex delicto*, and whether *in personam* or *in rem*, for only the value of the vessel or the capital used in that business. Dunlap, Adm., 31. And if the vessel was lost, the remedy against the owners was entirely lost in admiralty. 1 Ware, 188. Yet it is a conclusive answer that here, as well as abroad, the rule of the civil and common law is to give the whole loss. 2 Kent Comm., 606; 3 Kent Comm., 217. And that this rule of full damage in a libel in admiralty has been adopted here after much consideration. Livingston, J., in 1 Paine, 118, says that "it had long been regarded as a general principle of maritime law" to make the owners liable for a tort by the master, and that now the whole injury was the measure of damage, without reference to the value of the vessel and freight. See, also, *Del Col v. Arnold*, 3 Dal., 333; *The Apollon*, 9 Wheat., 376; 3 Story, 347; 2 Story, 187. This is modified by some state laws, under certain circumstances. See *The Rebecca and Phebe*, 1 Ware, 188, and 263. And in England, by 53 Geo. III., c. 99. But even there the owner is still liable beyond the value of the vessel and freight, if the damage or neg-

lect was "committed or occasioned" with "the fault or privity of such owner." See Stats. at Large of that year; *The Phebe*, 1 Ware, 269. See, for this and other statutes, 2 Bro. Civ. & Adm. Law, 45, excusing owners if the pilot alone is in fault. See 6 Geo. IV., c. 125, § 55; 1 Wm. Rob., 46; 1 Dod. Adm., 467. So the whole injury must be paid now on the contract, and the owners cannot escape by abandoning the vessel which did the wrong. 2 Bro. Civ. & Adm. Law, 206, note. On principle, also, this is the right rule in admiralty, clearly, where the owners themselves at home, and not the master abroad, made the contract, or where they were guilty of any neglect in properly furnishing the vessel, and not he. *The Phebe*, 1 Ware, 269, 203-206.

The principle of his binding them only to the extent of the property confided to him to act with or administer on does not apply to that state of facts (*Abbott on Shipp.*, 93), but only to his doings abroad. The contracts made abroad are usually in his name, as well as by him and not by the owners, and he only to sue or be sued. *Abbott on Shipp.*, pt. 2, c. 2, § 5. In *Waring v. Clarke*, 5 How., 441, which was a tort by the master at home, in a collision of two boats, the whole amount of the injury was awarded. See, also, 1 How., 23; 3 Kent Comm., 238. So principle, no less than precedent, requires it now, in admiralty as well as common law, when the master is usually not a part-owner, but a mere agent of the owners, and doing damage, as here, by unskilfulness or neglect, and not by wilful misconduct. 1 Ware, 208; 1 East, 106. For this, surely, those should suffer who selected him *respondet superiori*. 1 East, 106; *Abbott on Shipp.*, pt. 2, c. 2, § 9; 2 Kent Comm., 218.

It is a mistake, likewise, to suppose, as some have, that the rule of damage is thus higher in admiralty than at common law, or when counting on the tort rather than contract. The only difference is that in admiralty, if counting on the contract, doubts exist whether a recovery can be had on the precedents, while, if counting on the tort, no doubt exists, the place of the tort being clearly on the sea and within admiralty jurisdiction. Nor do I see any sound reason for not sustaining this case in admiralty when jurisdiction exists there over the subject, because this proceeding is *in personam* and not *in rem*. 6 Am. Jur., 4; 2 Bro. Civ. & Adm. Law, 396; 2 Gall., 461, 462; Hard., 473. The jurisdiction is one thing, the form of proceeding another; and it is only when the vessel itself is pledged, and no personal liability created so as to lay a foundation for an action at law, that the form of proceeding seems to help to give jurisdiction in admiralty, where alone the libel *in rem* in such case can be followed. 3 Durn. & E., 269. But even then, I apprehend, the subject-matter must be proper for admiralty or it could not be prosecuted there *in rem*, because, if the subject-matter is a carriage or horse rather than a ship or its voyage, or something maritime, admiralty would get no jurisdiction by the thing itself being pledged or to be proceeded against. *The Fair American*, 1 Pet. Adm., 87; *Duponceau on Juris.*, 22, 23. Indeed, the rule in England to this day seems to be adverse to proceeding in admiralty at all, even *in rem*, to recover freight. *Abbott on Shipp.*, 170. *King v. Shepherd*, 3 Story, 349, was a libel *in personam* against a common carrier by water, and held that the liability was the same as on land, and an act of God to excuse must be immediate, and that the burden of the excuse rests on the respondents, and they are not discharged by a wreck, but must attend to the property until safe or restored. So it has been adjudged by this court to be proper to prosecute in admiralty for marine torts *in personam* as well as *in rem*. *Manro v. Almeida*, 10 Wheat., 473; *The Apollon*, 9 id., 362; *Bee*, 141; *The Cassius*, 2 Story, 81; 14 Pet., 99. See, also, the rules of this

court (1845) for admiralty practice, the fourteenth, sixteenth and seventeenth (3 How., 6, preface), and which expressly allow in libels for freight proceedings *in rem* or *in personam*, and in some trespasses to property, either mode.

§ 242. *Conturrence on the ground of a marine tort rather than a breach of contract.*

I concur, therefore, in the judgment of the court affirming the decree for full damages, but on the ground of a recovery for the wrong committed as a marine tort rather than on any breach of contract which can be prosecuted by these plaintiffs, and in admiralty.

YORK COMPANY v. CENTRAL RAILROAD.

(3 Wallace, 107-114. 1865.)

ERROR to U. S. Circuit Court for Illinois.

STATEMENT OF FACTS.—Cotton was shipped at Memphis to be delivered at Boston, “fire and the unavoidable dangers of the river only excepted.” The bill of lading was signed in four parts, two of which were delivered to the shipper, who sent one to the consignee. The cotton was destroyed by fire. The shipper, who appeared to be an agent, when his deposition was taken, annexed a copy of the bill of lading, and on the trial objections were made because no foundation had been laid for the introduction of secondary evidence.

§ 243. *A common carrier may limit his responsibility by special contract.*

Opinion by MR. JUSTICE FIELD.

The right of a common carrier to limit his responsibility by special contract has long been the settled law in England. It was the subject of frequent adjudication in her courts, and had there ceased to be a controverted point before the passage of the Carrier's Act of 1830. In this country, it was at one time a subject of much controversy whether any such limitation could be permitted. It was insisted that, exercising a public employment, the carrier owed duties at common law, from which public policy demanded that he should not be discharged even by express agreement with the owner of the goods delivered to him for transportation. This was the ground taken by Mr. Justice Cowen, of the supreme court of New York, in *Cole v. Goodwin*, 19 Wend., 251, and although what that learned judge said on this point was mere *obiter*, as the question presented was not upon the effect of a special agreement, but of a general notice, it appears to have been adopted by a majority of the court in the subsequent case of *Gould v. Hill*, 2 Hill, 623. But from this doctrine that court has since receded; and, in a recent decision, the court of appeals of that state has affirmed the right of the carrier to stipulate for a limitation of his responsibility. *Parsons v. Monteath*, 13 Barb., 353; *Moore v. Evans*, 14 id., 524; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y., 486. The same rule prevails in Pennsylvania; it has been asserted in Ohio and in Illinois, and, it is believed, in a majority of the other states; and in *New Jersey Steam Navigation Co. v. Merchants' Bank*, it received the sanction of this court. 6 How., 382; *Atwood v. Delaware Transportation Co.*, 9 Watts, 89; *Camden & Amboy R. Co. v. Baldauf*, 16 Penn. St., 67; *Verner v. Sweitzer*, 32 id., 208; *Kitzmiller v. Van Rensselaer*, 10 Ohio St., 63; *Illinois Central R. Co. v. Morrison*, 19 Ill., 136; *Western Transportation Co. v. Newhall*, 24 id., 466.

§ 244. — *he may by special contract become an ordinary bailee for hire.*

Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns

them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire.

§ 245. *Liabilities of carriers by common law.*

The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may limit his services to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and he cannot, by any mere act of his own, avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.

§ 246. — *these liabilities qualified by contract, except as to negligence or misconduct.*

The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

§ 247. *Objections of non-agency and want of consideration answered.*

We do not understand that the counsel of the plaintiff in error questions that the law is as we have stated it to be. His positions are that the agents of the plaintiffs at Memphis, who made the contract with the Illinois Central Railroad Company, were not authorized to stipulate for any limitation of responsibility on the part of that company; and that no consideration was given for the stipulation made. The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see they were themselves the owners. The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.

§ 248. *When a deposition is taken, objections must be made at the time of the examination.*

The objection urged to the introduction of the copy of the bill of lading annexed to the deposition of the witness Trout was properly overruled. The deposition was taken upon a commission, and in such cases the general rule is that all objections of a formal character, and such as might have been obviated

if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. The rule may be different in some state courts; but this rule is more likely than any other to prevent surprise and secure the ends of justice. There may be cases where the rule should be relaxed, as where the deposition is returned at so brief a period before the trial as to preclude a proper examination, and prevent a motion to suppress. In this case there was no occasion for any such relaxation of the rule, and had the objection been taken before the trial — either at the examination of the witness or on a motion to suppress — to the proof of the copy without producing the original or showing its loss, the opposite party would undoubtedly have secured the production of the original, if in existence, or, if it be lost or destroyed, been prepared to account for its absence.

Judgment affirmed.

MUSER v. HOLLAND.

(Circuit Court for New York: 17 Blatchford, 412-415; 1 Federal Reporter, 382. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiffs delivered to the American Express Company, at Syracuse, N. Y., a trunk with contents of the value of \$4,172, for transportation to New York city, taking a receipt, which, among other stipulations, contained those reading as follows: "This company is not to be held liable for any loss or damage by fire, . . . nor, in any event, shall this company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of \$50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the trunk and contents was not stated in the receipt, and no evidence was given to show that the agents of the defendant knew the value of the property. Through the negligence of the employees of the New York Central & Hudson River Railroad Company, which corporation was employed by the defendant to transport the property in question, the car in which the express company shipped the property for transportation to New York city was thrown from the track, and a fire ensued, which destroyed the plaintiff's trunk and contents. The question now is, whether the defendant is relieved from responsibility by reason of the stipulation in the receipt, or, if not wholly absolved, whether it is liable for more than \$50.

§ 249. *Extent to which carrier may modify common law liability by special contract stated.*

It will not be profitable to review the authorities which consider the right of common carriers to limit or modify their common law liabilities by notices or special contracts. It is the settled law in the federal courts, that common carriers cannot relieve themselves from liability for negligence, either by notice or by special contract, though they may, by contract with the shipper, stipulate for such a reasonable modification of their common law liability as is not inconsistent with their essential duties to the public. They cannot, therefore, exonerate themselves from liability for the negligence of their own agents, but may from the acts or misconduct of persons over whom they have no authority or control, actual or legal. *York Co. v. Central Railroad*, 3 Wall., 107 (§§ 243-248, *supra*); *Railroad Co. v. Lockwood*, 17 Wall., 357 (§§ 1379-1400,

infra); *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 174 (§§ 1492-98, *infra*).

§ 250. *Carrier liable for loss by fire, notwithstanding special contract, where the loss was by his agent's negligence.*

The plaintiff's property was destroyed by the negligence of the railroad company, the agent of the defendant, and the defendant is, therefore, liable, notwithstanding the stipulation against liability for fire.

§ 251. *Stipulation upheld, limiting liability to fifty dollars for trunk and contents unless real value is stated.*

The precise question presented under the stipulation limiting the defendant's liability to \$50, in the absence of a statement of the real value in the receipt, was decided in *Berry v. Dinsmore*, where, at *nisi prius*, I held such a stipulation valid. After a more careful consideration of the question than I was then able to give, I am confirmed in the conclusion then reached. The case of *Hopkins v. Westcott*, 6 Blatch., 64, which was not then called to my attention, is a controlling authority in this circuit, and decides that such a limitation is binding upon the shipper. To the same effect are *Belger v. Dinsmore*, 51 N. Y., 166; *Magnin v. Dinsmore*, 62 N. Y., 35, and 70 N. Y., 410; and *Kirkland v. Dinsmore*, 62 N. Y., 171.

§ 252. *Right of carrier considered to inquire as to value of articles offered.*

The right of a carrier to exact fair information as to the value of property confided to his care has always been recognized. He has the right to insist that his compensation be measured by his risk, and, obviously, the degree of care which he will exercise will measurably depend upon the extent of the responsibility he may incur. While it is not primarily the duty of the shipper to inform the carrier of the nature or value of the contents of the parcel sent, the carrier has the right to make inquiry and receive a true answer; and any concealment on the part of the shipper, intended to mislead the carrier as to the character or value of the property and which does mislead, is a fraud, which absolves the carrier from responsibility. *Sewall v. Allen*, 6 Wend., 335; *Phillips v. Earle*, 8 Pick., 182; *Brooke v. Pickwick*, 4 Bing., 218; *Riley v. Horne*, 5 Bing., 217; *Sleat v. Fagg*, 5 Barn. & Ald., 342; *Crouch v. London & N. W. R'y*, 14 Com. B., 255.

§ 253. *Stipulations as to value not unreasonable; analogous stipulations considered.*

The question has generally arisen in cases where the carrier sought to protect himself under the terms of a general notice or regulation requiring the shipper to state the value or character of the property, and when the notice or regulation was brought to the knowledge of the shipper, the carrier was protected by it. How much stronger is the case when, as here, the shipper enters into a contract, by which he agrees that the property shall be valued at \$50, in the absence of specific statement of the real value. In *Express Co. v. Caldwell*, 21 Wall., 264 (§§ 254-262, *infra*), a clause in a contract relieving the carrier from liability for any loss or damage to a package whatever, unless claim should be made therefor within a limited time, was sustained, as a reasonable condition. The stipulation in the present case is plainly as reasonable as was that in *Express Co. v. Caldwell*. In effect it exacts from the shipper only that fair information of the extent of the carrier's risk to which he is entitled. Upon the argument, it was contended that this stipulation could not shield the carrier from the consequences of his own misfeasance. Undoubtedly a carrier

may so conduct himself with property intrusted to him as to divest himself of the character of a carrier. In such case, his contract would not protect him. This is not such a case.

Judgment is rendered for the plaintiff, for \$50, with interest from January 3, 1879.

EXPRESS COMPANY v. CALDWELL.

(21 Wallace, 264-272. 1874.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.—Action against a common carrier for failure to deliver a package. Defense, that the carrier was not to be liable for loss or damage unless claim was made within ninety days from the time it received the package, and that the claim was not made within the ninety days. Demurrer entered and sustained, and judgment against the company.

§ 254. *Special contract may modify the carrier's responsibility within just limits.*

Opinion by MR. JUSTICE STRONG.

Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable.

§ 255. *Common carriers should not be permitted to take advantage of their great powers.*

Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of

the public, to exact exemptions from that measure of duty which public policy demands.

§ 256. — *but public policy has undergone changes in our modern social progress.*

But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy.

§ 257. *Case reviewed as to permitting a special contract.*

This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In *York Co. v. Railroad Co.*, 3 Wall., 107 (§§ 243-248, *supra*), it is ruled that the common law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, *Railroad Co. v. Lockwood*, 17 id., 357 (§§ 1379-1400, *infra*), where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

§ 258. *Whether special stipulation is just which limits right to claim for loss.*

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit. It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law and inoperative. Such was our opinion in *Railroad Co. v. Lockwood*. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the

strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case.

§ 259. — *such limitations are just as applied in favor of express companies.*

The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss or making a claim indefinitely, they may not be able to trace the parcels bailed and to recover them, if accidentally missent, or if they have, in fact, been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

§ 260. — *such limitations are conceded as to insurance and telegraph business.*

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given within the time designated or have not been waived the insurers are not liable. Such conditions have always been considered reasonable because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. See *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall., 386, and the numerous cases therein cited. Telegraph companies, though not common carriers, are engaged in a business that is, in its nature, almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may, by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in *Wolf v. Western Union Tel. Co.*, 62 Penn. St., 83, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the

form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in *Young v. Western Union Tel. Co.*, 34 N. Y. Super. Ct., 390:

§ 261. *Cases in point considered.*

In *Lewis v. Great Western R'y Co.*, 5 Hurlst. & N., 867, which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage or detention would be allowed unless made within three days after the delivery of the goods, nor for loss unless made within seven days from the time they should have been delivered." Under the last clause of this condition the *onus* was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and, in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defense to the action. We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding, that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is *The Southern Express Co. v. Caperton*, 44 Ala., 101. There the receipts for the goods contained a provision that there should be no liability for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liability for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that, too, under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper." This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 36 Georgia, 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

§ 262. *Conclusion that stipulation in present instance was reasonable.*

Our conclusion, then, founded upon the analogous decisions of courts, as well

as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the circuit court erred in sustaining the plaintiff's demurrer to the plea. Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

§ 263. **Mutual assent to a special contract.**—An unsigned general notice printed on the back of a railway receipt does not *per se* amount to a special contract limiting the carrier's responsibility, though the receipt may have been taken by the shipper without dissent. *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84). See § 1249; *Ormsby v. Union Pacific R'y Co.*,* 2 McC., 48; *Ayers v. Western R. Co.*, 14 Blatch., 9 (§§ 1294-96).

§ 264. Where a bill of lading is stamped on the back with words purporting to make freight payable prior to delivery, the stamp does not *per se* constitute part of the contract contained in the bill. *Brittan v. Barnaby*, 21 How., 527 (§§ 923-927).

§ 265. A baggage express company may relieve itself from liability for the loss of merchandise or jewelry in a trunk by handing to the owner a printed notice to that effect, and it is immaterial that such notice is not read. *Hopkins v. Westcott*, 6 Blatch., 64; S. C., 16 Am. L. Reg., 533 (§§ 1503-6).

§ 266. A common carrier who sets up a special written contract to avoid his common law liability should show clear language and mutual assent. General and indefinite expressions, or doubtful and conflicting evidence, will not be construed as establishing such exoneration. *Menzell v. Railway Co.*,* 1 Dill., 531; *The Pacific*,* Deady, 17.

§ 267. **Special contract construed.**—A special contract with a railway carrier read as follows: "I hereby release said company from any and all *damage* that may occur to said goods, arising from leakage or decay, chafing or breakage, or from *any other cause not the result of collision of trains or of cars being thrown from the track while in transit.*" Held, no exemption from liability for a total loss or destruction of the goods by accidental fire while in the company's depot at an intermediate station was thereby intended. *Menzell v. Railway Co.*,* 1 Dill., 531. And see 4 Am. L. T., 58.

§ 268. **Immunity limited.**—A common carrier cannot relieve himself from responsibility for his own misconduct or negligence, or that of his employees, by a contract that he may enter into with the shipper. But he may enter into stipulations which relieve him otherwise of his public responsibility, if the customer assents and agrees to them by a special contract, whether verbal or in writing. *Ormsby v. Union Pacific R'y Co.*,* 2 McC., 48.

§ 269. A special contract cannot exonerate a carrier absolutely from delay in the transportation. *Ibid.*

§ 270. Under a contract expressly exempting him from liability in case of fire, the carrier becomes an ordinary bailee of the property he transports, and is held only to the degree of care and diligence applicable to such bailee under the circumstances of the case. *Woodward v. Illinois Central R. Co.*,* 1 Biss., 447.

§ 271. Notwithstanding a clause of special exemption from liability in case of fire, a carrier must use due diligence and care, in transporting the goods, as to the kind and quality of the cars, as to the running and management of the trains, as to the proper means of extinguishing fires caused by a spark from the engine or otherwise, and as to the train hands; having reference to the season of the year, the character of the property and of the country through which it was to be carried and the nature of the transit, viz., by railroad. (*DRUMMOND, J.*) *Ibid.*

§ 272. In case of fire, however occasioned, the carrier and his agents should make reasonable and proper efforts to save the property, considering the circumstances and the means and appliances at hand, notwithstanding a special contract exempting from loss by fire; but actual danger to the person need not be incurred. *Ibid.*

§ 273. A captain of a steam-tug cannot vary or lessen his liability by a notice given to the owner of a canal-boat to be towed that the voyage, if undertaken, must be at the latter's sole risk, but is bound to exercise all the skill and care that the case demands. *Vanderslice v. Steam Tow-Boat Superior*,* 2 Am. L. J., 347.

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§ 274. Where cotton is carried on open or flat cars, and the railway carrier takes no additional precautions for its protection and safety while attempting to run the train through woods which are on fire, there is such culpable negligence that a special contract against liability for loss by fire does not exonerate the carrier. *Insurance Co. of North America v. St. Louis, etc., R. Co.*,* 3 McC., 238.

§ 275. A special contract cannot require the customer to give notice of his claim for loss or damage to cattle before removing them from the place of destination or unloading them. *Ormsby v. Union Pacific R'y Co.*,* 2 McC., 48.

§ 276. As to a receipt stating "not accountable for contents," held, that where the words were inserted after the receipt of the goods by the carrier, and the receipt was delivered to the draymen, without any evidence of assent by the shipper, the latter was not bound. *The Pacific*,* Deady, 17.

§ 277. An agreement to tow a canal-boat "at the risk of the master and owners" calls for only ordinary skill and prudence on the part of the boat towing. *The Princeton*, 3 Blatch., 54.

§ 278. Limit as to value.—A common carrier guilty of negligence cannot avail himself of a provision in a bill of lading limiting his liability to a stated small sum. *Unnevehr v. The Steamship Hindoo*,* 1 Fed. R., 627.

§ 279. A carrier may by contract limit his liability for loss of barrels of wine delivered to him to \$20 per barrel, and a bill of lading handed by the carrier to the consignor on receiving the goods, and containing such a stipulation, plainly printed, constitutes a contract whether actually read by the consignor or not. *Leitch v. Union R. R. Transportation Co.*,* 7 Ch. Leg. N., 291.

§ 280. An express company may specially contract that it will not be liable to a greater amount than \$50 for the loss of an unvalued package. *Earnest v. Express Co.*,* 1 Woods, 573.

§ 281. A special contract which provides, in the transportation of horses, that the carrier's liability shall be limited to the extent of \$200 for each of the horses, or \$1,200 for the carload, binds the shipper to such limitation, notwithstanding a valuable horse was killed and others injured through the carrier's negligence; the shipper having failed to inform the carrier of the value of his horses and having signed the contract. *Hart v. Pennsylvania R. Co.*,* 2 McC., 337.

§ 282. Limitations for presenting claims.—A contract between a railway company and a shipper of horses stipulated that for injuries to the animals shipped over the road the owner should make a demand in writing before removing them from the place of destination. Held, that this clause could not apply in any sense so as to deprive the consignee of reasonably ascertaining after their arrival whether animals were ill through the carrier's negligence. *Ormsby v. Union Pacific R'y Co.*,* 4 Fed. R., 170.

§ 283. Usage considered.—Usage may affect the issue of mutual assent as between the common carrier and his customer. *Van Schaack v. Transportation Co.*,* 3 Biss., 394.

§ 284. Usage may be waived at the will of the parties, nor can it vary their positive stipulations. *The Reeside*, 2 Sumn., 567 (§§ 451-454); *Knox v. The Ninetta*,* Crabbe, 534.

§ 285. Warranty by a private carrier.—An express warranty by a private carrier for hire, that the goods shall go "safely," puts him into the situation of a common carrier. *Gibbons v. United States*,* Dev., 26.

§ 286. Limitation by bill of lading.—The liabilities of common carriers may, as to certain classes of carriers, and more particularly as to carriers by water, be varied, under the usual limitations, by the contract which is found specially expressed in a bill of lading. *The Niagara v. Cordes*, 21 How., 7 (§§ 438-450). And see IV, 3. And as to special contracts affecting passenger transportation, see VIII.

3. Carriage under Bills of Lading.

SUMMARY — Nature and characteristics of a bill of lading, §§ 287-296.—Explaining the receipt as to quantity of goods, their condition, etc., when shipped, §§ 297-303.—Responsibility of carrier under bill of lading, § 304.—Duties as to deviation, transshipment, etc., §§ 305-307.—Stowage of cargo, §§ 308-322.—Danger by perils of navigation, etc., §§ 323-338.—Burden of proof as to excepted cause of loss, § 339.—Effect of usage, § 340.—Transportation of animals, § 341.—Acceptance of bill of lading implies knowledge of its terms, § 342.—Master's default in not signing bills of lading, § 343.

§ 287. Nature of a bill of lading stated. Its evidence of ownership of the property mentioned and of the rights of the holder to receive it. Its transfer does not preclude inquiry into the transaction to the same extent as where negotiable paper is held by a bona fide purchaser. *Pollard v. Vinton*, §§ 344-349.

§ 288. It has a two-fold character, being at once a receipt and a contract. Receipt of the goods lies at the foundation, and if no goods are received there is no valid contract to carry and deliver. *Ibid.*

§ 289. Neither master nor shipping agent can bind the ship-owner as carrier by giving a bill of lading for goods not received for shipment; and such bill is void even in the hands of a *bona fide* holder for value. (*Approving Schooner Freeman v. Buckingham*, 18 How., 182.) *Ibid.*

§ 290. Where the freight agent of a railroad company gives a bill of lading for goods which were never in fact delivered, the company cannot be held liable, even though sued by an innocent holder, who paid a draft for the price of the goods on the faith of such bill. *Robinson v. Memphis, etc., R. Co.*, §§ 350-362.

§ 291. Public policy does not favor enlarging the liabilities of a common carrier by treating his receipt for the merchandise carried as though in the full sense negotiable paper. Nor can a custom of pledging bills of lading as security for drafts drawn against the merchandise be alleged for thus increasing his risks. *Ibid.*

§ 292. The master of a vessel cannot bind its owner by signing a third bill of lading in blank; and where the shipper fills up such bill and procures an advance upon its security from a bank, the latter, though a *bona fide* holder of such bill for value, cannot hold the ship-owner liable, where delivery at the end of the transit has been made to the holder of the bill properly made out, without previous notice of the bank's claim. *The Joseph Grant*, §§ 363-366.

§ 293. The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded an opportunity for increasing the statement of the number of things shipped, will not render the carrier liable to a holder of the raised bill of lading, especially if the forger was a business associate of the holder. *Lehman v. Central, etc., Co.*, §§ 367-371.

§ 294. While a bill of lading cannot, as respects the contract, be explained by parol, yet as a receipt it is open to such explanation, especially as between the original parties. And if through the mistake of an agent for different vessels the bill of lading acknowledges goods as received for one vessel, when they had rightfully been sent by him on another, the facts of the case must determine which was the actual responsible carrier, provided the shipper still holds the bill of lading and no *bona fide* third person has acquired rights under the document. *The Lady Franklin*, §§ 372-376.

§ 295. Though a local statute should pronounce bills of lading negotiable, it must not be assumed that all the consequences incident to acquiring title in a lost or stolen negotiable instrument necessarily follow. A bill of lading is *quasi* negotiable, rather than negotiable, in its nature. Where, therefore, a stolen bill of lading is taken by a third person, who advances money upon it, he does not acquire title to the goods it represents, as one might who held a stolen negotiable bill or note; but his disregard of suspicious circumstances, and not positive bad faith alone, will impair his title. *Shaw v. Railroad Co.*, §§ 377-384.

§ 296. General doctrines of bills of lading in transportation by water stated. Shippers usually require one bill of lading from a set which is made out. What bills of lading evince. Definition of a bill of lading. Goods embraced under such an instrument, whether already on board or placed on board afterwards. How far such instruments may be contradicted or explained by evidence of usage or a parol agreement. *The Delaware*, §§ 385-392.

§ 297. Where a bill of lading was signed for more in quantity than was actually shipped, the carrier may by parol evidence show fraud or mistake, on an issue of non-delivery as between the original parties to the bill. *Goodrich v. Norria*, §§ 393-393.

§ 298. The receipt, though not the contract, of a bill of lading, is open to explanation; and under receipt is included statements that the goods embraced within the contract have been received on board the vessel and that they are of such a description in point of quantity, quality, condition, marks and numbers. *Ibid.*

§ 299. If a master of a vessel signs bills of lading before goods are on board, and the goods, or part of them, are placed on board afterwards, as the goods therein described, the bills operate on the goods as against both shipper and carrier, no third person's rights having intervened. *The L. J. Farwell*, §§ 397-401.

§ 300. Where only a portion of the wheat designed for the respective consignees is thus placed on board, and the shipper does not direct appropriation to either, the bills become concurrently operative when the wheat is placed on board, and the holders of the bills are made tenants in common and are entitled to share *pro rata* in the wheat actually delivered. Vessel held liable accordingly, the master having appropriated the wheat to one bill rather than the other. *Ibid.* And see *The Idaho*, §§ 880-887.

§ 301. Presumptions and burden of proof in case of loss stated. Where bill of lading states that goods are shipped "in good order," the presumption of good condition corresponds as to

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matters visible and open to inspection; but latent defects may be shown, and the presumption of good condition overcome, by proof to the contrary. The burden of doing this rests upon the carrier. *Choate v. Crowninshield*, §§ 402-407; *Nelson v. Woodruff*, §§ 408-412.

§ 302. Deterioration or spoliation of goods resulting from natural causes or the shipper's own act absolves the carrier, to whom no fault can be imputed. *Ibid*.

§ 303. Proper mode of proving execution of bill of lading stated. Where a bill of lading acknowledges the receipt, in good order and condition, of casks of bristles covered with matting, and also contains the words "weight and contents unknown," nothing as to condition is admitted except what is apparent. In such case the burden is on the shipper to prove the condition of the goods at the time of shipment, unless the external covering is damaged when they are delivered. *The Columbo*, §§ 413-415; *Clark v. Barnwell*, §§ 416-423.

§ 304. Common carriers by water, like common carriers by land, are, in the absence of any legislative provisions prescribing a different rule, insurers of the goods shipped, and are liable in all events and for every loss and damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. *The Maggie Hammond*, §§ 424-437. And see *The Delaware*, §§ 335-392.

§ 305. How far and under what circumstances a carrier may be permitted to deviate stated. *The Maggie Hammond*, §§ 424-437. And see *Hostetter v. Gray*, § 515.

§ 306. How far carrier may be justified in putting back for repairs. Where voyage is long, ships, in order to be seaworthy, should have spare sails. *The Maggie Hammond*, § 434.

§ 307. If vessel be disabled, from some cause not excepted by law or the bill of lading, the master ought with reasonable promptness to tranship and send the goods forward, or else carry in his own vessel, provided he can repair it in a reasonable time. He should not store the goods, enter into a new contract of affreightment and sail for a distant port, unreasonably delaying completion of the original transportation. *Ibid*.

§ 308. Duties of common carriers by water stated, as to providing vessel, crew, etc., stowing cargo and proceeding on the voyage after the vessel was injured. *The Niagara v. Cordes*, §§ 438-450; *The Maggie Hammond*, § 434.

§ 309. Where casks of oil improperly coopered are received on board and stowed near carpeting, the owner of the carpeting may recover of the carrier for damage sustained in consequence of leakage of the casks. Leakage cannot under such circumstances be alleged as caused by "danger of the seas;" the vessel rolling as usual in a voyage, but encountering no severe storm. *The Reeside*, §§ 451-454.

§ 310. Goods for which full freight is charged and a clean bill of lading given should not be stowed on deck, but under deck. Oral conversations before and at the time of giving the bill cannot control or vary the effect of the bill of lading in this respect. *The Wellington*, §§ 455, 456.

§ 311. Where goods are stowed on deck without the shipper's express consent, the vessel is not excused for their jettison during a storm as by a loss from "dangers of the seas" under the bill of lading. A shipper's consent to stowing goods on deck is not presumed; nor will a local custom to that effect be readily inferred; but the burden of proof is on the ship. *The Paragon*, §§ 457-462. And see *The Peytona*, § 550.

§ 312. But if a shipper expressly agrees that his goods shall be carried on deck, he takes the risk as to excepted "perils of the sea," which that place of stowage on the particular vessel enhances. *Lawrence v. Minturn*, §§ 463-470.

§ 313. Where champagne is carried in a deck room with the shipper's assent, the vessel is responsible for serious loss caused by the bursting of the bottles, where the master's failure to properly ventilate the room is the moving cause of the loss rather than the inherent qualities of the wine or the place where the shipper assented to their stowage. For damage or deterioration caused to articles carried, the carrier is answerable if the damage is to be ascribed to his negligence. *The Invincible*, § 471.

§ 314. Injury produced in consequence of negligent stowage is not a "danger of the seas." It is negligent stowage to place packages of nuts, properly marked as such, in the hold of a vessel, where they are liable to injury by "sweating." *The Star of Hope*, §§ 472-474.

§ 315. Where flour is stowed in the usual manner, and the ship is seaworthy, and the shipment is delivered in apparently like condition to that in which it was received, except slight stains upon the barrels from mould or damp, which are not proved to have affected their contents, the vessel is not liable. Nor is the carrier responsible for injuries received by the flour in consequence of the mere sweating of the ship, or because of exhalations arising from other parts of the cargo, which were well stowed and secured. *Baxter v. Leland*, §§ 475-481.

§ 316. Where goods arrived in a damaged condition, and it appeared that there was negligent stowage causing much of the injury, but that some damage would probably have been

caused by peril of the sea in any event, though how much could not be shown, *held*, that the carrier was liable for the whole injury. *Speyer v. The Mary Belle Roberts*, §§ 482-484.

§ 317. Object of dunnage in stowage stated. *Ibid.*

§ 318. Burden is upon the carrier to disprove liability for breakage. How far qualified by special contract with the shipper. Assent of the shipper should be shown; and circumstances showing a stamp put upon the bill of lading, or statements made to one unauthorized to represent the shipper, *semble* are insufficient. But in any event, breakage resulting from the carrier's own negligence is not excused. *Merriman v. Brig May Queen*, §§ 485-490.

§ 319. Question of damage to goods in the hold of a vessel; facts held to establish that "peril of the sea" occasioned the injury, and not the fault of the carrier. *Rich v. Lambert*, §§ 491-498.

§ 320. It is incumbent upon the shipper to see that his goods are of such a character and in such a condition that they will bear the voyage upon which he sends them, if conducted in the usual and customary manner; and under such circumstances he must bear loss by deterioration resulting from the companionship of other articles usually carried with them. *The Bark Colonel Ledyard*, §§ 499-501.

§ 321. But the usage of carrying breadstuffs in companionship with turpentine not being shown, the carrier must bear the loss of damage done to the former by the effluvium of the latter. Damages stated. *Ibid.*

§ 322. Nor is an injury caused to certain articles by the carrier's negligence, inattention or improper stowage, to be excused. *The Reeside*, § 454; *Mainwaring v. Bark Carrie Delap*, §§ 502, 503.

§ 323. Under a bill of lading which excepts "the dangers of navigation," *held*, that the carrier who shows that his vessel, tight, staunch, well manned and well equipped, encountered rough weather with gales, thereby injuring hardware which was properly stowed and protected, makes out such a case of excepted danger as puts the burden of showing contributory negligence upon the shipper. *Hunt v. The Cleveland*, §§ 504, 505.

§ 324. It is a useful and proper precaution for the master to note a protest upon his arrival at the first port after encountering injury by rough weather, but it is not an indispensable duty and only throws doubt and suspicion upon the occurrence. *Ibid.*

§ 325. A river carrier who exposed his vessel and cargo in bad weather in attempting to pass through a bridge is not excused by showing that a sudden gust drove the vessel against a pier so that the cargo was lost. Loss occasioned by imprudent exposure to a tempest cannot be referred to the exception of "dangers of navigation." *The Mohler*, §§ 506-508.

§ 326. "Dangers of lake navigation" being excepted under a bill of lading, a carrier is *prima facie* excused from loss occasioned by the shallowness of water at the entrance of a lake harbor, whereby his seaworthy steamer runs aground, and goods are wet and damaged in consequence. *Transportation Company v. Downer*, §§ 509-512.

§ 327. "Unavoidable dangers of the river" considered. The carrier should furnish evidence tending to show that the accident was unavoidable, before the shipper need prove negligence. Where a barge is made leaky by an effort to remove her from a sand bar, the master should seek to stop the leak and protect the cargo. *The Ocean Wave*, §§ 513, 514.

§ 328. Damage to goods from humidity and dampness is excused under an exception of "dangers and accidents of the seas," unless want of reasonable care and diligence in the carrier as inducing such damage be established. *Clark v. Barnwell*, § 419.

§ 329. Delays of the voyage attributable to boisterous weather, adverse winds, and the like, are "dangers and accidents of the seas." *Ibid.*, § 421.

§ 330. Usage of tow-boats on the western rivers, shown to justify detaching one of a fleet of barges in tow to take on cargo at various adjacent points, leaving the rest tied up at a safer place. *Hostetter v. Gray*, §§ 515-517.

§ 331. The loss of cargo of a barge thus towed by the sinking of the barge in consequence of striking an unknown and concealed obstruction in the Ohio river, *held*, to be excused under the exception of "dangers of navigation and unavoidable accidents" in the bill of lading, no fault upon the carrier's part being shown. *Ibid.*

§ 332. Where a bill of lading of iron contains an exception "not accountable for rust," this does not exempt the carrier from liability occasioned by his negligence; as in case of negligent stowage. *Dedekam v. Vose*, §§ 518, 519.

§ 333. Nor where the unfitness of the vessel as constructed causes the damage. *The Svend*, §§ 520-523.

§ 334. Where goods are in transit by railway, and the carrier is overpowered by a mob which takes possession and destroys the goods by incendiary fire, no contributory negligence on the carrier's part appearing from the facts, the stated exception in a bill of lading as to loss or damage by fire applies so as to exonerate the carrier. *Wertheimer v. Pennsylvania R. Co.*, §§ 524-526.

§ 335. Depredations on a ship's stores or on her cargo, committed by passengers or crew in consequence of a short allowance, made necessary by a long voyage, is not a peril of the sea, within the meaning of a bill of lading. *The Gold Hunter*, §§ 527-531.

§ 336. Notwithstanding an exemption of "perils of the sea," the carrier is liable for theft or robbery, while the vessel is lying off a shore, wrecked, especially if the master be remiss in duty under such circumstances. *King v. Shepherd*, §§ 532-537.

§ 337. So, too, is the carrier liable for failing to keep pumps working as he might have done, and thereby negligently damaging the cargo still further after its injury by a "peril of the sea." *The Ship Shand*, §§ 538-543.

§ 338. Duty of carrier, under exception of "dangers of navigation," stated, where a master, navigating on the great lakes, encountered a storm. In case of doubt, his discretion as to entering port, instead of remaining outside, is upheld; but *held*, that his vessel, having been stranded in the harbor, he was negligent in leaving his injured vessel with cargo aboard, which he might have landed or preserved, and ship-owners held liable accordingly. *The Niagara v. Cordes*, §§ 438-450.

§ 339. Damage or loss being shown, burden is upon carrier to show that it was occasioned by some excepted peril in the bill of lading; but this being shown, it is incumbent upon the customer to show that the peril might have been avoided by reasonable care and diligence; and corresponding default in the carrier appearing, he is chargeable. But where it is left in doubt whether the carrier was culpable, proof of the excepted peril relieves him from liability. *Clark v. Barnwell*, §§ 416-423; *Rich v. Lambert*, § 494; *Transportation Company v. Downer*, §§ 509-511; *Wertheimer v. Pennsylvania R. Co.*, § 525; *The Mohler*, § 506. But see as to showing a leak, *The Schooner Emma Johnson*, §§ 544, 545.

§ 340. Usage, how far admissible. As to stowage, *The Delaware*, § 391; *The Paragon*, § 461; *Baxter v. Leland*, §§ 476, 479. As to deviation, *Hostetter v. Gray*, §§ 515, 516. It cannot modify the contract expression of the bill of lading. *The Reeside*, §§ 451, 452.

§ 341. An animal being delivered at the end of a voyage in a sick and debilitated condition, but without external marks of injury, the presumption is that such condition is due to natural causes and not to the fault of the carrier, and the burden of proof is upon the owner to show otherwise. *Hussey v. The Saragossa*, §§ 546, 547; *The Powhatan*, §§ 548, 549.

§ 342. Acceptance of a bill of lading by the shipper imports knowledge of its terms. *Wertheimer v. Pennsylvania R. Co.*, § 524.

§ 343. Where the master has wrongfully omitted to sign bills of lading and sailed without learning the names of the consignees, his ignorance cannot avail as an excuse for omitting his duties towards them. Though not bound to seek out the consignor for signing the bills, yet if he objects to them when presented and promises to call on the consignor, but sails without doing so, he is in fault. *The Peytona*, §§ 550-554.

[NOTES.—See §§ 555-715.]

POLLARD v. VINTON.

(15 Otto, 7-12. 1881.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi river, and Cincinnati, on the Ohio river, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams & Co. at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for \$5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue. These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered

accordingly. This instruction is the error complained of by the plaintiffs, who sued out the present writ.

§ 344. *Nature of bill of lading; its two-fold character.*

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

§ 345. *Bill of lading signed by a shipping agent does not bind principal more than if signed by master.*

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment. It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

§ 346. *Whether ship-owner is estopped where bill of lading is held by bona fide transferee for value.*

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

§ 347. *Delivery of bill of lading where there are no goods is not within scope of authority of a ship-owner's agent.*

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the ship-owner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority. If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence: "During the month of December, 1873" (the date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, with power to solicit freights and to execute and deliver to shippers bills of

lading for freight shipped on defendant's steamboat, 'Ben. Franklin.'" This authority to execute and deliver bills of lading has two limitations, namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat. Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one. They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped. Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

§ 348. *Former decisions reviewed.*

It appears to us that this proposition was distinctly adjudged by this court in the case of *Schooner Freeman v. Buckingham*, 18 How., 182. In that case the schooner was libeled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libelants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libelants had paid the money and received the bills of lading in good faith. A question arose how far the claimant, who was the real owner, or general owner, of the vessel, could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel; and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner. The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale

of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends."

The court cites, as settling the law in this way in England, the cases of *Grant v. Norway*, 10 Com. B., 665; *Coleman v. Riches*, 16 id., 104; *Hubbersty v. Ward*, 8 Exch., 330; and *Walter v. Brewer*, 11 Mass., 99. See, also, *McLean v. Fleming*, Law Rep., 2 H. of L. (Sc.), 128; *MacLachlan's Law of Merchant Shipp.*, 368, 369. It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world. And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very questions of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice. The case of *New York & New Haven R. Co. v. Schuyler*, 34 N. Y., 30, is much relied on by counsel as opposed to this principle.

§ 349. *Agent for ship-owner may, perhaps, be distinguished from agent for a corporation, as to binding principal by his fraud.*

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent. In the other case *the officer is the corporation* for many purposes. Certainly, a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts. We do not think that case presents a rule for this case.

Judgment affirmed.

ROBINSON v. MEMPHIS & CHARLESTON RAILROAD COMPANY.

(Circuit Court for Tennessee: 9 Federal Reporter, 129-142. 1881.)

STATEMENT OF FACTS.—Action against a railway company upon a bill of lading for thirty-two bales of cotton. The bill of lading was issued by defend-

ant's agent to the (apparent) shipper, who, however, delivered no cotton on it. The holder drew upon plaintiffs and attached the bill of lading to the draft, which the plaintiffs paid. There was a demurrer to the pleas of defendant.

Opinion by HAMMOND, D. J.

No technical objections have been raised as to the form of any of the pleadings in this case, nor has the case been strictly argued on the facts as they appear by the pleadings. The difficulty is that the second and third pleas are not special pleas, stating the particular facts, and amount to no more than the general denial of the first, on which issue has been joined. Of course, if the bill of lading "was given, executed and signed without authority from this defendant," and the demurrer admits this, there can be no recovery in any view of the case; but the allegation amounts to no more than that of the first plea, that the company "did not contract, undertake," etc. Nor is the statement contained in these pleas, that the cotton was never delivered to the company, anything more than this general denial of the first plea; for neither of the pleas admits the bill of lading to have been signed by an agent of the company who would have been authorized to sign it if the cotton had been delivered, although that important fact has been assumed in the argument. The allegation of these pleas, that the bill of lading was "false and fraudulent," is a mere conclusion of law, based upon the other allegations that it was issued without authority, and that no cotton was delivered for transportation. The court understands from counsel on both sides that there was an agent of the defendant company at Jackson authorized to sign bills of lading when cotton was actually delivered to him, or the company's other agents, for transportation,—the defendant contending that this was a special agency arising only on actual delivery of cotton, while the plaintiff treats him as a general agent of the largest powers; that this man Chiles, either by collusion with this agent or by false representations to him, procured him to sign the bill of lading in controversy without any actual delivery of the cotton, attached it to the draft as stated in the declaration, negotiated them as alleged, but never delivered any cotton to the company. This is the case that has been argued, but it is readily seen that it is not precisely the one presented by the record. Inasmuch, however, as counsel have treated these pleas as if the facts stated to the court were contained in them, and seem desirous of taking the judgment of the court on those admitted facts, I shall so treat the case, but will require a special plea to be added, stating the facts something in the form indicated, and reserve the right, if I have mistaken them, to reconsider the case on those to be stated in the plea, or to render the judgment demanded by the record as it now stands.

§ 350. *The question is whether a common carrier is liable to indorsee of bill of lading.*

It will be seen, from this statement of the facts and those contained in the pleadings, that the question is whether or not a common carrier is liable for damages sustained by the indorsee of a bill of lading, issued by its agent, binding it to deliver merchandise never in fact delivered to the carrier for transportation, where there is an allegation of special damage sustained by reason of the fact that the indorsee has advanced money on the faith of a receipt of the goods by the carrier, as expressed in the bill of lading. That the plaintiffs believed this cotton was in the hands of the carrier, as certified by its agent, under a contract to deliver it to the order of Chiles, there can be no doubt. I cannot see that it is material whether this agent trustingly confided in the misrepresentations or promises of Chiles, or whether he fraudulently conspired

with him to do the wrong. The question is, who shall suffer the loss, the railroad company or the plaintiffs? If I may use the language of Mr. Justice Field: "The question involved is one so often unfortunately raised in courts of justice as to which of two innocent parties is to suffer by the dishonest dealing of a third, and the only course open to a court in such case is to ascertain upon which of the parties the loss is cast by the operation of the rules of law applicable to the case, and decide accordingly. In this action the question is one of considerable mercantile importance, and I have taken time to consider the authorities applicable to it, but the legal result of the facts has always seemed and now seems to me plain." *Glyn v. E. & W. India Dock Co.*, 5 Q. B. D., 129, 132.

But, notwithstanding this seeming confidence, the judgment of that learned court was, as the one I am about to give may be, reversed on writ of error, and the case is, though not precisely like this, very instructive here. The shipper and consignee received from the master three bills of lading,—or rather one bill of lading in three parts, as is sometimes customary,—marked "first," "second" and "third." The first he indorsed to the plaintiffs for advances made, and afterwards the goods being entered at a warehouse in the shipper's name, he dishonestly gave orders to other persons for the goods, assigning the "second" part of the bill of lading, upon which the goods were delivered. The plaintiffs sued the warehouseman, and the queen's bench division gave judgment for the value of the goods. That court calls attention to the fact that the carrier would not have been liable, though the concession is somewhat reluctantly made, because he was not bound to settle conflicting claims, and might deliver the goods to an apparent owner holding either part of the bill of lading. I have not seen the report of the judgment of the court of appeal reversing the queen's bench division, but it must have been on the ground that the warehouseman was equally protected with the carrier. 15 Am. Law Rev. (N. S.), 156.

§ 351. *The law does not readily impose liabilities upon common carrier beyond his public duties as such.*

I cite the case to show that while the law holds a carrier to a very rigid and often harsh degree of liability for the performance of his contract *qua* carrier, it does not readily impose any outside liability or embarrassment upon him. And this is in the interest of commerce, and in pursuance of that public policy which encourages the unembarrassed transportation of goods by common carriers. Their business is that of transportation, and they are not engaged in issuing bills of lading as negotiable securities, to be used as such for the convenience of bankers, brokers and commercial men. A bill of lading is issued primarily as an evidence of their executory contract to carry, and the acknowledgment of the receipt of the goods for that purpose is only incidental,—the mere averment of a fact for the purpose of founding thereon the contract to carry. Now, commercial men have, from time immemorial, for their own advantage, and not at all for that of the carrier let it be remembered, treated these documents as convenient symbols or muniments of title, and as instruments of transfer of title, and they have, for that purpose, acquired among them a *quasi* negotiability or capacity to pass from hand to hand by indorsement. But the carrier is not at all benefited by this, and it is not for his gain that it is done. Mr. Justice Clifford defines a bill of lading thus: "Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport and right delivery of the same, upon

the terms as to freight therein described, the extent of the obligation being specified in the instrument." The Delaware, 14 Wall., 579, 596.

§ 352. *Carrier should not be held on bill of lading like one issuing negotiable paper.*

It seems to me, with all deference, that it is a misapprehension of the true character of this instrument, and of the true relation of the parties to it, to treat it as if the maker were engaged in the business of issuing negotiable securities, which he is bound to protect at all hazards in the hands of a *bona fide* purchaser for value; or, as it is expressed in argument here, to protect those who innocently and in good faith deal with it. This entails a liability *dehors* the contract. It makes the carrier an insurer or guarantor of strangers to the contract against loss incurred by a use of the instrument in which the carrier has no interest, and binds him to a liability for which he is not paid; for the comparatively small sum he receives as compensation for carriage will not, and is never intended to, cover or insure him against loss incurred by such a liability as that. The consideration he receives is not commensurate with the liability sought to be imposed, and if it is determined to exist, carriers must necessarily add to the freight a sum sufficient to indemnify them, as insurance companies are; and this for the protection of outside parties dealing in matters not pertaining to the carriage of the goods. Moreover, it obstructs the carrier in his proper business, and entails upon him the selection of agents possessing not only the ordinary mental and moral qualifications essential to the receiving, handling and carriage of merchandise, but those having the relatively higher qualifications required of bank cashiers or other agents intrusted with the duty of issuing, signing and handling bank notes, negotiable bonds, or like securities. It does not seem to me in the interest of commerce to compel carriers either to so increase the rates of compensation or to confine them to the selection of agents as banks and trust companies are confined.

§ 353. — *one about to advance on such bill of lading should ascertain that it is not false.*

And these considerations cannot be overlooked or overborne by the supposed benefits of having the commercial world supplied with an assurance against inconvenience in their dealings, not with the carrier, but each other. To illustrate by this case, it is plain that the Bank of Madison, when it discounted the draft and took the bill of lading, could have known, being in the same town, by sending a messenger to the agent, depot or warehouse of the company, that this was a false bill of lading. So, although these plaintiffs in New York could not so readily have ascertained that fact, they could have protected themselves by refusing to accept the drafts until the cotton had arrived, or until by telegraph they had assured themselves of the existence of the cotton. 16 Am. L. Reg. (N. S.), 1. They both, no doubt, trusted more to the ordinary honesty of human nature and the particular honesty of Chiles, than they did to this bill of lading, or at least as much; and, at all events, the person who signed the bill of lading trusted to that honesty, if he was not *particeps criminis*, and I do not see why one should lose more by the trust than the other. And in this connection it must be remembered that Chiles was the plaintiff's regular customer. *Hoffman v. Bank of Milwaukee*, 12 Wall., 181, at p. 190. Certainly, in my judgment, an extraordinary liability so beyond the scope of the actual contract of the carrier, and beyond the general business he is engaged in, should not be imposed to save a bank from the inconvenience of sending a messenger a few squares in the same town, or yet to expedite by a few days cr

moments the dealings between a cotton factor and his customer, upon any theory that it is in the interest of commerce to do this. A factor must attend to the honesty of his customer, and so a bank; and they should know that a common carrier is confined to the business of carrying goods actually delivered, has no liability till they are delivered, and that delivery, and not the signing of the bill of lading, is the initial point of the contract and the liability.

§ 354. — *cases reviewed on this point.*

Mr. Justice Willes said, in a case involving a fraudulent dealing with a bill of lading, that "Arguments founded upon the notion that the court is to pronounce a judgment in this case which will protect those who deal with fraudulent people are altogether beside the facts of this case and foreign from transactions of this nature. To attempt such a task would be idle; to accomplish it, impossible. We must apply our minds to the facts of the case before us, and see what is their true bearing, and what is the proper conclusion we ought to arrive at in respect to the litigant parties, without considering what may hereafter happen to persons who omit to use diligence and consequently to have the misfortune to be overreached." And this was emphasized, when the case went to the house of lords, by Lord Chancellor Hatherley, in language I forbear to quote, only because it requires space to present it properly. *Meyerstein v. Barber*, 2 C. P., 38, 51; S. C., 4 H. L., 317, 332. The holder of the first two parts of a bill of lading, who had made advances on it, sued, in that case, the holder of the third part, who had in good faith, relying on the bill of lading, purchased the goods, and recovered their value, notwithstanding the argument just alluded to, which is the same suggested by the averments of the declaration and pressed in argument here. The principle established is that because others may deal fraudulently with bills of lading furnishes no ground for the court, in the supposed interest of commerce, to disregard the ordinary rules governing the contract of the parties in order to protect those who carelessly neglect to take the precautions that would protect themselves.

§ 355. *Bills of lading are not negotiable instruments.*

The rule contended for would make bills of lading in this respect negotiable, like bills of exchange or other representations of money, which they are not. 2 Daniel, Neg. Inst. (2d ed.), §§ 1727, 1751. Mr. Justice Strong puts this claim for them at rest when he says: "The function of that instrument is entirely different from a bill or note. It is not a representation of money used for transmission of money, or for the payment of debts, or for purchases. It does not pass from hand to hand, as bank-notes or coin. It is a contract for the performance of a duty. True, it is a symbol of ownership of the goods covered by it — a representation of those goods. . . . Bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representations of money, and charged the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of indorsers, the duty of demand *ad diem*, notice of non-

delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief." *Shaw v. Railroad Co.*, 101 U. S., 557, 564 (§§ 377, 384, *infra*). If a statute like that described by the learned justice does not so result, how can a careless belief of the plaintiffs in this case, that this bill of lading was what it purported to be, have the effect of subjecting the carrier to the same liability as if it had issued a bill of exchange or promissory note without receiving the consideration for it? Or the same result as if an agent, authorized to sign its notes, had executed and negotiated one on his own account to defraud the principal? *Lowell Bank v. Winchester*, 8 Allen, 109.

§ 356. — *usage cannot be set up to enlarge carrier's liability in this respect.*

Nor do I see why the local or special custom averred in this declaration, or any general custom of dealing with bills of lading as if they possessed this element of negotiability, should give it to them as against the carrier, or enlarge his liability on them. *Whart. Ag.*, §§ 134, 675, 676; *The Reeside*, 2 Sumn., 567, 569 (§§ 451-454, *infra*); *Turney v. Wilson*, 7 Yerg., 340; 6 So. Law Rev. (N. S.), 845; *The Delaware*, 14 Wall., at pp. 602, 603 (§§ 388-392, *infra*); *Blake-more v. Heyman*, 6 Fed. R., 581.

§ 357. — *whether principal is thus estopped to repudiate agent's receipt as to innocent third party for value.*

The most plausible argument in favor of the plaintiffs is that the carrier, having authorized an agent to sign bills of lading, is estopped to deny the receipt of the cotton when the bill of lading has passed into the hands of an innocent party, and should be held precisely as if it had received the cotton and failed to deliver it to the plaintiffs. I doubt whether a factor and his principal occupy such a relation to each other in their dealings as will justify either in saying of their common or mutual carrier that he is the carrier for the other, so as to take the case out of the category of one between the original parties, where there is not the least doubt that the carrier is not estopped to explain his receipt by showing it to be a false one, or only partially a true one. *The Lady Franklin*, 8 Wall., 325 (§§ 372-376, *infra*). But, passing that question, there can be no doubt that one should not be estopped by the conduct of another, unless that other is acting for him in the premises. *Big. Estop.*, 442; *id.*, 429; *Whart. Ag.*, 127-139; 13 Am. L. Reg. (N. S.), 657; *Planters' Bank v. Merritt*, 7 Heisk., 177; *Merchants' Bank v. State Bank*, 10 Wall., at p. 675. It is sometimes said that the principal is estopped where the agent acts within the *apparent* scope of his authority, and this may be conceded here. But this railroad company did not authorize this agent to sign false or fictitious bills of lading. It said to the community: We are engaged in carrying merchandise to New York or elsewhere over our lines, and we place this man here to receive such as you have for transportation, and authorize him to give you a receipt for it, and a written contract stipulating for its transportation. They did no more than this, and no more can be fairly inferred from what they did. It was not within the apparent scope of this authority to sign and issue documents for the mere purpose of having them attached to drafts or otherwise pledged as collateral security, irrespective of the actual possession of goods to be carried. It may well be doubted whether the directory itself, or the body of the stockholders even, could authorize the company to issue bills of lading without the merchandise in hand to be used for any purpose. The charter does not authorize such a business, and the company is not engaged in it. Therefore, it seems to me plain that the agent's authority, actual and apparent, was limited to issuing bills of lading on goods in hand, and all else was outside

the agency, unless we are to treat these documents as against the carrier just as if they were as negotiable in this respect as bills and notes, which we have seen we are not authorized to do. Indeed, a bill of lading is not necessary at all, and the carrier's liability is fixed by delivery of the goods without it. *Fox v. Hall*, 36 Conn., 558; S. C., 4 Ben., 278; *Shelton v. Merchants' Co.*, 4 J. & S. (N. Y.), 527; *Hutch. Car.*, §§ 118, 729. A general railroad agent may sometimes bind the company within the general scope of its own powers, but not a mere station agent, freight receiver or conductor. *Atlantic, etc., Railroad v. Reisner*, 18 Kan., 458; *Whart. Ag.*, § 222; *id.*, §§ 57-59, 129, 172, 478, 670, 671, 677; *Story, Ag.*, § 69; *Cox v. Midland R. Co.*, 3 Exch. (Wils., Hurl. & Gord.), 268.

§ 358. *Cases reviewed.*

The case of *Farmers', etc., Nat. Bank v. Erie R. Co.*, 72 N. Y., 188, illustrates the class of acts within the scope of the authority of this kind of agent, and shows where the corporation is liable for their neglect. It was a bill of lading issued to the wrong person on goods received, and the carrier was liable to the rightful owner, notwithstanding it delivered to this fraudulent consignee. Of course the company did not authorize an agent to issue to a wrong person, but having received the goods of the rightful owner its liability was fixed, and the agent was neglectful within the scope of his authority over the goods. It was his business to deliver to the rightful owner, and it was negligence to deliver to another. Signing the bill of lading to the wrong person was only an incident of that neglect. Another illustration is found in *Bradstreet v. Heran*, 2 Blatch., 116, where a master signed a bill of lading, representing that the goods shipped were in good order; and another in *Relyea v. Rolling Mill Co.*, 42 Conn., 579, where the bill of lading represented that there was a larger quantity than was actually shipped, and libels to recover freight were dismissed. But see *Blanchet v. Powell*, 9 Exch., 74. But there being no goods delivered to the carrier, no agency to sign a bill of lading is called into being; indeed, there is no carrier, for there are no goods to be carried. There is a ship or a railroad, but it is not, as to any given person, a carrier without the goods, and it is only as carrier that a bill of lading, in the nature of the thing, binds the company or owner. The master of a ship has a more comprehensive agency than a station or freight agent of a railroad, and he has no authority, actual or apparent, to issue bills of lading until the goods are delivered to him or to the ship, and it took a statute in England to make him even personally liable to one injured by such bill of lading. 3 Kent (12th ed.), 207, and note; 1 Pars. Mar. Law (ed. 1859), 135, 137, and notes; 1 Pars. Ship. & Ad. (ed. 1869), 187, 190, and notes; 2 Daniel, Neg. Inst. (2d ed.), §§ 1729, 1733; 1 Chit. Cont. (11th ed.), 7, note *e*; *Hutch. Car.*, §§ 122, 123, 124; 2 Jac. Fish. Dig., 1654, and cases cited by these authorities; 18 and 19 Vict., c. 111, § 3; *Jessel v. Bath*, 2 Exch., 267; *Brown v. Powell Col. Co.*, 10 C. P., 562; *Grant v. Norway*, 10 Com. B., 665; 70 Eng. Com. Law, 664.

These authorities establish beyond dispute that where a master signs a bill of lading for goods not received, or for more than are received, he acts beyond his authority, and the owner is not liable either to the original shipper or any assignee of the bill of lading, whether he makes advances on the faith of it or gives value for it or not; neither is the owner estopped to show the facts as they really exist. Some courts have reluctantly yielded to this principle, and some have sought to restrict or qualify it in the supposed interest of commercial dealing; but in England, although a statute makes the individual signing

the bill of lading liable, it goes no further, and the doctrine of *Grant v. Norway*, *supra*, has withstood the assaults upon it and is established law. It has been approved by the supreme court of the United States, and directly or in principle by other federal courts. *Schooner Freeman v. Buckingham*, 18 How., 182; *Vandewater v. Mills*, 19 How., 90; *The Lady Franklin*, 8 Wall., 325; *The Keokuk*, 9 Wall., 517, 519 (§§ 84, 85, *supra*); *Bulkley v. Naumkeag Co.*, 24 How., 386, 392 (§§ 86-92, *supra*); S. C., 1 Cliff., 322, 328; *The Loon*, 7 Blatch., 244; *The Grant*, 1 Biss., 193 (§§ 363-366, *infra*); *The May Flower*, 3 Ware, 300; *The Edwin*, 1 Spr., 477; *The Leonidas*, 1 Olc., 12; *The Marengo*, 6 McL., 487 [1 Spr., 506]; *McCready v. Holmes*, 6 Am. L. Reg. (O. S.), 229; *The Brown*, 1 Biss., 76; *The Wellington*, *id.*, 279, 280 (§§ 455, 456, *infra*); *The Tuskar*, 1 Spr., 71; *Sutton v. Kettell*, *id.*, 309; *Blagg v. Phoenix Ins. Co.*, 3 Wash., 5; *Dixon v. Railroad Co.*, 4 Biss., 137, and note at page 147; *Bradstreet v. Heran*, 2 Blatch., 116; *Relyea v. Rolling Mill Co.*, 42 Conn., 579. It must be conceded, as is contended here, that none of these cases were against railroad companies—the case of *Dixon v. Railroad Co.*, *supra*, being cited only for the note as a collection of authorities; and in *The Lady Franklin*, *supra*, *Relyea v. Rolling Mill Co.*, *supra*, *Bradstreet v. Heran*, *supra*, there are intimations, and in two of them something more than intimations, perhaps, that the rule might be different where the case is embarrassed by advances being made on the faith of the bill of lading. But it is thoroughly settled that there is no distinction between a bill of lading given by a carrier on land and one given by a carrier on water. Mr. Justice Story says as much, and that “each means the same obligation and liabilities, and is subject to the same duties.” *King v. Shepherd*, 3 Story, 349, 360 (§§ 532-537, *infra*). The learned annotators of *Lickbarrow v. Mason*, 2 Term R., 63 (S. C., 6 East, 21), say: “It has, indeed, been questioned whether a receipt given by a carrier for goods or merchandise placed in his hands for transportation from one part of the same country to another, along the line of a canal or railroad, is a bill of lading in the sense of the commercial law, or within the rule of *Lickbarrow v. Mason*. But this doubt has but little foundation in reason, and is impliedly excluded by the decisions in this country, which treat the legal effect of instruments of this description as the same, whether the property which they represent is carried by land or across the ocean.” 1 Smith, Lead. Cas. (7th ed.), 1205, marg. p. 900. See, also, 2 Daniel, Neg. Inst. (2d ed.), § 1732; 1 Parsons, Ship. & Adm., 134; Bouv. Law Dic., tit. “Bill of Lading,” and cases cited.

§ 359. *Bill of lading given for carriage by sea is not peculiar in this respect.*

The argument of learned counsel for the plaintiffs, that this exemption of the owner of a ship from liability for the fraud of the master in issuing a false bill of lading grows out of the peculiarities of the laws of the sea, and is founded on the principle that the ship is bound to the freight and the freight to the ship, is a misapprehension, I think, of the meaning of the supreme court in *The Schooner Freeman Case*, for the court distinctly places its judgment as well upon the want of authority in the master as an agent. See *The Williams*, 1 Brown, Adm., 208; *The Pauline*, 1 Biss., 390.

§ 360. *No distinction tenable in favor of innocent third parties as to a false bill of lading.*

And in respect to the intimations that there is a different rule between an assignee who has in good faith advanced money on the faith of the bill of lading and the original parties, I can only say that, in my judgment, no such distinction exists. These intimations are all founded on doubts and conflicts

that were set at rest by *Grant v. Norway*, which is a direct authority against them. The *Schooner Freeman* Case approves that of *Grant v. Norway*, was itself a case of advancement of money on the faith of a false bill of lading, and must bind us here, both in its principle and its precedent. Besides, I have no doubt, for the reasons I have stated, that it is the correct principle, and it is a mistake to suppose that the interests of commerce require that the common carriers of the country shall become the insurers or guarantors of merchants who choose to make, in their dealings with each other, a convenience of their bills of lading.

§ 361. *Conflicting state cases reviewed.*

It is proper that I should give attention to the conflict of authority in the state courts, though in this matter of general commercial law I should feel at liberty to act independently, without attempting to reconcile the conflict, and follow the guidance that seems to me plainly pointed out by the federal adjudications I have consulted. The New York commission of appeals has deliberately overruled both the courts of England and the supreme court of the United States, though the lamented author of *Hutchinson on Carriers* seems to distinguish the case, and the court itself somewhat relies upon the distinction; and the responsibility for any want of uniformity on the subject must rest on that court. *Armour v. Michigan Cent. R.*, 65 N. Y., 111; *Hutch. Car.*, § 124. The supreme court of Kansas adopts this view of the New York court in the case of *Savings Bank v. Railroad*, 20 Kan., 519. On the other hand, the supreme courts of Maryland, Louisiana, Missouri, Massachusetts and Ohio sustain *Grant v. Norway* and the *Schooner Freeman* Case in opinions that are instructive and conclusive to my mind. There may be other cases on both sides, but these are sufficient for the present purpose. I find no Tennessee case on the subject, and it is proper to say that the decision in Maryland to which I refer inspired a statute since passed to make bills of lading negotiable, the effect of which upon the principle we are considering has not been determined. *Baltimore & Ohio R. v. Wilkins*, 44 Md., 11; *Tiedman v. Knox*, 53 Md., 612, 615; *Fellows v. Powell*, 16 La. Ann., 316; *Adams v. Trent*, 19 La. Ann., 262; *Hunt v. Mississippi Cent. R.*, 29 La. Ann., 446; *Louisiana Nat. Bank v. Lavielle*, 52 Mo., 380; *Dean v. King*, 22 Ohio St., 118; *Sears v. Wingate*, 3 Allen, 103; 1 Meigs' Dig. (Tenn., 2d ed.), p. 384, § 396; *id.*, p. 411, § 420, subs. 3. The Massachusetts case formulates the rules of law on this subject, the third of which says: "When the master is acting within the limits of his authority the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board."

§ 362. *Under a bill of lading, holder may sue for non-delivery.*

A question is made by the defendant that the plaintiffs cannot sue in their own name because it is contended that the assignment of a bill of lading goes no further than to give the assignee a right to bring replevin or trover for the goods or some action connected with his ownership, and does not assign the right to bring an action for a breach of the contract of affreightment. This was never so in our admiralty courts, though for a long time such was the contention in courts of law. But now, as the authorities already cited and numerous others show, the assignment carries the right to bring an action against the carrier for loss or non-delivery. This would be certainly so under the influence of our code, which makes all bills for the performance of any duty assignable, and our decisions collected in Meigs' Digest at the places above

cited. T. & S. (Tenn.), Code, § 1967; The Thames, 14 Wall., 98 (§§ 859-864, *infra*); S. C., 3 Ben., 279; 7 Blatch., 226; The Vaughan and Telegraph, 14 Wall., 258; Curry v. Roulstone, 2 Tenn., 110; Newcomb v. Boston, etc., R., 115 Mass., 230; Merchants' Bank v. U. R. Co., 69 N. Y., 373; 1 Am. Lead. Cas. (4th ed.), 323; 1 Smith Lead. Cas. (7th ed.), 816; *id.*, 1147, 1227; Hutch. Car., §§ 720, 737; 2 Daniel Neg. Inst., c. 54. Demurrer overruled.

THE JOSEPH GRANT.

(District Court for Wisconsin: 1 Bissell, 198-197. 1857.)

STATEMENT OF FACTS.—Proceeding *in rem* brought by the Marine Bank of Chicago against the schooner J. R. Grant for not delivering a cargo of grain on account of the bank to Fitzhugh & Littlejohn, millers in Oswego. Chapman, the Chicago agent of the Oswego firm, freighted the J. R. Grant in Chicago with eighteen thousand seven hundred and forty-four bushels of corn, to be transported to his principals in Oswego. Duplicate bills of lading were made out, consigning the corn to Fitzhugh & Littlejohn. One was signed by the master of the schooner, the other by Chapman, and a third bill was signed in blank by the master. After the schooner had left on its voyage, Chapman, in order to cover advances made by the Marine Bank on his drafts to Fitzhugh & Littlejohn, filled out the bill of lading signed in blank, consigning the corn to his principals for account of the Marine Bank. When the vessel arrived at Oswego the cargo was delivered according to the bill of lading which Chapman had signed and delivered to the master, the latter having no notice of the delivery of the bill of lading which he had signed in blank. A few days afterwards Fitzhugh & Littlejohn failed in business, and the bank now brings this action against the vessel for not having delivered its cargo according to the bill of lading delivered to it.

§ 363. *Parol evidence, when admissible to explain a bill of lading.*

Opinion by MILLER, J.

So far as a bill of lading partakes of the character of a receipt, it is open to explanation between the parties to it, but as a contract, when legally executed by the proper party, in the proper and usual manner, the master or owner of a vessel shall not be permitted to show a mistake in stating the destination of the property, unless when fraud or imposition is practiced on the party. Flanders on Shipp., § 479 and note.

§ 364. *The master of a vessel is the general agent of the owner to sign bills of lading.*

The masters of vessels employed in the lake trade are considered the agents of the owners, to sign bills of lading of goods received on board for transportation. Usually triplicate bills of every shipment are made out,—one is signed by the shipper, which goes with the vessel as a guide for delivery, two are signed by the master, one of which is retained at the place of shipment, and the other is forwarded to the consignee. The master is the general agent of the owner, and his acts in the scope of his duties as such bind the vessel. In the exercise of the duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated. The acts of agents do not derive their validity from professing, on the face of them, to have been in the exercise of their agency. But the facts in relation to the powers and duties of general agents are neces-

sarily inquirable into by the court. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat., 326.

§ 365. *How far owner may inquire into circumstances as to a third party holding bill of lading.*

The bank did not acquire an interest in the cargo or any service of the vessel by the shipment. It became an apparent assignee of the cargo, subsequent to the date of the bill of lading and the departure of the vessel. The libel raises the question whether the bill of lading created a maritime contract between the master and the bank binding on the vessel, to estop the owner from inquiring into the circumstances attending it. The owner is not estopped from inquiring into the necessity of a sale of his vessel by the master, or of his creating a lien by a bottomry bond, or of his purchase of supplies. Maritime liens are *stricti juris*, and will not be extended by implication or construction. *Vandewater v. Mills*, 19 How., 82; *Thomas v. Osborn*, id., 22; *Pratt v. Reed*, id., 359; *Tod v. Pratt*, id., 362.

§ 366. *The master of a vessel cannot bind owner by signing a bill of lading in blank.*

When the master, as agent, receives goods on board and gives a bill of lading, a contract is made between the shipper and the vessel. But he cannot bind either the vessel or its owner by a receipt for goods not delivered on board, for it is not a contract entered into by the master in good faith, or within the scope of his authority; and the general owner is not estopped from proving the facts, even against a *bona fide* holder of the bill of lading. *Grant v. Norway*, 2 Eng. L. & Eq., 337; *Schooner Freeman v. Buckingham*, 18 How., 182. The master has no apparent authority to sign a bill of lading for goods not actually shipped, and there can be no implication that the owner of the vessel consented that false pretenses of contracts, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. To sign a bill of lading made out in full, describing the goods shipped, is within the authority of the master, but not a blank bill. A blank bill of lading is no contract binding on the vessel or owner. The master has no implied authority from the owner to sign any such paper. An agent of limited powers cannot bind his principal when he exceeds those powers. *Schimmelpennich v. Bayard*, 1 Pet., 264; *Manella v. Barry*, 3 Cranch, 415; *Lanusse v. Barker*, 3 Wheat., 101; *Parsons v. Armor*, 3 Pet., 413; *Owings v. Hull*, 9 Pet., 607. Signing a blank bill of lading by the master should no more bind the vessel than signing a bill of lading of goods not put on board, or putting goods on board without the knowledge or consent of the master or receiving officer; but in such case the vessel may charge for freight of goods actually carried. The vessel departed from Chicago, under a bill of lading signed by the owners of the cargo by their agent and by the master, in which the cargo was consigned to said owners, *Fitzhugh & Littlejohn*. The cargo was so delivered in due course, without any knowledge on the part of said owners, or of the master, of the third bill of lading having been filled up and delivered to the Marine Bank. The vessel had no goods on board consigned to *Delos DeWolf*, cashier, on account of the Marine Bank, for *Fitzhugh & Littlejohn*. No maritime lien attached to the vessel in favor of the bank, and the libel must be dismissed, with costs.

LEHMAN v. CENTRAL RAILROAD & BANKING COMPANY.

(Circuit Court for Alabama: 12 Federal Reporter, 595-600. 1892.)

§ 367. *Whether the carrier is liable for the forgery of the shipper in raising a bill of lading.*

Opinion by Woods, J.

STATEMENT OF FACTS.—The gravamen of the complaint is that the defendant so negligently performed its duty in respect to the making out of the bills of lading that it was in the power of any one to commit the fraud alleged. The question is, does the fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, render the common carrier liable for any loss occasioned by the forgery of the shipper in raising the bill of lading? We think that upon the weight of reason and authority the question must be answered in the negative.

§ 368. *Analogous cases of negotiable paper.*

The cases most nearly resembling this are those in which a promissory note has been executed complete upon its face, in which there are blanks left by the maker, in which, after the delivery of the note, additional words, without the assent of the maker in the drawing, had been inserted, increasing the amount of the note, or the rate of interest, etc. Such notes have been held to be void in the hands of a *bona fide* holder. The rule established by the authorities seems to be that where a note complete on its face and not intrusted by the maker to any one for the purpose of being filled up or added to, but which is afterwards altered without the authority or assent of the maker, by the insertion of additional words in blank spaces therein, the maker cannot be held to have contracted with every subsequent innocent holder who may thereby be defrauded, and is not liable to him in an action on the note in its altered form. *Greenfield Savings Bank v. Stowell*, 123 Mass., 196, and cases therein cited. In *Wade v. Withington*, 1 Allen, 561, the defense that a note for \$100 had been fraudulently altered after it had been signed, by inserting the words "and forty," was sustained against a *bona fide* indorser, although the alteration could not be detected on the most careful scrutiny. So in *McGrath v. Clark*, 56 N. Y., 34, when a blank left in a note was filled with the words "with interest" after it had been signed by the maker, and indorsed by the payer, and the words were inserted without the assent of the indorser, it was held that the note was void as to the latter. Chief Justice Church, in delivering the opinion of court, said: "The rule that when one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, is not applicable, for the reason that the indorser did not in any legal sense enable the maker to make the alteration. He indorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to change or alter it. If it did, indorsers would occupy a perilous position."

In the case of *Worrall v. Gheen*, 39 Penn. St., 388, a printed form of a promissory note had been filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. Upon this case the court said: "If the same had been left entirely blank the impression would have been that the parties authorized the holder to act as their agent in filling it in, and they would have been bound accordingly. But when the sum is actually

written, we can make no such inference from this fact that there is *room to write more*. This fact shows carelessness, but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder." In *Holmes v. Trumper*, 22 Mich., 427, it was held that a promissory note which consisted of a printed blank, with the amount and time and place of payment filled in writing, and was altered, without the knowledge and consent of the maker, by adding after the printed words "with interest at," at the end of the note, the words "ten per cent.," was thereby rendered void even against an indorser who bought it in good faith. The court said: "The argument for the plaintiff amounts simply to this: that by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word "at" and to draw a line through the blank which followed it, and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way." But the court held the argument not to be sound, and declared that "whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should be equally protected from its alteration by forgery, in whatever mode it may be accomplished, unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence, as acting for him. He has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been."

To the same effect is the case of *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264 [S. C., 1 N. W. Rep. (N. S.), 491], in which it was held that where a negotiable note for \$10 was executed with a blank preceding the amount, and afterwards the words "one hundred and" were fraudulently inserted before the word "ten," and there was nothing in the note to excite suspicion, and it was subsequently transferred to the innocent holder, the latter could not recover on the note. In the case of *Wood v. Steele*, 6 Wall., 80, the suit was upon a promissory note, which after its delivery had, without the assent of the maker, been altered by altering the date of its maturity. The court held that the alteration extinguished the liability of the maker, and remarked: "The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he had as little reason to anticipate the one as the other. The law regards the security, after it is altered, as an entire forgery, with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly."

These citations show the drift of American authority on the question, and they are not opposed by any English decision. In the case of *Young v. Grote*, 4 Bing., 253 (S. C., 12 Moore, 484), the drawer had left with his wife checks signed by himself in blank, and the fraudulent alterations were made by his clerk, who was directed by his wife to fill out the check, and it having been found by an arbitrator that the maker had been guilty of gross negligence by causing his check to be delivered to his clerk in such a state that the latter could, and did by the mere insertion of additional words, make it appear to be his check for a larger sum, it was held by the court that he could not recover that sum from his banker, who had paid it. The ground upon which this decision rests is that the check was drawn in so negligent a way as to facilitate the forgery, and to exonerate the banker from liability to his customer from paying the amount that the latter, as it seems, gave authority to the party to

fill up the check in the way it was filled up. See *Robarts v. Tucker*, 20 L. J. (N. S.), Q. B., 270; 16 Q. B., 560.

§ 369. — *rule applies with greater force to bills of lading.*

But this case is clearly distinguishable from the case of promissory notes above cited. (1) The relation of the maker of a promissory note and the indorser is entirely different from that held by a customer to his banker. The contract of the banker with his customer is to honor the latter's checks, and if the negligence of the customer affords opportunity to the clerk or other person in his employ to add to the terms of a check, and thereby mislead the banker, the customer is held liable to the banker. (2) There was no alteration of the check after it left the hands of the drawer's agents. The alteration was made by the banker's own agents, to whom he had intrusted his blank checks. We may, then, take it as settled that when the maker of a note uses a printed blank, and fills in the amount for which he intends to become liable, leaving a vacant space to the left of the amount, in which, after the note has been put in circulation, words are fraudulently inserted which increases the amount of the note, the liability of the maker upon the note is extinguished, and no recovery can be had therein against him.

(3) This rule should apply with greater force to bills of lading, which are not negotiable commercial paper in the sense of bills of exchange or promissory notes. The conclusion is therefore inevitable that no suit could have been maintained by the plaintiffs, the consignees, on the bills of lading mentioned in the complaint. If that be true, is there any ground for holding the defendant liable for its alleged negligence in filling up the bill of lading? Because, by the negligence charged, Johnson could the more easily commit the crime of forgery, is the defendant to be held civilly liable for the consequence of that crime? If a grantor leaves a blank in a deed, of which the grantee takes advantage by inserting words which increase the amount of land which the deed purports to convey, and thereby cheats and defrauds a subsequent grantee, is the first grantor liable for the damages sustained by the last grantee? To ask the question is to answer it. No one is bound to presume that the parties with whom he deals are ready to commit crime, or is bound to take precautions to prevent it. "Is it not a rule that everyone has a right to suppose that a crime will not be committed, and to act on that belief?" *Bramwell, L. J., in Baxendale v. Bennett*, note to *Knoxville Bank v. Clarke*, 33 Am. Rep., 137. In writing promissory notes and bills of lading, and other contracts which are to pass into the hands of others, everyone has a right to presume that the criminal laws of the land will protect the paper from felonious alteration, and if crime is not thus restrained he cannot be held civilly liable for the resulting damages. A failure to take all precautions to prevent the felonious alteration of a contract in writing is not negligence. The maker of the paper has the right to presume that no such alteration will be made.

§ 370. *Leaving blank space does not render carrier liable.*

I am therefore of opinion that the leaving of a blank space in the bill of lading filled up by Johnson does not make defendant liable for the damages resulting from Johnson's forgery. Here is another ground on which we think the demurrer ought to be sustained. Before the making of the bills of lading there were business relations between the plaintiffs and Johnson. The complaint shows that the plaintiffs had given him a letter of credit, the plain purpose of which was to enable him to buy cotton to be consigned to the plaintiffs, and the fair presumption is that the object of the arrangement was gain to both parties.

§ 371. *Further considerations; the forger was business associate of the plaintiffs, etc.; his forgery the direct cause of loss.*

Pursuant to their understanding Johnson buys cotton, and, expecting to draw a bill on the plaintiff for the purpose of paying for it or other cotton to be shipped to them, he delivers the cotton to defendant and takes a bill of lading for it, by the terms of which it is to be delivered to the plaintiffs as consignees. He thereby transfers the title of the cotton to the plaintiffs. Now, if not the agent of the plaintiffs in this transaction, he is their business associate and customer. To hold the railroad company responsible to the plaintiffs for the damages resulting from a crime committed by their own customer in conducting the enterprise in which both were interested, because the company fail to suspect that the customer would commit a felony, and did not take precautions to prevent it, is to push the liability of a common carrier beyond that authorized by any adjudicated case, or by reason or justice. The plaintiffs trusted to Johnson to send them fair and honest bills of lading. It was they who confided in him. If he has defrauded them, they must look to him, and cannot shift the responsibility upon another party, which has been guilty of neither crime nor fraud, nor of any such negligence as can be considered the cause of their loss.

Lastly: The damage sustained by plaintiffs must be attributed to the proximate and not to the remote cause. Their loss was the direct result of the forgery committed by Johnson. Even on the theory of the plaintiffs, the negligence of the defendants preceded the forgery by Johnson and afforded the facilities for committing it. The plaintiffs cannot, therefore, charge their loss to the negligence of the defendant, which is the remote, and pass over the forgery of Johnson, which is its proximate cause. *Knoxville Nat. Bank v. Clarke*, 51 Ia., 254; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. (L. R.), 1; *Byles, J.*, in *Richardson v. Dunn*, 8 Com. B. (N. S.), 665; *Denny v. New York Cent. R. Co.*, 13 Gray, 481; *Morrison v. Davis*, 20 Penn., 171; *Railroad Co. v. Reeves*, 10 Wall., 176 (§§ 136-43, *supra*). We are of opinion, therefore, that the facts stated in the complaint do not constitute a cause of action in favor of the plaintiff against the defendant. The demurrer must therefore be sustained.

THE LADY FRANKLIN.

(8 Wallace, 325-329. 1868.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—The agent of a line of vessels engaged in transportation received and sent a lot of flour by one of the vessels, but by inadvertence his clerk gave a bill of lading for the flour as shipped on another vessel, the *Lady Franklin*. The *Water Witch*, on which the flour was really shipped, foundered on the voyage and the cargo was lost. The owners of the flour libeled the *Lady Franklin* on the strength of the bill of lading. Judgment being rendered against them the libelants appealed.

§ 372. *Libel for non-delivery under a false bill of lading cannot be maintained.*

Opinion by MR. JUSTICE DAVIS.

The attempt made, in the prosecution of this libel, to charge this vessel for the non-delivery of a cargo which she never received, and, therefore, could not deliver, because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here.

§ 373. *The agent for transportation discharged his obligation as to the goods.*

Courtenay was a warehouseman in Milwaukee, and, although he acted as agent for the different steamers of the Grand Trunk line, he did not receive the flour to be sent by one particular steamer in preference to another. His engagement had this meaning, and nothing more: to forward the flour with all practicable expedition, by the first suitable steamer of the line which arrived in port that would carry it. Having actually shipped it in good condition in advance of the arrival of the Franklin in port, by seaworthy steamers, against which nothing is alleged, he discharged his obligations to the libelants. It would be strange, indeed, if the owners of the Franklin were made to suffer because the common agent of all the boats had, through inadvertence, given a receipt for merchandise not on the boat, or in the warehouse even, but which was then on board other boats on its way to its destination.

§ 374. *Owner being holder of bill of lading, questions of bona fide rights of third persons do not arise.*

The case is not embarrassed by any question of a *bona fide* purchase on the strength of the bill of lading, for the libelants themselves were the real shippers. Such is the claim of the libel, and it is supported by the evidence, for Sanderson swears the flour belonged to the libelants, on its delivery at the warehouse.

§ 375. *Bill of lading can be explained, as to its receipt, by parol.*

In so far as a bill of lading is a contract, it cannot be explained by parol; but if a contract, it is also a receipt, and in that regard it may be explained, especially when it is used as the foundation of a suit between the original parties to it—the shippers of the merchandise and the owner of the vessel. The principle is elementary and needs the citation of no authority to sustain it. In this case the bill of lading acknowledges the receipt of so much flour, and is *prima facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony.

§ 376. *Reciprocal obligations of ship and cargo do not attach unless cargo is received.*

The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it or the principles which lie at its foundation. The case of the Schooner *Freeman v. Buckingham*, 18 How., 182, decided by this court, is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading. The court say, “there was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.”

Judgment affirmed.

SHAW v. RAILROAD COMPANY.

(11 Otto, 537-567. 1879.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

STATEMENT OF FACTS.—Replevin to recover possession of certain cotton. As collateral security for the payment of a draft, an original bill of lading for the cotton was delivered to a bank. One of the consignee firm, Kuhn & Brother, having already received the duplicate bill of lading by mail, accepted the draft

on presentation, but substituted the duplicate for the original bill of lading without being detected; and the firm then indorsed the original bill of lading to Miller & Brother and received an advance upon it. The goods on arrival were delivered to a transferee of this stolen bill of lading. The consignee firm failed; and on protest of the accepted draft, the fraudulent substitution of the duplicate bill for that pledged to the bank was discovered. The remaining facts are stated in the opinion.

Opinion by MR. JUSTICE STRONG.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence they can have no other or better title than their vendors had. The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of \$8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

§ 377. *Question whether the party advancing on a stolen bill of lading acquired title to the goods.*

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

§ 378. — *no question of conflict of state laws is involved.*

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both states enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

§ 379. *What is meant by a statute declaring bills of lading negotiable.*

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange, and afterwards promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce

it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer. In regard to bills and notes, certain other consequences generally, though not always, follow, such as a liability of the indorser, if demand be duly made of the acceptor or maker, and reasonable notice of his default be given. So, if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee had the bill or note remained in his hands. So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception to the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability or negotiation. That may exist without them. A bill or note past due is negotiable if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

§ 380. *Bill of lading, though declared negotiable, is not necessarily to be treated like a bill or note when stolen.*

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation. Bills of exchange and promissory notes are exceptional in their character. They are representatives of money circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange as, in some sort, sacred instruments in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note indorsed in blank or payable to bearer be lost or stolen and be purchased from the finder or thief without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of *mala fides*, will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 343; *Murray v. Lardner*, 2 Wall., 110; *Matthews v. Poythress*, 4 Ga., 287. The rule was first applied to

the case of a lost bank-note (*Miller v. Race*, 1 Burr., 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in *Peacock v. Rhodes*, 2 Doug., 633, to bills and notes, as coming within the same reason.

§ 381. *Bill of lading is a symbol of ownership of goods; rule of stolen goods stated.*

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner, by his negligence or carelessness, may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

§ 382. *Statutes as to negotiability are not to be construed as altering common law beyond their fair import.*

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a mis-

appropriation had reason to believe that the person from whom he took the property had no right to it.

§ 383. *A stolen bill of lading passes no title to the goods to a negligent third party.*

We think, therefore, that the rule asserted in *Goodman v. Harvey*, *Goodman v. Simonds*, *Murray v. Larder*, *supra*, and in *Phelan v. Moss*, 67 Penn. St., 59, is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists knows it exists. Certainly, if he be a reasonable being. This disposes of the principal objections urged against the charge given to the jury. They are not sustained. The other assignments of error are of little importance. We cannot say there was no evidence in the case to justify a submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft. It does not appear that we have before us all the evidence that was given, but if we have, there is enough to warrant a submission of that question.

The exceptions to the admission of testimony and to the cross-examination of Andrew H. Miller are not of sufficient importance, even if they could be sustained, to justify our reversing the judgment. Nor are we convinced that they exhibit any error.

§ 384. *An amendable mistake below in entering a just verdict treated as though amended.*

There was undoubtedly a mistake in entering the verdict. It was a mistake of the clerk in using a superfluous word. The jury found a general verdict for the plaintiff. But they found the value of the goods "eloigned" to have been \$7,015.97. The word "eloigned" was inadvertently used, and it might have been stricken out. It should have been, and it may be here. The judgment was entered properly. As the verdict was amendable in the court below, we will regard the amendment as made. It would be quite inadmissible to send the case back for another trial because of such a verbal mistake.

Judgment affirmed.

THE DELAWARE.

(14 Wallace, 579-606. 1871.)

Appeal from U. S. Circuit Court, District of California.

§ 385. *Mutual obligations as expressed by the bill of lading.*

Opinion by MR. JUSTICE CLIFFORD.

Ship-owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of the goods; and the shipper, consignee or owner of the cargo contracts to pay the freight and charges; and by the maritime law, as expounded by the decisions of this court, the obligations of the ship-owner and the shipper are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations,

unless the lien is waived by some express stipulation or is displaced by some inconsistent and irreconcilable provision in the charter-party or bill of lading. *The Eddy*, 5 Wall., 494 (§§ 968-976, *infra*); *The Bird of Paradise*, 5 id., 555 (§§ 959-967, *infra*); *Bags of Linseed*, 1 Black, 112 (§§ 955-958, *infra*). Shippers should in all cases require a bill of lading, which is to be signed by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate, or other person in charge of the deck and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consignment is delivered, the master, upon those receipts being given up, will sign two or three, or, if requested, even four bills of lading in the usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument.

§ 386. *Exceptions may be made by bill of lading.*

Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination, unless he can prove that the loss happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any congressional legislation upon the subject, he is in the nature of an insurer, and liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. *The Propeller Niagara v. Cordes*, 21 How., 23 (§§ 438-450, *infra*); *Clark v. Barnwell*, 12 id., 272 (§§ 416-423, *infra*); *Elliott v. Rossell*, 10 Johns., 7.

STATEMENT OF FACTS.—Seventy-five tons of pig-iron were shipped by the libelants, on the 8th of May, 1868, on board the bark *Delaware*, then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of \$4.50 per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent. primage and average accustomed. Dangers of the seas, fire and collision were excepted in the bill of lading, and the statement at the close of the instrument was, "vessel not accountable for breakage, leakage or rust." Process was served and the claimant appeared and filed an answer, in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed, and that but a small portion of the iron shipped, to wit, some thirteen or fourteen thousand pounds, was ever delivered to the consignees, and that all the residue of the shipment was

thrown overboard as a jettison during the voyage, which became necessary by a peril of the sea, for the safety of the other associated interests and for the preservation of the lives of those on board. Sacrificed as all that portion of the shipment was as jettison in consequence of a peril of the sea, excepted in the bill of lading, claimant insists that the libelants have no claim against the ship, and that the libelants as the shippers of the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison in consequence of a peril of the sea are true, but the libelants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which, by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading.

Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee, unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law. *Lawrence v. Minturn*, 17 How., 114 (§§ 463-470, *infra*); *The Peytona*, 2 Curt., 23 (§§ 550-554, *infra*). Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods. *Gould v. Oliver*, 4 Bing. N. C., 142; *Story on Bailm.*, § 531.

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pursuant to that theory testimony was offered in the district court showing that certain conversations took place between the consignee of the bark and the agent of the shippers, tending to prove that the shippers consented that the iron in question should be stowed on the deck of the vessel. Whether any express exception to the admissibility of the evidence was taken or not does not distinctly appear, but it does appear that the question whether the evidence was or not admissible was the principal question examined by the district court, and the one upon which the decision in the case

chiefly turned. Apparently it was also the main point examined in the circuit court, and it is certain that it has been treated by both sides in this court as the principal issue involved in the record, and in view of all the circumstances the court here decides that it must be considered that the question as to the admissibility of the evidence is now open for revision, as the decree for the libelant was equivalent to a ruling rejecting the evidence offered in defense, or to a ruling granting a motion to strike it out after it had been admitted, which is a course often pursued by courts in cases where the question deserves examination. What the claimant offered to prove was that the iron was stowed on deck with the consent of the shippers, but the libelants objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libelants, which was equivalent to a decision that the evidence offered was incompetent. Dissatisfied with that decree the respondent appealed to the circuit court, where the decree of the district court was affirmed, and the same party appealed from that decree and removed the cause into this court for re-examination.

§ 387. *The main question is, whether evidence of consent to stow goods on deck is admissible.*

Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed. Angell on Carriers, § 212; Redfield on Carriers, §§ 247-269; The St. Cloud, Brown & L., 14.

§ 388. *Definition of bill of lading; goods embraced under such instrument.*

Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abbott on Shipp., 7th Am. ed., 323; O'Brien v. Gilchrist, 34 Me., 558; 1 Parsons on Shipp., 186; Machlachlan on Shipp., 338; Emerigon on Ins., 251. Regularly the goods ought to be on board before the bill of lading is signed; but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel, and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley v. Bigelow, 12 Pick., 307; The Eddy, 5 Wall., 495 (§§ 968-976, *infra*). Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Machlachlan on Shipp., 338-9; Smith's Mercantile Law, 6th ed., 308. Beyond all doubt, a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated.

Bates v. Todd, 1 Moody & R., 106; Berkley v. Watling, 7 Ad. & Ell., 29; Wayland v. Mosely, 5 Ala., 430; Brown v. Byrne, 3 Ell. & Bl., 714; Blaikie v. Stenbridge, 6 Com. B., N. S., 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. 1 Greenl. on Ev., 12th ed., § 305; Bradley v. Dunipace, 1 Hurlst. & C., 525.

§ 389. *Contradiction or explanation of bill of lading.*

Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts. Hastings v. Pepper, 11 Pick., 42; Clark v. Barnwell, 12 How., 272; Ellis v. Willard, 5 Seld., 529; May v. Babcock, 4 Ohio, 346; Adams v. Packet Co., 5 Com. B., N. S., 492; Sack v. Ford, 13 Com. B., N. S., 100.

Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent. The Schooner Freeman v. Buckingham, 18 How., 187; Maude & Pollock on Shipp., 233; Grant v. Norway, 10 Com. B., 665; Zipsy v. Hill, Fost. & F., 573; Meyer v. Dresser, 16 Com. B., N. S., 657.

§ 390. *If bill of lading be silent as to mode of stowing, goods must be carried under deck.*

Proof of fraud is certainly a good defense to an action claiming damages for the non-delivery of the goods, but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper. The Propeller Niagara v. Cordes, 21 How., 23 (§§ 438-450, *infra*); Sandeman v. Scurr, Law Rep., 2 Q. B., 98; Swainston v. Garrick, 2 Law J., N. S., Exch., 255; African Co. v. Lamzed, Law Rep., 1 C. P., 229; Alston v. Herring, 11 Exch., 822. Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of

the general rule applied in such controversies. *Abbott on Shipp.* (7th Am. ed.), 345; *Smith v. Wright*, 1 Caines, 43; *Gould v. Oliver*, 2 Mann. & G., 208; *Waring v. Morse*, 7 Ala., 343; *Falkner v. Earle*, 3 Best & S., 363.

§ 391. — *how far evidence of usage, etc., is admissible to the contrary.*

Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. *Oelricks v. Ford*, 23 How., 63; *Barnard v. Kellogg*, 10 Wall., 383; *Simmons v. Law*, 3 Keyes, 219; *Spartali v. Benecke*, 10 Com. B., 222. Cases may arise where such evidence may be admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument, where it appears that the instrument was not within the statute of frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. *Emerson v. Slater*, 22 How., 41; *Goss v. Nugent*, 5 Barn. & Ad., 65; *Nelson v. Boynton*, 3 Metc., 402; 1 Greenl. on Ev., 303; *Harvey v. Graham*, 5 Ad. & Ell., 61. Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract. *Ruse v. Ins. Co.*, 23 N. Y., 519; *Wheelton v. Hardisty*, 8 Ell. & Bl., 296; 2 *Smith Lead. Cas.*, 758; *Angell on Carriers*, 4th ed., § 229.

Apply that rule to the case before the court, and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo, on deck, as when he signs the bill of lading, in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception of dangers of the seas, unless the dangers were such as would have occasioned the loss, even if the goods had been stowed as required by the contract of affreightment. *The Rebecca*, 1 Ware, 210; *Dodge v. Bartol*, 5 Greenl., 236; *Walcott v. Ins. Co.*, 4 Pick., 429; *Copper Co. v. Insurance Co.*, 22 id., 108; *Adams v. Insurance Co. id.*, 163. Contracts of the master, within the scope of his author-

ity as such, bind the vessel and give the creditor a lien upon it for his security, except for repairs and supplies purchased in the home port, and the master is responsible for the safe stowage of the cargo under deck; and if he fails to fulfil that duty he is responsible for the safety of the goods, and if they are sacrificed for the common safety, the goods stowed under deck do not contribute to the loss. *The Paragon*, 1 Ware, 329, 331 (§§ 457-462, *infra*); 2 Phillips on Ins., § 704; *Brooks v. Insurance Co.*, 7 Pick., 259. Ship-owners, in a contract by a bill of lading for the transportation of merchandise, take upon themselves the responsibilities of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to carry the goods on deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law. *The Waldo*, Dav., 162; *Blackett v. Exchange Co.*, 2 Crompt. & J., 250; 1 Arnould on Ins., 69; *Lenox v. Insurance Co.*, 3 Johns. Cas., 178.

§ 392. *A clean bill of lading is not to be varied by parol evidence as to stowage.*

Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact. *Shackleford v. Wilcox*, 9 La., 38. Parol evidence, said Mr. Justice Nelson, in the case of *Creery v. Holly*, 14 Wend., 28, is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity; and it was accordingly held in that case that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence that the vendor agreed that the goods should be stowed on deck could not legally be received even in an action by the vendor against the purchaser for the price of the goods which were lost in consequence of the stowage of the goods in that manner by the carrier. Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the supreme court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck; but the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner. *Sproat v. Donnell*, 26 Me., 187; 2 Taylor on Ev., §§ 1062, 1067; *Hope v. State Bank*, 4 La., 212; 1 Arnould on Ins., 70; *Lapham v. Insurance Co.*, 24 Pick., 1. Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defense in the case of *Barber v. Brace*, 3 Conn., 14, but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which undoubtedly is the correct rule upon the subject. Written instruments

cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed; but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck, as was distinctly decided in that case. *Barber v. Brace*, 3 Pick., 13; 1 Smith Lead. Cas., 6th Am. ed., 837. But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport and deliver the goods in good order and condition. *The Reeside*, 2 Sumn., 570 (§§ 451-454, *infra*); 1 Duer on Ins., § 17.

Remarks, it must be admitted, are found in the opinion of the court, in the case of *Vernard v. Hudson*, 3 Sumn., 406, and also in the case of *Sayward v. Stevens*, 3 Gray, 101, which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion as the correct rule of law, subject to the qualifications herein expressed.

Decree affirmed.

GOODRICH v. NORRIS.

(District Court for New York: Abbott's Admiralty, 190-202. 1848.)

Opinion by BETTS, J.

STATEMENT OF FACTS.—This case rests wholly upon one fact, and turns upon the force and effect of the evidence relative to that fact, offered upon both sides.

On December 3, 1846, the respondent signed a bill of lading, in the usual form, for eleven barrels of tripe, shipped by the libelants on board the respondent's schooner, to be delivered at Boston to the firm of Davis & Whittemore. The bill described the barrels as being "marked and numbered as in the margin," but it contained no marginal marks or numbers. The vessel arrived at Boston, having on board twelve barrels of tripe, but six only were marked for Davis & Whittemore, and that number were delivered to them. The other six were delivered to other consignees conformably to their marks. No bill of lading was shown for them, although the mate testifies that he believes one was signed; and he also proves that freight was received for twelve barrels only. He also testifies that no more than twelve barrels were on board the vessel, and that after the vessel got out of port it was ascertained, by the amount of cargo and by the freight list, that bills of lading had been signed for five barrels more than were in the vessel.

§ 393. *Evidence to contradict or explain bill of lading is competent to show mistake in quantity.*

The libelants contend that evidence to contradict or explain the bill of lading is incompetent, and maintain that the respondent is concluded by his signature to the one produced. This is not the rule as between the original parties of the bill of lading, and where no rights of third persons are in question. In that case evidence may be received to show a mistake in the statement of the quantity of goods received contained in the bill of lading. In an action by the original shipper of the goods, the master or owner will be allowed to show that he was induced by *fraud* to sign a bill of lading containing an exaggerated statement of the quantity of goods received; and that such

evidence will defeat an action for the recovery of an alleged deficiency in the delivery made is well settled by the case of *Bates v. Todd*, 1 Moody & R., 106. That was an action against the owners of the ship *Thames* on a bill of lading, signed by the master at Singapore, for eight hundred and ninety bags of pepper. The declaration alleged that *eight* hundred and ninety bags were shipped, and that some of them had been lost. The defense was, that only *seven* hundred and ninety bags were in fact shipped, and that the captain had been induced to sign the bill of lading for *eight* hundred and ninety by the fraud of the plaintiffs' agent at Singapore. It was contended for the plaintiffs that the bill of lading was conclusive, and estopped the defendant, who was owner of the ship. But Chief Justice Tindal held that, as between the original parties, the bill of lading was merely a receipt, liable to be opened by the evidence of the real facts, and he left the question to the jury, whether in fact eight hundred and ninety bags or only seven hundred and ninety were shipped.

The case of *Berkley v. Watling*, 7 Ad. & Ell., 29, is somewhat broader. The plaintiff there declared, *in assumptit*, that the defendants, Watling and Nave, were owners of a ship called the *Search*, and that in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him or his assigns, the defendants promised to deliver them and had failed to do so. Nave pleaded separately that the plaintiff did not cause the goods to be shipped in the vessel. On the trial the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by Watling, which stated the goods to be shipped by Watling, to be delivered to the plaintiff or his assigns. It was also proved that the plaintiff held the bill of lading for value. Evidence was offered at the trial, on the part of the defendant Nave, to show that, although the master signed the bill of lading for the goods, yet they were never shipped on board the vessel, as therein expressed; and the question was, whether Nave was estopped by the bill of lading from showing that fact. "The statement in the declaration," said Mr. Justice Littledale, "is that the plaintiff caused the goods to be shipped, which is put in issue by the second plea. How does the plaintiff prove his allegation? He puts in a bill of lading, which certainly appears to be signed by the master, but, on the face of it, the goods are shipped by Watling. Then the plaintiff must prove Watling to be his agent; by so doing he supports the allegation. It turns out that in fact the goods were not shipped on board the *Search* at all. But the plaintiff says that the defendant Nave is estopped from showing this by the bill of lading signed by his own agent. How is he estopped? Watling knew the fact, and his knowledge is the plaintiff's knowledge. The plaintiff, knowing the fact by Watling, his agent, how is the defendant Nave estopped by what Watling does as his agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need not say how far, on the general question, there is an estoppel, but, in my opinion, the bill of lading is not conclusive."

§ 394. *Goods receipted for may be shown to have been never actually delivered.*

In the case now presented, no suggestion of fraud is made, but the respondent relies upon proof of the mere fact that the goods receipted for by the bill were never actually delivered to the vessel. That fact, if clearly proved, will exonerate the master from responsibility to the original shipper, though it might not release him in an action by an assignee.

§ 395. *Distinction between receipt and contract of a bill of lading.*

The bill of lading has, in legal effect, a double aspect. It is a contract for the transportation and safe delivery of the property shipped, and it also em-

bodies, as a matter collateral to that contract, a receipt for the goods so shipped. In so far as the bill operates as a contract, it is, undoubtedly, the exclusive evidence of the obligation of the parties; but in respect to those clauses which operate merely as a receipt for the goods, it has no higher obligation than an ordinary receipt, and is open to explanation and rectification by parol proof. *Phill. Ev.*, 3 Cow. & H., 1439. The fact that both a contract and a receipt are embodied in one instrument forms no reason why they should be regarded as differing in effect from similar instruments executed in an independent form. The clauses in the bill of lading which relate to the quantity and condition of the goods received, do not enter into the *contract* between the parties; they are parts of the *receipt*. The contract is for the transportation of the goods, for their delivery, for the stipulated freight, etc. But the statements that the goods embraced within this contract have been received on board the vessel, and that they are of such and such description in point of quantity, quality, condition, marks and numbers, etc., are in the nature of a receipt, not an agreement. They are therefore explainable, not alone by evidence of fraud, but by such proof of mistake as is by well settled rules of law permitted to control the operation of ordinary receipts. It is proper, therefore, to receive the evidence offered on the part of the defense in this case, and if it clearly shows that the goods for which this suit is brought were never, in point of fact, delivered to the respondent, it will constitute a good defense to this action.

§ 396. *Rule applied to facts of the case.*

On the part of the libellant, the testimony, if not direct and complete to the fact that the seventeen barrels were delivered on board the vessel, at least strongly corroborated the bills of lading, and may furthermore account for the difference between the quantity receipted and that found on board; as one witness states that he took down five barrels, and another person in the libellant's employment carted down twelve barrels. The latter saw barrels already on the dock, and was told in answer to his inquiry on board the vessel that they belonged to the libellant's parcel. He left his five barrels on the dock near the vessel by direction of those on board. He does not remember that he had a receipt given him, but thinks the other man brought back a receipt for his loads. He assisted the other man (who is now at sea) in loading twelve barrels, eleven of which were marked Whittemore & Davis and one to O. Robinson. One of those he carted down had the same mark, and the other four were Russel & Squires. The mate's impression is that six of the barrels were addressed to Russel & Squires, and were delivered to them out of the twelve on board. He further says he found four barrels on the dock when the vessel came into her berth, and had them rolled on board. They were marked for Whittemore & Davis; and he further testifies that the twelve barrels were all brought to the vessel by one person. If the evidence of the other cartman is credited, there are then five more barrels which were delivered by him of which the mate took no account. Under these circumstances the testimony of the mate does not destroy the effect of the bills of lading. The written evidence must prevail, and the respondent must be held to account for the five barrels deficient in the delivery. The proof is they were worth here from \$10 to \$12 per barrel; and the lowest valuation of the goods will be taken in such case, when the evidence carrying them higher is not precise and clear. The libellant is entitled to a decree for \$50, with interest from December 3, 1846, to this day, and his costs to be taxed.

THE L. J. FARWELL.

(District Court, Eastern District of Wisconsin: 8 Bissell, 61-71. 1877.)

STATEMENT OF FACTS.—The master of the L. J. Farwell executed two bills of lading, one for eight thousand bushels of wheat, the other for eight thousand three hundred bushels, no wheat at all having been delivered to him at the time. The shipper under the two bills was the same, but the consignees named were different. Drafts were drawn with the bills attached, which were duly paid by the respective consignees on presentation. Dickinson, the shipper, only furnished nine thousand three hundred bushels in all. The master delivered to the consignee, who held the first bill of lading for eight thousand bushels, the full amount consigned to him, and tendered the remainder to E. J. Burkam & Co., who held the other bill of lading, which they declined to receive, and libeled the vessel. At the time the two bills of lading were signed and delivered, both shipper and master expected that the entire quantity named would be put on board, but the shipper failed after furnishing the nine thousand three hundred bushels; and he gave no directions as to the application or apportionment of the wheat thus delivered. Other facts appear in the opinion of the court.

Opinion by DYER, J.

It is claimed by the libelants that the wheat should have been delivered to the respective consignees, each receiving such share of the whole as should be in proper proportion to the quantity of wheat called for by his bill of lading; that the libelants were entitled to four thousand seven hundred and thirty-six bushels; that the vessel is liable for non-delivery of the same, and that the libelants are entitled to a decree for the value of the wheat put on board as and for the wheat embraced in libelants' bill of lading, which, it is claimed, has been converted by the master and owners of the vessel. The question for determination involves, therefore, the ownership of this wheat under these two bills of lading.

§ 397. *Signing bills for wheat not received is an unauthorized act of the master, and the ship-owners are not estopped thereby.*

The act of the master in signing and delivering the bills of lading in question, when there was no wheat on board the vessel, was unauthorized and irregular. A bill of lading is a contract by which the master engages to carry and deliver goods to the consignee, or to the order of the shipper. It acknowledges the goods to be on board, and they should be on board before the bill is signed. If, therefore, a master signs bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, as the act of the master is not within the scope of his authority, the owners of the vessel are not estopped from showing the facts in a suit brought against them for non-delivery, by a *bona fide* indorsee of the bill of lading. In such case the owners are not liable. 1 Parsons on Shipp. and Adm., 187, note; The Schooner Freeman v. Buckingham, 18 How., 191.

§ 398. — *but bills of lading become operative if signed on the assurance of a delivery which afterwards takes place.*

If, however, the bill is signed before the goods are on board, but upon the faith and assurance that they are to be delivered, and afterward they are delivered as and for the goods embraced in the bill of lading, as against the shipper and master the bill operates on the goods by way of relation and estoppel. This being so, the bill of lading then represents the property as effectually as if

the execution of the bill and the delivery of the goods on board had been concurrent; and any *bona fide* holder for valuable consideration, who, by transmission to him or negotiation, has obtained such bill of lading, gets as valid and effectual a title to the goods so placed on board as could be acquired by an actual delivery of the goods themselves. *Rowley v. Bigelow*, 12 Pick., 314; *Halliday v. Hamilton*, 11 Wall., 560.

§ 399. *Priority of lien does not depend upon priority of signing bills of lading.*

Another general principle may be here stated, namely, that priority of lien or of title does not depend upon the mere priority of signing either bill of lading. It is the shipment which gives the lien; the delivery of the property on board with notice to the party, which fixes the right and vests the property. *Stevens v. Boston & Worcester R. Co.*, 8 Gray, 265. As fundamental propositions, then, to aid us in settling the rights of these parties, it may be stated that, although there was no wheat on board this vessel when these bills of lading were issued, if subsequently wheat to the extent of nine thousand three hundred bushels was placed on board as and for a portion of the grain embraced in the bills of lading, as against both Dickinson and Driscoll the bills of lading became operative to cover the property by way of estoppel, and in such proportions, with reference to each holder of a bill of lading, as, upon a correct application of the facts and law of the case, may be established; further, that the priority in date of the bill of lading held by Reed & Co. does not alone fix their right or title to any particular proportion of the wheat. The lien or title, if any, of both Reed & Co. and the libelants, as we have seen, springs from the shipment — the delivery of the property on board.

Now, had the bills of lading called for different kinds of wheat, and if such different kinds had been put on board, the appropriation to each bill of the kind of wheat called for would seem clearly consistent with the rights of each holder of such bill of lading. So, too, if the master had received on board eight thousand bushels of wheat, and then given to the shipper a bill of lading therefor, and afterward had issued another bill of lading for eight thousand three hundred bushels, and had then received but one thousand four hundred bushels, there would be no difficulty in appropriating the eight thousand bushels to the first bill of lading. In these cases it would be apparent that the bills of lading covered specific wheat, and such appropriations would accord with the evident intentions of the parties as manifested by their acts. But in the present case there was no wheat on board the vessel when either bill of lading was issued. After both were issued, the shipper commenced delivering the wheat to the vessel, intending to fill both bills. Undoubtedly Dickinson could have controlled and directed the application of the wheat on either bill, and his direction in that respect might have been conclusive. But he made no such direction, and, so far as his intentions were concerned, he delivered the wheat as much for one bill as the other, since it was his expectation to place on board the full amount of both consignments. He had it in his power to deliver first the wheat to fill the second bill, and could have refused to deliver any upon the first bill, and in that case the holder of the bill posterior in date would have taken his full *quantum* of grain. But there was no designation or appropriation by the shipper. This being so, could the master, after receiving the wheat on board, appropriate it to such bill of lading as he chose, and bind the parties? After much deliberation upon this point, I am convinced he could not, and will presently state reasons for that opinion. Then, if there was no spe-

cific appropriation of the wheat on either bill by the shipper, and if there could be none by the master, how, according to legal principles, must it be appropriated? As no wheat was placed on board until after both bills of lading were issued, and as there was no designation by the shipper of specific wheat for either bill, but an intention on his part to deliver the entire cargo according to the charter, both bills, although bearing different dates, became concurrently operative; that is, both became effectual to cover their proportionate shares of the wheat delivered, as the wheat was placed on board. Without regard to the dates of the bills of lading, from the time the wheat delivered on both bills was in the custody of the vessel the legal relations of Reed & Co. and of the libelants were fixed. As soon as the wheat was deposited with the carrier the title to it and right of property in it was vested in those parties. Their bills of lading called for wheat of the same grade; the property was mixed, and could not be distinguished, and there was not sufficient to satisfy the demands of both.

§ 400. *Rights of consignees were those of tenants in common on facts shown.*

They stood, then, in the position of tenants in common, and determining their rights accordingly, each was entitled to wheat from the common mass in proportion to the amount called for by his bill of lading, and it was the duty of the master so to deliver it. In my judgment this conclusion is not to be avoided, if it be conceded that the wheat was put on board as and for the wheat covered by both bills of lading. And I think the proofs show that the shipper placed the wheat on board as a part of the sixteen thousand three hundred bushels embraced in both bills, and as both bills became concurrently operative to pass the title to the wheat, the holders of the bills of lading took title in common. But it has been ably contended by the learned counsel for respondents that the master was justified in delivering the eight thousand bushels of wheat to Reed & Co. because their bill of lading was prior in date, and should first be made good from the wheat first delivered; further, that up to the time any wheat actually went on board, the transaction between the shipper and the master was purely personal; that the master was personally liable to the parties to whom the bills of lading were transmitted, and who paid drafts on the faith of them; that, therefore, in the absence of any appropriation of the wheat by the shipper, the master had the legal right to cancel his liability to either party on the bill of lading held by such party, by delivery of wheat sufficient to fill that bill, and stand personally responsible to the party holding the other bill; finally, that upon the bills of lading being issued, Dickinson stood in the relation of debtor to Driscoll, and that when wheat was delivered without specific appropriation by the former on either bill, the master, as his creditor, had the right to apply it according to the doctrine of appropriation of payments. Upon the first point taken I have already sufficiently stated my judgment. As no wheat was delivered until after the issuance of both bills, and as it was the intention of the shipper to satisfy one bill as much as the other by delivery of wheat for both, and as the bills became operative only when wheat was deposited on the vessel, I am unable to see how priority in date of their bill gave Reed & Co. priority of right.

§ 401. *The master cannot appropriate so as to satisfy one bill of lading to the exclusion of the other.*

Had the master a right to so appropriate the wheat as to fully satisfy one bill of lading to the exclusion of the other? It is true, as already stated, that his action, in signing the bills of lading before any wheat was delivered, was

irregular, and it may be admitted that he thereby incurred a personal liability to the holders of the bills. But when wheat was delivered by the shipper and was deposited on the vessel to meet the bills certain relations sprang up between the consignees and the property. Certain rights in favor of the holders of the bills and certain obligations on the part of the carrier then became established which could not be divested by any personal act of the master. The moment he began to receive grain on board to cover the bills of lading he began to act, not for himself alone, but as the agent of the vessel. The error of the position here urged arises from ignoring the legal relations to the property of Reed & Co. and Burkam & Co., which were created and fixed by the delivery on board the vessel for shipment of wheat called for by the bills of lading. The argument on this point proceeds upon the theory that the master became personally liable to the holders of the bills of lading; that Dickinson became his debtor, and that, in partial satisfaction of the debt, Dickinson delivered to him this wheat, which the master personally had the right to appropriate in payment of any part of his indebtedness created by the bills of lading. But the argument fails when we consider that the wheat was delivered on board the vessel; that in receiving it the master acted as the vessel's agent, and that, by established principles of law, when the wheat passed into the custody of the vessel, a right of property vested in the consignee, which could be no more affected by the personal act of the master than by that of any other person. And this is entirely consistent with the proposition that, as to all wheat called for by the bills of lading and not delivered on board the vessel, Dickinson and Driscoll, and not the vessel or its owners, are alone liable. It by no means follows that because originally, and before any wheat was placed on the vessel, the master may have incurred a personal liability by signing the bills of lading, he had the right to appropriate on either bill, as he saw fit, the wheat actually delivered on board.

It is further insisted that the master had the same right to appropriate the wheat to the bill of lading earliest in date as a creditor has to apply moneys paid to him by his debtor upon promissory notes when the payment is general by the debtor and the demands are various in date. In other words, the doctrine of appropriation of payments is invoked, which is that where a debtor owes his creditor on distinct accounts, he may direct his payment to be applied to either demand. If he makes no appropriation the creditor may apply the money as he pleases. If no specific application is made by either party, the law will appropriate it as the justice and equity of the case may require. I do not think this rule can be successfully invoked so as to give to the master the right to appropriate the wheat upon either bill of lading as he should choose. In the case of application of payments under the rule stated, no other party than the debtor and creditor are interested. The money paid by the debtor becomes the money of the creditor in his personal right, and the interests or rights of third parties are not involved. The views already expressed touching the rights of the holders of these bills of lading and their relations to the property afford a further answer to the particular point under consideration, and need not be repeated. In analogy to the present case counsel suggested that if a vessel were chartered to carry wheat to one party, lumber to another and shingles to still another, and bills of lading were accordingly issued before any part of the cargo was placed on board, and subsequently only wheat and a portion of the lumber were delivered, the party whose bill was not filled would not be heard to demand a *pro rata* share of the value of that part of the

cargo delivered. The analogy fails, because in the case supposed the bills of lading would be issued for and on account of specific and dissimilar kinds of property. The consignee of lumber would have no right to call for wheat, and the holder of a bill of lading for shingles could not demand any other property than such as his bill specified. The bills of lading held by Reed & Co. and Burkam & Co. called for No. 1 wheat. With no specific designation of any particular portion to apply on either bill by the shipper, either expressed or to be inferred from the character of the property, the delivery of any part of the cargo would satisfy the terms of either bill of lading, and give to the consignees what they were entitled to.

It is said that the libelants cannot have a decree because they have failed to show ownership of any part of the wheat placed on board the vessel, and that the burden of proof is upon them to establish such ownership. The answer to this proposition involves a repetition of what has been already stated as to the effect to be given to the bills of lading, and the time when they became operative to vest the property in the holders of the bills. When the wheat was placed on board, these bills of lading represented that property, and the title to the wheat was changed and vested in the parties to whom it was to be delivered. *Halliday v. Hamilton*, 11 Wall., 564. To the extent that libelants' bill of lading represented the wheat on board, they became vested with title and ownership. Let a decree be entered in favor of libelants for the value of their proportionate share of the wheat delivered to the vessel as prayed in the libel.

CHOATE v. CROWNINSHIELD.

(Circuit Court for Massachusetts: 8 Clifford, 184-190. 1868.)

STATEMENT OF FACTS.—Action by common carrier to recover balance of freight due on a lot of cotton carried from New Orleans to Boston. The defense was that though the bill of lading stated that the cotton was shipped in good order, and to be delivered in like good order, it was not so delivered, being damaged and wet when received. Damages were claimed accordingly by way of recoupment to the freight. Further facts appear in the opinion of the court.

§ 402. *Circuit court has jurisdiction under statute where the district judge had been of counsel.*

Opinion by CLIFFORD, J.

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is conferred upon the district courts by the ninth section of the judiciary act; but the first section of the act of the 3d of March, 1821, provides that in all suits and actions in any district court in which it shall appear that the judge of such court has been of counsel for either party, said suit or action may be certified to the next circuit court of the district. 1 Stat. at Large, 76; 3 Stat. at Large, 643. Jurisdiction of the suit in this case is derived from that provision, the same having been duly certified into this court because the district judge had been of counsel to one of the parties.

§ 403. *General rules of liability as common carrier stated.*

The obligations of a common carrier by water, who receives goods to transport from port to port, are to keep the goods safely, duly transport them, and make right delivery of the same at the port of destination. *The Eddy*, 5 Wall., 481 (§§ 963-976, *infra*); *The Bird of Paradise*, 5 Wall., 545 (§§ 959-967, *infra*); *McAndrews v. Thatcher*, 3 Wall., 369. Common carriers are responsible for

all losses and damages which may happen to goods received to be carried, except such as result from the act of God or the public enemy, or from the act or default of the owner himself, unless such liability is limited or restrained by the terms of the contract under which the goods were received. *Propeller Niagara v. Cordes*, 21 How., 26 (§§ 438-450, *infra*); *Hastings v. Pepper*, 11 Pick., 42.

§ 404. *Presumptions and burden of proof in case of loss stated.*

Dangers of the seas are excepted in the bill of lading in this case, but there is no other material limitation to the contract of affreightment. When goods in the custody of a common carrier are lost or damaged after their reception and before their delivery, the *prima facie* presumption is that the loss or injury was occasioned by the default of the carrier, and the burden is upon him to prove that it arose from a cause for which he is not responsible. *Nelson v. Woodruff*, 1 Black, 156 (§§ 408-412, *infra*); *Clarke v. Barnwell*, 12 How., 280 (§§ 416-423, *infra*).

§ 405. *Where a bill of lading states shipment "in good order," such is the presumption; but this presumption may be overcome by proof of latent defects.*

Such a presumption, however, is nothing more than a *prima facie* presumption, and it may be overcome by any proper testimony which is sufficient to show that the fact was otherwise. The legal effect of a bill of lading such as was given in this case, affirming that the goods were shipped in good order and condition, is also to raise a *prima facie* presumption that, as to all circumstances which were visible and open to inspection, the goods were in that condition, but it does not preclude the carrier from showing, if he can, in a case of loss or damage, that the loss or damage proceeded from some cause which existed but was not apparent at the time he received the goods, and which, if satisfactorily proved, will discharge him from liability. *Clarke v. Barnwell*, 12 How., 280. Between the shipper and the ship-owner the bill of lading is not conclusive as against proof of latent defects, even in a case where the bill of lading states that the goods were shipped in good order and condition. *Ellis v. Willard*, 5 Seld., 530; *Sheppard v. Naylor*, 5 Gray, 592; *Barrel v. Rogers*, 7 Mass., 297; *Haddow v. Parry*, 3 Trent, 303; *M. on Ship.*, 339; *Bates v. Todd*, 1 Rob., 106; *Sears v. Wingate*, 3 Allen, 103; 1 Pars. M. L., 37; *Berkley v. Watling*, 7 Ad. & Ell., 29; *O'Brien v. Gilchrist*, 34 Me., 554.

§ 406. — *these principles applied to facts of the case.*

Applying these principles of law to the case, it is quite clear that the decision must turn upon the questions of fact, which may be determined without any extended argument, as there is not much real conflict in the testimony, except as to a single point. The seaworthiness of the ship is not controverted, and the proofs show that she was staunch and strong, and that she was well manned and equipped. Due care was used in taking the cargo on board, and the goods of the respondent were well stowed and dunnaged. The testimony of the master is that there were two iron ventilators in the ship, one forward, and one aft, and that the hatches were left open till they left the bar, near the mouth of the river. The usual length of a voyage from New Orleans, as shown in the testimony, is eighteen or twenty days, but the ship in this case was detained twenty days inside the bar. During that period, the evidence is, there was little or no motion in the vessel, and that the weather was hot, sultry and disagreeable, and that there were light showers with heavy fogs. Want of motion in the vessel doubtless rendered the circulation between decks and in the hold less than it would have been if the vessel had been under way. Proper

care appears to have been taken of the goods from the time they were delivered on the wharf until they were stowed in the ship, and the proofs show that none of the bales remained on the wharf more than four days before they were shipped. The outside appearance of the bales was "ordinarily good," and nothing except a single circumstance occurred during the loading of the ship to awaken any suspicion that the contents of the bales were in any respect unfit for transportation in such a voyage. When about two-thirds of the consignment had been loaded and stowed, the master discovered a man attempting to steal cotton from one of the bales on the wharf, but he escaped before he could be apprehended. He had cut the bagging so that the contents were exposed, and on examining the cotton the master found that it was wet, and immediately reported the fact to the shippers. The statement of the master is that, when he reported the fact to the shippers, they told him that the wet would not injure it, as it was bound coastwise, and he immediately tied up the broken bale, and it was taken on board. Other than that circumstance, there does not appear that anything occurred, or that there was anything in the outside appearance of the bales calculated to create suspicion that the goods were not in a proper condition for the voyage.

§ 407. *Deterioration of the goods from natural causes, imputing no fault to the carrier, does not render him liable.*

Two propositions are submitted by the respondent in respect to that evidence: 1. He insists that it does not sufficiently appear that the bale cut open was one that belonged to his consignment. 2. But if it did, then it shows that the defect in the goods, if it existed at that time, was not latent.

Neither of the propositions, however, can be sustained to an extent to benefit the respondent. The better opinion from all the evidence is that the broken bale was one which belonged to his consignment, and there is no evidence to warrant the conclusion that the master had any reason to believe that any portion of the residue was unfit for the voyage, especially as he was assured to the contrary by the shippers. The theory of the libelants is that the bales had been exposed to rain, either on the plantation where the cotton was grown and put in bales, or on the way down the river, or on the levee before it was delivered to the master, or that it was injured by the humidity of the atmosphere and dampness of the ship's hold, where most of the respondent's consignment was stowed. The responsibility of the carrier does not extend to damage resulting from such causes, if it appear that the vessel was in all respects seaworthy, and that there was no want of ordinary skill and vigilance and energy on the part of the master to protect the goods against such injury. *Clarke v. Barnwell*, 12 How., 282; *Abb. on Ship.*, 42; *Lamb v. Parkman*, 20 Law Rep., 186; 1 Pars. Mer. L., 136, n. 1. Examined in view of the testimony that much of the top tier between decks appeared as if wet from steam and sweat, and that the bagging and bands were mouldy, and that the bagging was much decayed, it seems almost an irresistible conclusion that the cotton must have received the damage from a combination of both the causes suggested by the libelants, as the testimony negatives every theory suggested by the respondent. Twenty or thirty bales were slightly wet by sea-water, but the same witnesses who state the fact affirm that it was hardly sufficient to deserve notice. The plain inference from the evidence is that the bales, before they were delivered to the master, had been exposed to the rain, so that the cotton within the bales was damp. Cotton in that condition when stowed, either in the hold or between decks, will soon create heat, and the moisture under the influence of the heat

will generate steam and produce all the results shown in this case. When the ship, in the course of her voyage, passed into cold weather, those in charge of her noticed that steam was escaping from the ventilators of the vessel, which is strong evidence in support of the libelants' theory. Weighed in any just view of the evidence, there does not appear to be any good reason to question the credibility of the master, or those associated with him in the charge of the vessel; and it is clear that the libelants are entitled to recover, unless the statements of those witnesses can be overcome. The actual delivery of all the bales is conceded, and the testimony shows that they were accepted by the respondent and sent to certain cotton-mills and appropriated to the use for which the cotton was designed. Nothing appears in the case to show how much the cotton in the broken bale was injured, beyond what is shown in respect to it at the place of loading.

Another theory of the respondent is that the cotton in other bales belonging to other consignments was wet, and that the damage to their cotton was occasioned in that way, but it is sufficient answer to that proposition to say that it is not satisfactorily supported by the evidence. The amount not being a matter of dispute, it does not seem necessary to send the case to an assessor. Decree for the libelants.

NELSON v. WOODRUFF.

(1 Black, 156-169. 1861.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.— We are now about to decide two appeals in admiralty from the circuit court of the United States of the southern district of New York. They are substantially cross-actions, and the testimony is the same in both. They have been fully argued, and shall be discussed by us with reference to the rights and liabilities of the parties growing out of their pleadings and the bills of lading upon which they rely.

William Nelson and others are the owners of the ship *Maid of Orleans*, and they have filed their libel to recover from John O. Woodruff and Robt. M. Henning, survivors of the firm of James E. Woodruff & Co., \$1,838.11, with interest from the 14th of August, 1854, for the freight, with primage and average accustomed, of a large quantity of lard which was carried in their ship, in barrels and tierces, from New Orleans to New York, for which the master of the ship had affirmed for the shippers in two bills of lading; that they had been shipped in good order and condition, etc., and were to be delivered in like good order at New York, the dangers of the sea and fire only excepted, to James E. Woodruff & Co., or to their assigns, freight to be paid by him or them at the rate of \$1.15 per barrel and \$1.50 per tierce, with five per cent. primage and average accustomed; and the libelants declare that the lard, upon the arrival of the ship, had been delivered to the consignees, and was accepted by them.

To this the respondents filed a joint answer, admitting the shipment, claiming that they had been made in conformity with the bills of lading, affirming the arrival of the ship in New York, and averring that only a part of the lard had been delivered, and allege that the agents of the libelants had taken so little care in receiving the casks and tierces on board of the ship, and in the stowing and conveyance of them, and in the discharge of them at New York, that a large quantity had been lost, about sixty thou-

sand pounds, of the value of \$6,000 and upwards, and that the loss or diminution in its weight had not been lost by the perils of the sea or from fire. They further answer that, relying upon the bills of lading, the consignees James E. Woodruff & Co. had made large advances upon them to the shippers of the lard. They then declare that, for cause stated by them, they were not liable to pay the freight and primage, but that the owners of the ship were answerable for the loss of the lard, and liable to pay them more than \$6,000, and claim to recoup against the freight and primage so much of the damage as they may have sustained as will be sufficient to liquidate and discharge the amount claimed for freight. When they answered the respondents, they at the same time filed a libel against the owners of the ship, propounding substantially the particulars of what was in their answer to the libel—so much so that we will not repeat them; indeed, there is no addition to it, nor will it be necessary to set out again the articles of their answer to the libel filed against them, for they are a repetition of their own original libel, except in one particular, upon which the controversy was made exclusively to turn, by the counsel on both sides, in the argument of the case before us. That was that the lard, as such, had not been in good order for shipping when put on board of the ship, inasmuch as it was then in a liquid state, and had in that condition been put into barrels and tierces, which, with the heat of the weather then and during the passage to New York, had started them, and had caused the leakage complained of before and during its transportation, and that the leakage had not been caused by any neglect or want of care of them, either in shipping the lard at New Orleans, or on the passage thence to New York, or in stowing it in the ship, or in the discharge of it in New York. There is much testimony in the record in respect to the effect of heat and barreling of lard in a liquid state in producing more than usual leakage; but it was urged in the argument that such proofs were inapplicable to this case, as the bills of lading affirmed that the lard, when shipped, was in good order and condition, and were conclusive against the allowance of any inquiry being made, or to any other causes of loss or damage than such as may have been caused by the dangers of the sea and fire. Such is not our view of the effect of the bills of lading we have now to consider.

§ 408. *Statement in bill of lading prima facie evidence that goods were received in good order, but not conclusive.*

We proceed to state what we believe to be the law, and will then apply the evidence to it to determine if this case is not within it. We think that the law is more accurately and compendiously given by Chief Justice Shaw than we have met with it elsewhere. In the case of *Hastings v. Pepper*, 11 Pick., 43, that learned judge says: "It may be taken to be perfectly well established that the signing of a bill of lading acknowledging to have received the goods in question in good order and well conditioned is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But, in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." The same has been decided by this court in two cases

as to the burden of proof, where the goods shipped were said to have been impaired in quality by the dampness of the vessel during passage to her port of delivery. *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *infra*); *Rich v. Lambert*, 12 How., 317 (§§ 491-498, *infra*).

§ 409. *Whether carrier liable for loss by leakage or melting.*

The rule having been given, our inquiry now will be, whether or not the owners of the *Maid of Orleans* have brought themselves within its operation, so as to be exempted from all liability for the loss of the lard, by having proved satisfactorily that it had been occasioned by causes existing in the lard, but not apparent when it was shipped, to the extent of the injury which those causes would produce upon the barrels and tierces which contained it; or, in other words, that the causes of the loss were incident to lard when operated upon by a heated temperature of the sun acting directly upon it, or when it shall be stored, and an excessive natural temperature has occasioned its liquefaction. It is alleged that the loss of this shipment was sixty thousand pounds less than the quantity shipped. It must be admitted to be too large to be brought under the rule which exempts the carriers from liability for the ordinary evaporation of liquids, or for leakage from casks, occurring in the course of transportation. The implied obligation of the carrier does not extend to such cases, any more than it does to a case when the liquid being carried, if it shall be conveyed with care, is entirely lost from its intrinsic acidity and fermentation, and bursting the vessel which contains it; as it was adjudged that the carrier was not liable when a pipe of wine during its fermentation burst and was lost, it being proved that at the time it was being carried carefully in a wagon commonly used for such a purpose. *Farrar v. Adams*, Bull. N. P., 60.

We do not know where an adjudged case can be found illustrating more fully the exemption of a carrier from responsibility for loss or leakage from the peculiar and intrinsic qualities of an article, and the inquiries which may be made upon the trial in respect to them, and into the causes of a loss from effervescence and leakage, and we may say for its discriminating rulings, than that of *Warden v. Greer*, in 6 Watts, 424. Mr. Angell has made all of us familiar with it in his *Treatise on the Law of Carriers*, ch. 6, 215. The action was brought against the owners of a steamer on account of loss on a cargo of two hundred barrels of molasses, which was affirmed in the bill of lading had been received in good order and well conditioned. Witnesses were examined as to the trade in that article on the western waters; the nature of molasses and the trade in it; as to its fermentation in warm weather; the effect upon it by heat in its removal and carriage in a dray; also as to the means usually taken to prevent loss of it, and injury to the barrels from the expansive force of fermentation; and as to the loss of it from those means and causes on a passage from New Orleans to Pittsburgh; and as to the loss by leakage or warm weather, according to the condition of the barrels in which it might be shipped. It was determined in that case that the defendants were not answerable for loss occasioned by the peculiar nature of the article carried at that season of the year, nor for leakage arising from secret defects in the casks, which existed, but were not apparent, when they were received on board of the steamer. Nor is the carrier responsible for diminution or leakage of liquids from barrels in the course of transportation, though they are such as are commonly used for that purpose, if it shall be satisfactorily proved that the barrels had become disqualified from containing their contents by causes connected with the nature and condition of the article, which the carrier could not control.

§ 410. *Facts considered as to leakage or melting of lard from causes excusing the carrier.*

Having stated the law as we think it to be, that a bill of lading for articles shipped, affirmed to be in good order and condition, is but *prima facie* evidence of that declaration, and does not preclude the carrier from showing that the loss proceeded from causes which existed, but were not apparent, we will now examine the testimony, to determine if such was not the fact in this case. The lard was taken from the warehouse, to be put on board of the ship, in a liquid state, in the month of July, during hotter weather — much hotter, all the witnesses say — than is usually felt in New Orleans at that time. This was known to the shippers, to their agent, who made the freight by contract, and to the captain of the Maid of Orleans. They also knew that the lard was in such barrels and tierces commonly used for the shipment of lard. All the barrels and tierces were put on board of the ship, according to contract, as soon as it could be done, after they were carted to the levee where the ship was, except a few barrels, not more than twenty barrels, which needed cooperage, and they were left on the levee from Saturday evening until Monday morning. There is no proof of leakage or loss from them by that exposure, than there would have been if those barrels had been put on board of the ship in the bad condition in which they were sent to the levee. Dix, who made the freight engagement in behalf of the shippers, says it was expressly agreed that the lard should be taken on board of the ship as soon as the same was sent to the vessel to avoid exposure to the sun; and he testifies that the casks containing it were in good order when they were delivered; but anticipating that some of them might not be, a cooper was sent, for the purpose of packing such of them as might not be in good shipping condition; and the witness Shinkle, the stevedore employed to load the ship, says the lard was promptly taken on board as soon as it was taken from the drays, but that there were about fifteen or twenty barrels leaking, which he caused to be rolled aside, and he put them under tarpaulins, to be coopered, and as soon as they were coopered by the shipper's employees, it was taken. This is the lard, as we learn from another witness, which had been on the levee from Saturday night until Monday morning. Besides, from answers of Mr. Dix to the cross-interrogatories put to him, we learn that he knew nothing of the good order and condition of the casks of lard, as to its cooperage, when they were carried to the levee to be received for shipment, except from the report of those who had done the work. Under such circumstances the casks put aside on the levee for cooperage, before they could be shipped, on account of their leaking, were not received by the stevedore, to be put on board, until they were put in a fit condition to be shipped. Until that was done they were at the shipper's risk. We cannot, therefore, allow the fact of the exposure of these twenty barrels to charge the ship with any loss, or to lessen the weight of the testimony that, in receiving and putting the casks into the vessel, it had been done in conformity, as to the time, with the engagement made with the agent of the shippers.

The proof is ample that it was put on board with care, and in the manner and with all the appliances for doing so most readily. It is in proof, also, that the stowage on the ship was good, both as to position and as to its support and steadiness, by dunnage and cantling, and that there had been no disarrangement of the casks, either by storm or rough seas, on the passage of the ship to New York, although she did encounter some heavy weather. Nevertheless, upon the discharge of the lard in New York, the barrels and tierces were found

to be in a worse condition, and leaking more, than had ever been seen by either of the witnesses, whose habit and business had made them familiar with such shipments. It appears that the barrels containing the lard were of the same materials, and coopered with hoop-poles, as barrels for such a purpose are usually made.

When the contents of such barrels are solidified, the leakage will be small; when liquified, larger. All of the witnesses who know how such barrels are coopered say so, particularly as to lard in a liquid state, and as to its effect upon the staves and hoops of such barrels when acted upon by the heat or rays of the sun. They know it from observation and experience; science confirms it from the composition of the article. This lard was of a secondary kind, or, as the witness Magrath says, it was a fair lard — not pure at all, but a good average lot, not a first-rate article. The differences in the qualities of lard may arise from a deficiency of oxygen, or from the inferior quality of the fat of the animal from which it is tried, and not unfrequently from a careless and insufficient melting and expression of the best of the animal fat from its membranous parts. Oils, whether animal or vegetable, are either solid or liquid, and when in the first condition are frequently termed fats. These fats are more abundant in the animal than in the vegetable kingdom. But whether liquid or solid, they usually consist of three substances, two of which (the stearine-suit and the margarine pearl) are solid, and the other (elane or oleine) is liquid at ordinary temperatures. They are all from 6° to 9° lighter than water, and their liquid or solid condition depends upon the proportion in which their component parts are mixed. Thus, in the *fats*, the oleine exists in small quantities, and in the liquid oils it is the chief constituent. A certain degree of heat is necessary to the mixture, for at low temperatures there is a tendency to separation; the stearine and margarine are precipitated or solidified, and, if pressed, can be entirely freed from the oleine. The stearine from the lard of swine is easily separable from the oleine, and it is used in the manufacture of candles. The liquid stearine, known in commerce as lard oil, is used for the finer parts of machinery; but all of the animal fats — such as those from the hog, the ox, the sheep and horse — have not a like consistency or proportion of stearine in them; when deficient in either or comparatively small, and tried into lard, they have not that tendency at low temperatures to precipitate and solidify as the stearine and margarine of the fat of the hog has; and being extremely penetrating from liquidity, there has always been a greater loss from evaporation and leakage from the barrels in which they are ordinarily put for transportation than there would be from hogs' lard under the same temperature; in other words, hogs' lard will solidify at a temperature at which those animal fats will not, and, from their liquidity, they escape from the barrels containing them in larger quantity; and that fact has been remarkably verified by the returns of English commerce with Buenos Ayres and Monte Video, in the importation from them of what is known there as horse or mare's grease, tried from the fat of the horse.

From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes, lined with tin, and the article is now carried without loss. And here we will remark, that a distinguished gentleman, thoroughly acquainted with the commerce of our country and its productions, and with its great lard production from the fat of the hog, has

made a calculation of the deterioration of the article and the loss of it by leakage from the barrels and casks in which it is now shipped, and his result is, if we would change it for square boxes, lined with tin, that the cost of them would be a saving of the loss now sustained by barreling it.

We have now shown that the cause of leakage of lard is its liquefaction under temperatures higher than those at which it will solidify when not deficient in stearine. One legal consequence from that fact is that shippers of that article should be considered as doing so very much as to leakage at their own risk when it is in a liquid state, however that may have been caused, whether from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was the higher ranges of heat, through latitudes where the heat would not be less until the ship had made more than three-fourths of her passage. Such was the case in this instance. When the lard was shipped, the thermometer had indicated for several days, and continued until the ship sailed, a heat of 97°; the ship itself had become heated by it. Her passage was made in the heat of the Gulf stream until she made the capes of the Delaware, and the witnesses describe the heat of the hold as unendurable upon her arrival in New York.

We have still to show what were the effects of the liquid lard upon the barrels in which it was, and that we shall do briefly by the testimony of several witnesses, and from what we all know to be the additional pressure of an article upon a barrel when liquefied by heat. The pressure from liquid lard is an expansion of its component constituents by heat into a larger bulk than it occupies when solidified, and its elastic pressure distends or swells the barrel which contains it, until the hoops which bind it are slackened and its staves are started; just as it would be in a barrel containing any other fluid expanded by heat or fermentation. The consequences must be a diminution of the liquid by an increased leakage and evaporation. Now, it so happens that the scientific explanation of the loss of the lard in this instance is verified by the experience of the libelants' and respondents' witnesses. Benzell, a cooper of forty years' experience in New York, in coopering casks of lard from New Orleans to New York, and who coopered this cargo upon its arrival, says the casks were of a good quality, except being slack—that is, hoops started; hoops were loose upon the casks; does not think there is any quality in lard to injure casks, except it will, when liquid, tend to shrink them; it requires a great deal of care in such a case; pressure increases the difficulty from heat, conduces to press upon the joints, and produces leakage; these casks were fully wooden-bound, but saw them leaking at bilge and at head; coopered four hundred of them. Ward, the city weigher, and who weighed several hundred casks of this shipment, says that they leaked largely; leakage was from loose hoops. Dibble, another weigher of twelve years' experience in the article of lard, says the lard was in a liquid state, like oil. Wright, who was present all the time when the ship was discharging, gives an account of the stowing of the shipment; says the packages or barrels were slack. Samuel Candler, marine surveyor, surveyed the cargo in August, 1854; made seven surveys on cargo and one on hatch; saw the lard when on board of the ship; says it was stowed in the after lower hold in four or five tiers on bilge, and cantling in ordinary way and best; bilge and bilge stowing not so well; went below; it was very hot there; barrels looked fair, but slack; the staves were shrunk; looked all alike; top casks leaked as well as those on the bottom tier; attributes the great loss to great heat and shrinking of the barrels; has surveyed a great many

ships laden with lard in hot weather; this cargo could not have been stowed better; recollects more of this cargo because there was so much leakage; nothing stood on the casks, or on the top tier of them, as is afterwards explained; surveyed ship; she had the appearance of having encountered bad weather. Francis J. Gerean, who has been accustomed for thirty years with stowing cargoes, says: I coopered this cargo for libelants, Woodruff & Henning; when the cargo was discharging, two coopers under his direction, one at gangway on deck, the other in the hold of the ship; he saw the lard in the hold before delivered; the hoops were very loose, and the barrels were leaking from sides and heads; intensely hot below; considerably hotter than on deck; leakage from shrinking of packages; the lard was liquid; that tends to shrink; staves and hoops become loose; only chime hoops were nailed; barrels were well stowed; does not think it possible to stow better; ground tier was damaged, as well as he judged; bilge of barrels did not leak; no barrel rested on a single barrel, but on others. Fisher, a large dealer in lard, grease and tallow, and who has received them at all temperatures of weather, says lard brought in vessels in hot weather will naturally leak ten pounds out of a package; lard of reasonable quality, in good packages, will leak about the same as oil; thinks putting liquid lard into barrels will not produce leakage as much as pressure of the barrels upon each other, but stores lard in cellar three to five tiers. Several other witnesses in New Orleans concur in stating that it was very hot weather when the lard was shipped, and that when shipped it was in a liquid state. Others, uncontradicted, testify that it was liquid when the vessel arrived in New York.

There is no testimony in the case impeaching the skill and proper management of the ship on the passage to New York or in the delivery of the lard there, or that there was any part of her cargo of a nature to increase the heat of the ship, or to liquefy the lard, or to alter or shrink the barrels, though the ship's heat, exposed as she had been to the rays of the sun in New Orleans, was higher than that temperature at which lard will solidify; and it consequently continued liquid, from the time it was received on board until its delivery in New York, as the ship, on her way to it, was never in a temperature low enough to solidify it. All the witnesses who were examined in respect to the shrunken and slackened condition of the barrels when they were discharged in New York agree. Two or three of them say they were in a worse condition than they had ever seen or handled, and attribute the loss to the agency of the melted lard upon the barrels.

§ 411. *Conclusion on facts that leakage of lard was owing to existing but not apparent causes exonerating the carrier.*

The result of our examination of these cases is, that though the owners of the *Maid of Orleans* could not controvert the affirmance in these bills of lading, that the lard of the shippers had been received on board of their ship in good order and condition, they have made out, by sufficient and satisfactory proofs, that the leakage and diminution of the lard was owing to existing but not apparent causes, in the condition of the lard, acting upon the barrels in which it was, which are not within the risks guarantied against to the shippers by the bill of lading.

§ 412. — *acknowledgment of good order, etc., in bill of lading disproved accordingly.*

In conclusion, that the signing of a bill of lading, acknowledging that merchandise had been received in good order and condition, is *prima facie* evidence

that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing that the loss proceeded from some cause which existed, but was not apparent when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. In case of such a loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier; and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible. We accordingly, with this opinion, affirm the decree of the district and circuit courts, in all particulars, dismissing the libel of Jno. O. Woodruff and Robert M. Henning, and also affirm the decree of the circuit court, with costs, to the libelants and appellees, Nelson, Dennison *et al.*, in all things expressed in the same.

We have not considered the point made in the argument, deeming it to be unnecessary, relating to James E. Woodruff & Co. having made advances, in a large sum of money, upon the faith of the bill of lading, as they were not made with any intention of acquiring property in or ownership of the lard.

We also concur entirely with the view taken by our brother Betts, of the district court, upon the objections made to the admission of the deposition of Capt. Dennis, taken *de bene esse* by the libelants. Decrees of the circuit court affirmed.

THE COLUMBO.

(Circuit Court for New York: 3 Blatchford, 521-524. 1856.)

Libel *in rem* for injury to a cask of bristles.

Opinion by NELSON, J.

STATEMENT OF FACTS.—The casks containing the bristles in this case were slightly made, in the form of barrels or hogsheads, covered with matting, and well secured by cords around the body and ends. The cartman who carried the goods from the ship went into the hold of the vessel to assist in taking them out, and, when he pressed his foot upon the cask in question, he discovered it was broken. It did not appear to be injured till he put his foot on it, and it could have been raised from the ship without discovering the break. It was found broken at the bilge, when the matting was removed, after it was delivered at the store.

§ 413. *Proper mode of proving bill of lading.*

The bill of lading was not proved, either in the court below or in this court, and I entertain strong doubts if it should be regarded as a part of the case. The clerk who testifies that it was received in a letter from the shippers at Hamburg to the consignees at this port speaks only from hearsay, and not of his own knowledge; and, even if he did, his evidence can hardly be regarded as proof of its execution by the master. The delivery of the goods by the master to the consignees named in it may raise an implication in favor of the genuineness of the instrument. But the evidence is very loose, and it might lead to abuse if such evidence were to be allowed as generally satisfactory. I do not mean, however, to put my opinion upon this part of the case.

§ 414. *Bill of lading with words, "weight and contents unknown," admits nothing as to condition except what is visible.*

The bill of lading produced contains the clause, "weight and contents unknown." When the matting and ropes were removed, the bristles in the cask were found to be very much deranged, and the bunches were broken and

in confusion, so as to make it difficult to assort them. Now, as I understand the effect of this clause in the bill of lading, there is no admission by the master as to the condition of the goods, beyond that visible to the eye, or apparent from handling the casks or boxes, or their outside protection, whatever it may be. If the clause does not mean this, I am not aware that any effect can be given to it. *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *infra*). It is observed by Mr. Abbott (*Abbott on Shipp.*, 216), that "if there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly." As far as my experience goes, I think this effect of the clause is in accordance with the general understanding of those concerned in the carrying of goods — shippers and owners.

§ 415. — *burden of proof as to condition at the time of shipment where bills of lading are thus expressed.*

When, therefore, a question arises as to the condition of the contents of casks or bales, in a case where this clause is inserted in the bill of lading, the burden rests upon the shipper, in the first instance, to prove the condition of the goods at the time of shipment; and I remember several cases before me in which commissions were executed on his behalf abroad, and an elaborate inquiry made for the purpose of establishing the fact. If the external covering of the goods is damaged when they are delivered, so as to account for an injury to the contents, then the evidence may be dispensed with. The admission in the bill of lading would then be *prima facie* sufficient. It was said, on the argument, that the external covering or protection, in this case, was damaged, and that, if it was in that condition at the time the goods were shipped, the master must have known it, or at least is chargeable with knowledge of it. But I am not satisfied that this is a just or reasonable conclusion from the evidence. The cartman states that the cask was apparently externally uninjured, and that it might have been raised from the hold without discovering the break; and, if so, it might have been stowed there without discovering the fact. Indeed, it appears, from the evidence, that the covering of the cask with the mat, well secured with cords both around the body and ends, would prevent any discovery of the break, unless there was some special examination. It seems to me, therefore, that the case is one in which effect should be given to the clause in question, and in which the burden lay upon the libelants to prove the condition of the contents at the time the goods were delivered on board of the ship; and that, in the absence of such proof, the carrier is not properly chargeable for the condition of the contents. It would be very unjust to charge him, if they were delivered to the consignee in the condition in which they were received on the ship; and, for aught that is stipulated in the bill of lading, I think they were. The decree must be reversed, with costs.

CLARK v. BARNWELL.

(12 Howard, 272-284. 1851.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is an appeal from a decree of the circuit court of the district of South Carolina in admiralty. The libel was filed against the ship *Susan W. Lind* and owners for alleged damage to cargo shipped to the libelants, as consignees, from Liverpool to Charleston, through the neglect and fault of the master. The goods shipped were twenty-four boxes of cotton

thread, which on delivery at Charleston were damaged to the amount of some fifty per cent. The spools of thread were packed in small wooden boxes lined with paper, one hundred dozen in each box, and again inclosed in a large wooden box, six small boxes in each large one, lined with paper between the small boxes. When these boxes were delivered and opened, the spools of thread in each of the small boxes were more or less stained, and spotted by dampness and mould, though the large and small boxes themselves were generally dry, as was also the paper covering the thread.

The respondents in their answer allege that, if the contents of the boxes were in a damaged state when opened, the damage must have existed, or originated in causes that existed, before they were delivered on board the ship, though not indicated by the external appearance of the boxes; or must have been produced by the effects of the dampness of the atmosphere in the hold of the vessel to which goods, wares and merchandise are exposed, and, especially such as were shipped for the libelants, in all vessels, however tight and staunch, with cargoes however well stowed, on as long and boisterous a passage as was experienced by the *Susan W. Lind*; or the same was caused by such dampness in consequence of the neglect of the shipper in not having packed the cotton thread in boxes calculated to exclude the damp air which otherwise it must be subject to in the transportation across the Atlantic.

The vessel sailed from Liverpool on the 14th day of March, 1848, and arrived at Charleston, her port of destination, on the 14th day of May following, making a long voyage of sixty-one days, during which she encountered rough weather and violent gales, causing her to labor heavily, and occasionally ship water. As we have already stated, the cotton thread, when the boxes were delivered to the consignees and opened, was found damaged on account of stains and spots, the effect apparently of dampness and mould happening in the course of the shipment.

§ 416. *Question whether damage was occasioned by a peril excepted in bill of lading.*

The bill of lading admits that the twenty-four boxes were shipped in good order, and bound the respondents to deliver the same in like good order, "all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted." And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading. For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract.

§ 417. *Burden of proof where damage is done to the goods.*

After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and

attention on the part of the persons employed in the conveyance of the goods; for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. On this ground, in the case of *Muddle v. Stride*, 9 Carr. & P., 380, which was an action against the proprietors of a steam vessel to recover compensation for damage to goods sent by them as carriers, Lord Chief Justice Denman, in summing up to the jury, observed: "If, on the whole, it be left in doubt what the cause of the injury was, or, if it may as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover; but, if the perils of the seas require that more care should be used in the stowing of the goods (articles of silk and linen) on board than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. That the jury were to see clearly that the defendants were guilty of negligence before they could find a verdict against them."

§ 418. *Principles applied to facts of case.*

Now, applying these principles to the facts disclosed in the record, we shall be enabled to determine whether or not the respondents in the court below are liable for the damage that happened to the goods in question, as they settle, with great clearness, the rule of responsibility, and also on which side the burden of proof lies to charge or exonerate them as common carriers. And, on looking into these facts, it will be seen that all the witnesses concur in the conclusion that the damage was occasioned by the humidity of the atmosphere and dampness of the ship's hold, producing mould and mildew upon the cotton spools, and thereby staining and spotting the thread, impairing its strength and rendering it unmerchantable. The article appears to be peculiarly subject to the effect of humidity and dampness, as the paper with which it was covered in the small boxes was generally dry and unaffected, when at the same time the thread beneath was mildewed and stained; and what is more remarkable, in many instances the upper layers of the spools were perfectly dry and sound, while those lying in the center were mouldy and spotted; and in other instances the only parts affected were the layers in the center. The vessel was a general ship, tight and staunch, well equipped and manned; and was laden with a mixed cargo, consisting of cases and crates of dry goods, hardware, and about two thousand sacks of salt. The cargo was well stowed and dunnaged. The sacks of salt, when discharged, were dry as usual, and in good condition; and no part of the cargo, except the cases in question, appears to have been injured in the voyage, or the subject of any complaint.

It was insisted on the argument that the respondents were in fault in taking on board their vessel the goods in question with salt as part of the cargo; but the evidence is full that salt in sacks is part of a mixed cargo of nearly all the vessels engaged in the trade between Liverpool and Charleston. One witness, who has been in the Liverpool trade for ten years, states that salt is part of the cargo of nine out of ten vessels trading from that port to the United States. Several shipmasters who have been engaged in this trade state that salt always constituted a part of their cargo, and they never knew any damage occasioned to the other goods. Indeed, the evidence is all one way on this point. In consequence of damage occasionally happening to these goods, and others of like

character, in vessels of a mixed cargo, of which salt was a part, some merchants latterly gave particular directions to their correspondents not to send their goods in a ship of this description. But this only shows that the general usage of the trade would justify the shipment with salt as part of the cargo, and hence the necessity of the particular instructions.

The weight of the evidence also seems to be, that the presence of salt, as part of the cargo of the ship, does not produce humidity or dampness in the atmosphere; but tends rather to diminish it by attracting and absorbing the humidity; and that unless in contact with the salt, or exposed to the drain from it by bad stowage, no injury would accrue to the other goods. Some attempt was also made upon the argument to show that the salt was badly stowed, regard being had to the nature and character of the goods in question; and that the damage was properly attributed to this circumstance. But there is no foundation for the argument upon the evidence. The salt was not within thirty feet of the cases of dry goods, with the exception of two cases, which were well dunnaged with matting and an inch board between them and the salt. The spools of thread in these were not damaged more than in the rest of the boxes.

§ 419. *Damage being brought within excepted perils, as caused by dampness, burden is to show negligence in precautions.*

Now the evidence showing very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship, or navigation of the same, or in the stowage, is one of the dangers and accidents of the seas for which the carrier is not liable, the burden lay upon the libelants to show that it might notwithstanding have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. For it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Camp., 119; 6 Taunt., 65; Abbott on Shipp., 428 (Shee's ed.). But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage on account of the humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade and navigation, especially upon the high seas.

§ 420. *No proof of negligent precautions shown; hence carrier is exonerated.*

Notwithstanding, therefore, the proof was clear that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libelants to show that the respondents might have prevented it by proper skill and diligence in the discharge of their duties; but no such evidence is found in the record. For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question. And hence we are obliged to conclude that it is to be attributed exclusively to the dampness of the atmosphere of the vessel, without negligence or fault on the part of the master or owners. No doubt the unusual duration of the voyage, on account of tempestuous weather and adverse winds, in connection with the fact that it was one in which the ship passed from a northern to a southern latitude, and in

a season of the year when the change from a cold to a warm climate must have been considerable, greatly increased the dampness, and also the influence of it upon goods liable to damage from that cause.

§ 421. *Carrier is not responsible for delay on account of boisterous weather.*

But the carrier is not responsible for delay in the voyage on account of boisterous weather or adverse winds, low tides, or the like, as was held in the case of *Boyle v. M'Laughlin*, 4 Harr. & J., 291. These are dangers and accidents of the navigation over which he has no control, and against which his contract contains no warranty.

§ 422. *A bill of lading acknowledging goods in good order, "contents unknown," extends only to the external condition of the cases.*

Another point was made on the part of the respondents below, which it may be proper briefly to notice. It was insisted that these goods had not been packed in good condition in the boxes at Paisley by the manufacturer, or if otherwise, that the damage might have happened to them in the conveyance from that place to Liverpool, before they were shipped for Charleston. The bill of lading contained the usual clause that they were shipped in good order; but there was added at the conclusion, "contents unknown."

It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes. *Abbott*, 339 (Shee's ed.), p. 216 (Story's ed.).

§ 423. *Burden to repel a reasonable inference that damage resulted from imperfection in things as given for shipment.*

And if the evidence on the part of the defense laid a foundation for a reasonable inference that the damage resulted from an imperfection in the goods when packed in the cases or had occurred previously to their being shipped on board, the burden was thrown upon the libelants to rebut the inference. It was accordingly assumed in this case, and evidence produced as to the condition of the thread when packed at Paisley, and also in respect to the mode of conveyance, from that place to Liverpool, preparatory to the shipment. The explanation is as full perhaps as could be well furnished, or as is usual, under the circumstances, and brings the case down, we think, to the question of damage occasioned by the effect of the humidity and dampness of the vessel in the course of the voyage. We have already expressed our views upon that question, the result of which is that the decree must be reversed.

TANEY, C. J., and WAYNE, J., dissented.

THE MAGGIE HAMMOND.

(9 Wallace, 435-461. 1869.)

APPEAL from U. S. Circuit Court, District of Maryland.

§ 424. *Liability of common carriers by water stated.*

Opinion by MR. JUSTICE CLIFFORD.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are insurers of goods shipped, and are liable in all events and for every loss and damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

§ 425. — *general duties of such carrier stated; rule as to deviation, etc.*

Whenever the goods intended for transportation are shipped on board, or delivered to the carrier or his agent for that purpose, it is the duty of the master, in the absence of any stipulation as to the period of sailing, to commence the voyage within a reasonable time, and he must proceed on the voyage in the direct and usual route to the port of delivery without any unnecessary deviation. Unless it becomes necessary to deviate for the purpose of making repairs or to avoid a storm, or an enemy or pirates, or to obtain necessary supplies, or for the purpose of assisting another vessel in distress, no deviation from the direct and usual route can in general be justified, nor will any other cause be admitted, except under very special circumstances, as a valid defense for any such delay in the transportation of the goods shipped under the bill of lading or other legal contract of shipment.

STATEMENT OF FACTS.—I. Certain parcels of pig-iron, amounting in the whole to three hundred tons, consigned to the libellants, were, by their agents, resident in England, shipped August 23, 1866, on board the *Maggie Hammond*, then lying at Ardrossan, Scotland, and bound on a voyage from that port to the port of Montreal, where the libellants reside. By the bill of lading, it appears that the iron constituting the consignment was shipped in good order and condition, and that the contract of shipment was that it should be delivered to the consignees at the port of destination, in like good order and condition, "the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted." Subject to the terms of that contract the merchandise in question was delivered to the carrier; and having been duly laden on board, the ship sailed on the following day for the port of delivery, and until the 7th of September she proceeded on her voyage in perfect safety, when she encountered heavy gales which continued through the night, causing the ship to leak, and doing great damage to the sails; and it appears that the master, at six o'clock in the afternoon of that day, finding that the weather exhibited no appearance of improvement, and having consulted with the other officers of the vessel and the crew, decided to bear away for some port of refuge, and that "they wore ship with her head to the eastward."

Prior to that change of course they had accomplished half the contemplated voyage, as it appears from the evidence that the ship, at noon of that day, was in latitude forty-nine degrees one minute north, and in longitude thirty degrees sixteen minutes west. Precisely what change was immediately made in the course of the ship does not appear; but it does appear that the master, on the following day, called the crew aft, and submitted the question to them whether they would go to the westward, or continue to go to the eastward, and that they decided to proceed to the eastward, which was equivalent to a decision to return. Much injury had doubtless been done to the sails, but they had spare sails, and it appears that the crew, before they were called aft, had bent and set the foresail, the maintopsail, the jib, the foretopmast staysail, the maintopmast staysail, the mizzen staysail, and the spanker, and the protest shows that the wind had subsided, and that the weather was more moderate. Principal reason given by the crew for refusing to go westward, as reported in the protest, was, that they had not sufficient sails, that the ship was leaking badly, and that they were not able to do any more work until they had some rest.

Midway between western and eastern ports, and with a ship as seaworthy to go forward as to go back, the master nevertheless yielded readily to the sugges-

tions of the crew, and decided to proceed to the eastward, and on the 17th of September the ship came to anchor, without any further damage, in the port of Milford, in Wales. Immediate steps were taken for a survey, which was held on the following day, but some of the recommendations of the surveyors were not satisfactory to the master, and he declined to carry them into effect. Dissatisfied with the results of that survey he called another, which was not held until the 25th of the same month, when it was recommended that the ship should proceed to Cardiff, where there were greater facilities for landing and storing the cargo and for repairing the vessel. Influenced by that recommendation the master, two days afterwards, weighed anchor, and, the ship having been taken in tow by a steam-tug, arrived at Cardiff on the next day, and was safely moored for repairs in the dry-dock at that port. Subsequent surveys were also held, confirming the prior conclusion that the ship was in need of repairs, and thereupon the cargo was landed and stored. Expenses were incurred in executing the repairs to the amount of £185 and 17s., but the mechanics, in accomplishing the work, stripped the vessel of her yellow metal, valued at £130, which was allowed as a credit to the owner of the ship.

On the 9th of October the master made a formal protest that the repairs recommended could not be completed until the season would be too far advanced for the ship to complete the voyage before winter. Her repairs were finished prior to the 3d of November, and on that day the surveyors certified that the ship was in a "seaworthy state to proceed on her intended voyage." Although the ship was ready for sea still the master refused to reload the cargo and proceed to fulfil his contract, alleging that the season was too far advanced. Negotiations were instituted between the consignees and the owner of the ship for a compromise of the controversy, but, before any conclusion was reached, the ship, on the 21st of November, took on board another cargo and sailed for Baltimore, leaving the merchandise constituting the consignment of the libelants in store at the port where the repairs were made. Left in store, the merchandise remained there until the 29th of May of the next year, when the agents of the ship forwarded the same in another vessel, but the vessel with the goods did not arrive at the port of delivery until the 22d of July, eleven months after the iron was shipped on board the vessel of the respondent. Aggrieved by such unusual delay, and learning that the ship had arrived at her port of destination under the new contract of affreightment, the shippers and consignees of the iron stored and left at Cardiff filed their libel in the district court for the district in which the ship then was, alleging a breach of the contract set forth in the bill of lading. Process of attachment was issued and the ship was seized on the 26th of February, 1867, the day before she finished discharging her cargo at Baltimore. Hearing was had and a decree was entered in favor of the libelants in the district court for \$3,092.30, together with costs of the proceedings. Determined to contest the matter further, the claimant appealed to the circuit court, and the appeal to this court is from the decree of the circuit court affirming the decree of the district court.

§ 426. *Principles in controversy stated.*

II. Several questions of importance and of no inconsiderable difficulty are presented for decision in this case. Most of the material facts are exhibited in the preceding statement, and in view of that state of facts the libelants submit the following propositions:

1. That it was the duty of the master, as the agent of the ship-owner, to transport the merchandise to the port of destination and deliver the same to

the consignees without unnecessary delay, unless he was prevented from so doing by the act of God, the public enemy or some one of the perils expressly excepted in the bill of lading, and that the evidence in the case does not show that the failure to transport and deliver the consignment was occasioned by any such causes.

2. That the ship, when she sprung aleak and when her sails were injured, inasmuch as she was as near to western ports as to those situated to the eastward, should have proceeded to some one of the former for repairs, and that the circumstances did not justify the master in putting back to an eastern port for that purpose.

3. That if he was justified in putting back to the port selected as a port of refuge, that his subsequent conduct in respect to the merchandise shipped by the libelants was wholly indefensible; that he had no right to leave the merchandise in store, enter into a new contract of affreightment, and sail with a new cargo for a distant port; that he was bound, as a carrier for hire, either to repair his own vessel, reload the cargo and resume and complete the voyage, as stipulated in the bill of lading; or, if the necessary repairs could not be made in season to enable him to fulfil his contract to transport and deliver the consignment before the fall navigation would close, then it was his duty to procure another vessel and to tranship the merchandise and send it forward to the port of delivery without unnecessary delay.

All of these propositions are controverted by the appellants, and they contend that the conduct of the master was in all respects justifiable; that he did everything which he, as such carrier, was required to do under the contract as expressed in the bill of lading, and that the libelants have no just cause of complaint.

§ 427. *Claim that district court had no jurisdiction.*

Aside from the merits of the controversy, they also contend that the district court had no jurisdiction of the case; and as that is a preliminary question, it will be first considered before examining the questions more immediately involved in the pleadings. No such question is directly presented in the pleadings, and none such was raised in the court below; still the better opinion is that the question is open to the appellants, as it substantially appears that the home port of the ship is Yarmouth, Nova Scotia, and that both the libelants and claimant are foreigners. By the answer it appears that the claimant is a resident of the place where the ship belongs, and the libel describes the consignees as residents of Montreal, in Canada, and that the iron was shipped at Ardrossan, in Scotland.

§ 428. *Owner of cargo has lien upon ship for right delivery, etc.*

Undoubtedly the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport and right delivery of the same, as much as the ship-owner has upon the cargo for the freight, as expressed in the maxim, *Le batel est obligé à la marchandise et la marchandise au batel*. Subject to the exception that the lien of the ship-owner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter-party or bill of lading, the rule is universal, as understood in the decisions of the federal courts, that the ship is bound to the merchandise and the merchandise to the ship for the performance on the part of the shipper and ship-owner of their respective contracts. Ship-owners contract for the safe custody, due transport and right delivery of the cargo, and for the performance of their contract the ship, her

apparel and furniture, are pledged in each particular case, and the shipper, consignee or owner of the cargo, contracts to pay the freight and charges, and to the fulfilment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement. The Eddy, 5 Wall., 493 (§§ 968-976, *infra*); Dupont de Nemours v. Vance, 19 How., 168; The Bird of Paradise, 5 Wall., 554 (§§ 959-967, *infra*); Alsager v. Dock Co., 14 Mees. & W., 798; Foster v. Colby, 3 Hurlst. & N., 715.

§ 429. *Maritime liens in international controversy.*

Consequently where the lien or privilege is created by the *lex loci contractus*, says Judge Story, it will generally, although not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*. Story on Confl. of Laws (6th ed.), 428; 3 Burge Comm., 770, 779. Such a lien is regarded as being in effect an element of the original contract, but in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, the admiralty courts of the United States will not, in general, entertain jurisdiction to enforce the maritime lien or privilege in favor of shipper or ship-owner, in a case where the libellant would not be entitled to such a remedy in the place where the contract was made or where the cause of action set forth in the libel accrued. The Infanta, Abb. Adm., 267; Whiston v. Stodder, 8 Mart. (La.), 134; The Havana, 1 Spr., 402; The Jerusalem, 2 Gall., 191; The Kenneway, Abb. Adm., 321; Brig Napoleon, Olc., 215; Brig Nestor, 1 Sumn., 73; New Brig, 1 Story, 244; Pope v. Nickerson, 3 id., 465-476. Where the lien exists only by some local statute, and is not given by the maritime law, admiralty courts in another jurisdiction can no more take jurisdiction of a case not within the local statute than the courts of the country could do where the cause of action arose; but where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the federal courts by the judiciary act.

§ 430. — *admiralty jurisdiction to enforce such liens.*

Courts of justice, and text writers, everywhere concede that the ship, under the maritime law, is bound to the merchandise and the merchandise to the ship, independent of any local usage or statute; but it is true, as suggested by the appellants, that such a lien cannot be enforced in some countries, because the courts of admiralty, which alone are competent to give effect to the same by a proceeding *in rem*, are not, as now constituted, invested with any authority, except to a very limited extent, to exercise such a jurisdiction. Maritime liens are of little or no value in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable; but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to enforce such remedies for the breach of a maritime contract. The Rebecca, 1 Ware, 190; The Phebe, id., 270; Abbott on Shipp. (ed. 1854), 167. Such a remedy will not in general be accorded, in our courts of admiralty, to the citizens or subjects of a foreign country whose courts are not clothed with the power to give the same remedy in similar controversies to the citizens of the United States; but the question whether they will do so or

not is not a question of jurisdiction in any case, as it is clear they may do so if they see fit, and in some cases they will take jurisdiction to prevent loss and injustice, especially if no objection is made by the consul of the nation to which the vessel belongs. *The Havana*, 1 Spr., 402; *The Volunteer*, 1 Sumn., 555; *The Spartan*, 1 Ware, 145; *Harmer v. Bell*, 22 Eng. L. & Eq., 72. Viewed in the light of these suggestions the case seems to be one where the jurisdiction may be sustained without difficulty, even though it be true that the shipper had no lien upon the ship by the law of the place where the contract of shipment was made. Appellants contend that the law of the place where the contract was made gives no such lien to the shipper in any case, but there is very respectable authority for a different opinion, independent of the usual presumption that the law of the place where the contract was made is the same as that of the forum where the remedy for the breach of it is sought. *Chase v. Insurance Co.*, 9 Allen, 311; *Leavenworth v. Brockway*, 2 Hill, 201; *Story on Confl. of Laws*, § 637.

Maritime law, says a learned commentator upon the law of Scotland, partakes more of the character of international law than any other branch of jurisprudence; and he adds, what is more material to the present inquiry, that in all the discussions respecting the same in the courts of that country the continental collections and treatises on the subject are received as authority by their judges where not unfitted for adoption there by any peculiarity which their practice does not recognize. Reference is then made to the principal continental treatises, usually referred to here, and frequently recognized by this court as the sources from which the rules of the maritime law were drawn. *Vandewater v. Mills*, 19 How., 89; 1 Bell Comm. (6th ed.), 364; *Dupont De Nemours v. Vance*, 19 How., 168. Speaking of the power and authority of the master of the ship, the same commentator says that he may hypothecate the ship for the supply of necessaries, and, as a last resort, he may sell the ship and cargo for that purpose. Abroad he has full authority to enter into a charter binding the owners and the ship, and he cites in support of that proposition the continental writers usually referred to as authority for that well-known rule of maritime law. *Dupont De Nemours v. Vance*, 19 How., 162. Ship-owners, the author says, have a lien as carriers for the security of the freight, and that the shipper, where the goods have been sold, lost or injured during the voyage, may have recourse upon the property of the vessel as a guaranty for the personal obligation of the ship-owner. He admits that the rule last mentioned is not generally followed in England, and that there is no adjudged case to that effect in the courts of Scotland, but he insists there is in their jurisprudence no reason for denying the privilege given in such cases by the maritime law, and he expresses the opinion that such a remedy would be sustained in their courts. *Ibid.*, 440.

§ 431. *Jurisdiction in admiralty on another ground.*

Suppose, however, that neither of the preceding propositions are correct, still it is clear that the jurisdiction in this case may be sustained upon another ground. Two causes of action are set forth in the libel, and before entering further into the discussion of the question of jurisdiction it becomes necessary to ascertain what they are and where they respectively arose, as alleged in the libel and as shown in the evidence. Obviously the first cause of action is founded solely on the alleged failure of the ship-owner to fulfil the contract of affreightment to transport the iron from the place of shipment to the port of destination, and to deliver the same to the consignees. Non-delivery of the

merchandise is the gravamen of the charge set forth in both articles of the libel, but the libelants also allege that the master, after the ship departed on her voyage, abandoned the same, and made some improper disposition of the shipment; that he neglected to transport and deliver the same, and that he entered into a new contract of affreightment with another party, and that the ship subsequently sailed for the port of Baltimore in charge of another master, not having the iron of the libelants on board.

Subsequent to the landing and storing of the goods the ship-owner discharged the master and appointed another in his place, and the ship took another cargo on board and sailed for the port where the process was served in this case, the ship-owner claiming the right so to do upon the ground that the season was too far advanced for the ship to proceed to her port of destination, and insisting that he might lawfully detain the shipment until spring in order that the ship might complete the voyage and earn full freight. In determining the question of jurisdiction the court must assume that the several propositions submitted by the libelants in respect to the merits of the controversy are correct. Assume that to be so, then it follows that the master improperly put back for repairs; that he abandoned the voyage without any lawful excuse; that he improperly entered into a new contract of affreightment, subjecting the ship to new perils and to a new lien, and that she had proceeded on a distant voyage, leaving the consignment of the libelants at the port where the same was stored at the time the iron was landed from the ship. Landed and stored as the merchandise was in Wales, the question is, whether the refusal of the master either to transport the goods in his own ship or to tranship the same and send the shipment forward in another vessel, and the subsequent abandonment of the voyage, gave the shippers and consignees any lien on the ship by the law of the country where those wrongful acts of the master took place.

§ 432. *English authorities reviewed.*

Jurisdiction is possessed by the admiralty court of England "over any claim by the owner or consignee, or assignee of any bill of lading of any goods *carried* into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." 24 and 25 Victoria, Pub. Gen. Stat., 1861, ch. 10, § 6, p. 132; Williams & Bruce, Adm. Prac., 85. Prior to that enactment the jurisdiction thereby conferred could not have been exercised by that court, and consequently the extent of the jurisdiction depends entirely upon the meaning of that provision. By the words of the act the jurisdiction conferred is confined to the case of goods *carried into England or Wales*, and it is equally clear that the claim must be made by the owner or consignee, or by the assignee of the bill of lading, but it cannot be denied that the case before the court in all those respects comes within the very words of the enactment. As construed by the courts of that country, the intent of the act is to give a remedy to the owner or consignee whenever the ship arrives in a British port and the cargo is not duly delivered in consequence of a breach of contract or duty on the part of the owner, master or crew of the ship; and the meaning has been so extended by construction that the admiralty court will entertain a claim for short delivery of the cargo, or a case where the goods are only incidentally brought into a port in England or Wales, the court holding that the word *carried* is not used

in the sense of imported, but that it includes every case of a breach of contract or duty by the carrier whenever the ship arrives in a British port. *The Danzig*, Brown. & L., 102; *The St. Cloud*, id., 14.

Where the master of a ship, on a voyage from New York with cargo consigned to Dunkirk, put into a port in England in consequence of an accident, and there landed the cargo and refused either to give delivery of it there or to carry it on to its destination, the court held that there was a clear breach of duty over which it had jurisdiction. *The Bahia*, Brown. & L., 61; *The Norway*, id., 227; *The Ironsides*, Lush., 458. Special reference is made by the appellants to the case of *The Pacific*, Brown. & L., 243, as showing that the sixth section of the admiralty court act gives merely a conditional right to sue the ship, that it does not create a maritime lien; but the decision in that case is not an authority for the proposition as applied to the case before the court, as the conclusion would be inconsistent with what the same learned judge decided in the case of *The St. Cloud*, Brown. & L., 14, where he said the act was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the ship-owner in foreign parts, the common law tribunals could not afford effectual redress. Effectual redress in such a case cannot be afforded, even in an admiralty court, without authority to arrest the ship; and wherever that authority exists the proceeding may be *in rem*, which is an admiralty proceeding, founded upon a lien; and it makes no difference whether it is held in the courts of the particular jurisdiction, that it exists by maritime usage, or that it was created by statute, if it be of such a character that it is recognized in our courts as a maritime lien. Extended argument upon the subject, however, seems to be unnecessary, as the later decisions in the admiralty courts of that country have disapproved of the prior decisions, and adopted a more liberal construction of the sixth section of the act. *The Nepoter*, Law Reports, 2 Ad. & Ec., 376; *The Beta*, Law Reports, 2 P. C., 447.

§ 433. *Better opinion favors lien in present case; jurisdiction asserted.*

Tested by these suggestions, the better opinion is that the sixth section of that act does give a maritime lien in a case like the present; but suppose it is otherwise, that it merely gives the right to sue the ship, still the concession cannot benefit the appellants, as the admiralty courts here administer the foreign law, and the consequence is that the filing of the libel in the district court here secures to the libellant the same lien in the ship as if the libel had been filed in his behalf in the jurisdiction where the wrongful acts set forth in the libel were committed. Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Unless, therefore, the suit *in rem* can be prosecuted in the jurisdiction where the property is found, it cannot be prosecuted at all, as the suit cannot be maintained without service of process upon the property described in the libel. *The Propeller Commerce*, 1 Black., 581; *The Reindeer*, 2 Wall., 403; *Nelson v. Leland*, 22 How., 48. Process having been duly served in the district where the ship was found and where the libel was filed, the jurisdiction of the district court is without any well-founded legal objection. In this country, says Mr. Parsons, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting

the parties to their home forum. 2 Parsons on Shipp., 226; The Johannes Christoph, 2 Spink, 98; The Jerusalem, 2 Gall., 191; The Aurora, 1 Wheat., 96; Taylor v. Carryl, 20 How., 611; The Gazelle, 1 Spr., 378.

§ 434. *Merits of the present case as to master's putting back for repairs.*

Jurisdiction being established it becomes necessary to examine the merits and to state our conclusions whether the decree from which the appeal was taken should be reversed or affirmed. Grave doubts are entertained whether the master was justified in putting back for repairs, as he was quite as near to western ports as to those situated to the eastward, and the record furnishes no reason to conclude that he would have encountered any greater perils or difficulties in proceeding to the westward than he did in putting back to the port selected as the port of refuge; but it is not necessary to pursue that inquiry, as it is not the intention of the court to rest the decision upon that ground. Ships, to be seaworthy, ought in general to have spare sails where the voyage is a long one, and if the ship in this case was properly furnished in that behalf the conduct of the master in putting back for the reasons assigned in the protest is quite indefensible, as it is clear that he might have gone forward just as safely, and if he had done so it cannot be doubted that he might have gone to any one of a half-dozen western ports where he could have repaired his ship in ample season to have enabled him to complete the voyage, deliver the cargo, and return to the open sea, without the least danger of any obstruction from ice in the river navigation. None of these matters, however, were much urged by the appellees at the argument, and they are accordingly passed over without further remark.

§ 435. *Facts considered as to master's conduct in failing to complete voyage or tranship. If vessel be disabled, master should tranship goods and have transportation completed.*

Grant that the conduct of the master in putting back is without objection, and that he was justified in landing and storing the goods with a view to a survey, and for the purpose of repairing the ship, the question then is whether his subsequent conduct in refusing, after the repairs were finished, to complete the voyage or to procure another vessel, tranship the goods, and send them forward, and in sailing for another and a distant port under a new contract of affreightment, leaving the goods of the libelants in store, without making any provision for their transportation and delivery, constitutes a breach of the contract of affreightment made with the shippers of the goods, as set forth in the bill of lading. As agent of the owners the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some one of the perils expressly excepted in the contract of shipment. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be seasonably repaired to perform the voyage, or cannot be repaired without too great delay and expense, the master is at liberty to tranship the goods and send them forward in another vessel, so as to earn the whole freight, but he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time and carries them on to the place of delivery. He is not only at liberty, in case of such a disaster, to tranship the goods and send them forward, but it is his duty to do so, if he cannot repair his own vessel in a reasonable time, and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance; and in that event he is entitled to charge the goods with the increased freight

arising from the hire of the vessel so procured. *The Propeller Niagara v. Cordes*, 21 How., 24 (§§ 438-450, *infra*).

Shipments are made that the goods may be transported to the place of delivery, and the master should always bear in mind that it is his duty to accomplish that object. Inexcusable delay occurred before it was ascertained what repairs were necessary, and before the work was actually commenced. They came to anchor in Milford Haven, on the 17th of September, and a survey was called on the following day, but the master was dissatisfied with the result, and on the 25th of the same month he called another, so that the ship did not arrive at the port where the repairs were made until the 28th of the month, ten days after her arrival at Milford. Duties remain to be performed by the master or the owner after the vessel is disabled. His obligation of safe custody, due transport and right delivery still continues, and is by no means discharged or lessened while it appears that the goods have not perished in the disaster. *King v. Shepherd*, 3 Story, 358 (§§ 532-537, *infra*); *Elliott v. Rosell*, 10 Johns., 7.

§ 436. *Carrier is only excused by stipulated exceptions, etc.*

Nothing will excuse the carrier under such circumstances but the causes stipulated in the bill of lading, and he is still bound by virtue of his original contract to use his utmost exertions to transport or send forward the goods to the port of delivery. Such carriers may be answerable for the goods in case of loss or injury, even though no actual blame can be imputed to them; and after the loss or injury is established the burden lies upon the respondent to show that it was occasioned by one of the perils excepted in the contract of shipment or bill of lading. *Clark v. Barnwell*, 12 How., 272; *Rich v. Lambert*, id., 347; *Chitty on Carriers*, 242; *Story on Bailm.*, §§ 528, 529; 3 Kent, 213; 1 Smith, *Lead. Cas.*, 313; *Smith, Mercantile Law*, 348. Diligence and promptitude were due in this case from the master, especially if he believed that there was any danger that the time which would be occupied in making the repairs would render it impracticable to carry forward the goods before the close of the fall navigation; and if he was of the opinion, in view of all the circumstances, that the repairs could not be completed in season to transport the goods to the port of delivery, he was bound to procure another vessel, tranship the goods, and forward them to the consignees.

§ 437. *Conclusion on facts that carrier is liable.*

Much testimony was introduced by the appellants to show that another vessel could not have been procured, but most of it is not of a character to apply to the case before the court. Bound to keep safely, duly transport and rightly deliver the goods, it is no defense for the carrier to allege that the price of freight at that time was higher than it would have been earlier in the season, as the charge for the increased price would have fallen upon the goods and not upon the appellants. They had contracted to transport the goods, and it is no defense to a suit for the breach of the contract that the rate of the insurance at that time was higher than it was earlier in the season. Excuses of the kind constitute no defense to such an action, as the carrier is bound to perform his contract unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading or contract of shipment. Under the circumstances of this case the appellants were bound to transport the goods in their own vessel, or to procure another and send them forward to the port of delivery. Opposed to this view is the sug-

gestion that they were not bound to tranship immediately, as they had the right to detain the goods and repair their own vessel for that purpose; but the decisive answer to that suggestion is that they had no right to detain the goods for any such purpose, unless the repairs could be made in time to enable the ship to transport the goods to the port of delivery before the navigation closed.

Without entering into the details of the evidence, suffice it to say the court is of the opinion that another vessel might have been procured for that purpose, and that it was the duty of the master to have transhipped the goods unless he could repair his own vessel in season to complete the voyage. *Cannan v. Meaburn*, 8 Moore, 141. Aside from that proposition, however, the court is of the opinion that the repairs were finished in season to have enabled the master to transport the goods in his own vessel, and it is clear that he was bound to do so unless he was prevented by some one of the causes expressed in the bill of lading. Mere fear that he might encounter ice in the voyage, or that he might not be able to return till spring, if he transported the goods to the port of delivery, constitutes no defense, as he was bound by his contract to complete the voyage without unnecessary delay, unless, as before explained, he was prevented by some one of the causes expressed in the bill of lading. His ship was fully repaired on the 3d of November, and the navigation did not close until the 15th of December following, which would have given him ample time to deliver the cargo and complete the voyage. Forty days would have been a long voyage, and probably it might have been accomplished in thirty-five. Viewed in any light, as shown by the evidence, the decree of the circuit court is correct.

Decree affirmed.

THE PROPELLER NIAGARA v. CORDES.

(21 Howard, 7-85. 1858.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—These are appeals in admiralty from the district court of the United States for the district of Wisconsin.

Libels were filed in these cases at a special term of the district court of the United States begun and held at the city of Milwaukee, on the first Monday of November, 1855. They are drawn in the usual form of libels *in rem*, and respectively allege a breach of contract of affreightment. Both suits grew out of contracts for the transportation of goods by the steam propeller Niagara, on her last trip during the season of 1854, from the port of Buffalo, in the state of New York, to Chicago, in the state of Illinois. They were argued together in this court, and it was conceded at the argument, by the counsel on both sides, that they depended substantially upon the same state of facts. All the testimony respecting the liability of the steamer was first taken and filed in the case last named, and was subsequently admitted and read in evidence at the hearing in the other suit, under a stipulation of the parties, and the pleadings are substantially the same in both cases. On the part of the libelants, it is alleged, among other things, to the effect that on or about the 28th day of November, 1854, the libelants caused certain goods, particularly described in the respective libels, to be shipped in good order and condition on board the propeller Niagara, to be transported from Buffalo to Milwaukee, in the state of Wisconsin, and that the master, Hugh Mallon, received the goods

on board, and in consideration of certain freight, to be paid in that behalf by the respective libelants, undertook and promised to convey the goods from the port of shipment to the port of destination, and there to deliver the goods (the dangers of navigation, fire and collision only excepted) in like good order and condition to the libelants or their respective agents.

And they further allege that the steamer shortly thereafter departed on her voyage, but that the master, not regarding his duty, nor his promise and undertaking, did not so convey the goods, although no danger of navigation, fire or collision prevented him from so doing, and that the goods, or a large portion of them, through the mere carelessness, negligence and improper conduct of the master, his mariners or servants, became wetted, heated or stained, and greatly damaged, or wholly lost to the libelants. Answers in the usual form of pleading were duly filed in each case on the 24th day of May, 1855, admitting the jurisdiction of the court, and setting up substantially the same grounds of defense. They are alike in all their material allegations, so far at least as respects the questions discussed at the bar, and all the matters involved in the judgment of the court. In both cases the answers admit the contract to transport the goods, as per bill of lading, the dangers of navigation, fire and collision excepted, and that certain packages under each of the contracts were accordingly shipped on board the steamer for that trip, leaving it to the libelants in each case to make such proof of the kind, quantity and value of the goods as they might be advised was material, and aver that the steamer, when she departed on the voyage, on the 29th day of November, 1854, was tight, staunch, seaworthy and well manned, and that her entire cargo was well, safely and securely stowed. And the respondents, denying every allegation in the libels of carelessness, negligence and improper conduct on the part of the master and his mariners, aver the fact to be that they were vigilant, competent and skilful in the premises, and did what it was their duty to do under the circumstances in which they were placed. They admit, also, that a part of the cargo was damaged, but allege and insist that the damage was occasioned by a danger of navigation within the exception of the bill of lading, for which they are not, and ought not, in any manner, to be held responsible. And they further allege that the steamer was, by stress of weather, compelled to make the harbor of Presque Isle, and by the snow and the force of the storm and wind, which was very severe, the steamer dragged her anchor, went ashore, and was dashed upon the beach, from which cause and the necessary detention of the goods on board, the damage, whatever it is, occurred; and that, in the month of May, 1855, which was as soon thereafter as it was possible to repair the steamer and for her to proceed on her voyage, the goods, or so much of them as belonged to the respective libelants, were transported to Milwaukee and there delivered to them, and were by them respectively received, with a full knowledge of the damage, if any, and of its cause, and with an agreement not only to share the damage, but that the goods should be charged with and pay their proportion of a general average of the losses thus occasioned; and the respondents claim that the libelants, in each case, are liable "for a large amount of the average and damage" to the steamer, which they aver to be the sum of \$2,000.

This statement from the libels and answers embraces the substance of the pleadings in both cases, so far as respects the several matters discussed at the bar, and the real merits of the controversy. Testimony was taken on both sides in the court below, and after a full hearing a decree in each case was

entered for the libelants, and the respondents appealed to this court. No additional testimony has been taken since the appeal, and it seems to be conceded that the rights of the parties depend chiefly upon certain questions of fact to be determined from the evidence, which is conflicting, and in some particulars very contradictory. That remark, however, applies more particularly to that part of the testimony which relates to the conduct of the master after the steamer was stranded, and the means at his command to secure and preserve the goods from damage. Many of the facts and circumstances connected with the voyage, as well as those attending the disaster, are involved in much less difficulty, and some of those most material to be ascertained are satisfactorily proved, without any contradiction whatever. On the one side no question is made that the goods were regularly shipped at Buffalo on the 28th day of November, 1854; and on the other it is admitted that, in the contract of shipment, the dangers of navigation, fire and collision were duly excepted in the usual form of such an exception in bills of lading. All of the goods were shipped in good order and condition, and were to be delivered at Milwaukee, as alleged by the libelants. They consisted in the one case of groceries, and in the other of dry goods; and it is conceded that they were carefully and properly stowed. On the day following the shipment, the Niagara left Buffalo and proceeded on her intended voyage. She was a steam propeller of four hundred and fifty tons burden, and, at the time of her departure, was a good, tight, staunch vessel, every way suitable for the navigation in which she was engaged, and was well furnished with ground tackle, including two anchors and two chains. One of her anchors weighed fourteen hundred pounds, with an inch and an eighth chain of sixty fathoms, and the other weighed seven hundred pounds, with a chain of the usual size and length. Her whole company consisted of twenty-two men, constituting a full complement of officers and crew for the voyage in a steamer of that description. Having proceeded on the usual route for that voyage, she arrived in Lake Huron on the 2d day of December, at four o'clock in the morning, in perfect safety, and crossed Saginaw bay in the afternoon of the same day. About eight o'clock in the evening of that day it commenced snowing, with a light wind, which, by twelve o'clock at night, freshened to a gale, and the storm continued without any abatement, blowing a heavy gale from a northeasterly direction, or east-northeast, till the day after the steamer was stranded.

After crossing Saginaw bay, however, she continued on her regular course, and made Thunder-bay light at one o'clock, and, proceeding onward on her voyage, arrived off Presque Isle, and made the light at that place at four o'clock in the morning, without having suffered any damage or met with any difficulty, except that the master testifies that she rolled heavily, and that for a half or three-quarters of an hour before he made the light, he had to keep her off her course two points, to ease her in the sea. Her course from Thunder bay had been north-northwest for a short time, then west by north, and then northwest; and the mate of the steamer testifies that, when they first saw Presque Isle light, the steamer was a mile or two east of the light, and was in the usual course. At that time she was in no want either of wood or water, and it does not appear that she was in any worse condition to proceed on the voyage, unless prevented by the storm, than at the moment when she left the place of her departure. Her cargo was a general assortment of merchandise, consisting of teas, sugars, coffee, fish, liquors, molasses, crates of crockery, bales of sheeting, boxes of dry goods, and various other articles, specified in the record. All

of the liquors, molasses, and some of the boxes, were stowed on **the ground tier** in the lower hold. Heavy goods were placed at the bottom, and light goods on top, and the hold was full, and battened down. Most of the light goods, such as boxes of merchandise, teas, sugar in barrels, and bales of sheeting, were on deck, and there were some willow wagons on the hurricane deck. None of her deck load had been washed away or injured, and it does not appear that it had been in any manner displaced or thrown into disorder by the rolling of the vessel.

These considerations tend strongly ~~to show that there~~ could not have been any urgent necessity to change the course of the steamer on account of the violence of the storm or the motion of the vessel, and, consequently, affect the credit of the master, and corroborate the statement of the mate that, at the time the light was discovered, the steamer was pursuing her usual route. Both the master and the mate were on deck when they made the light, and the master gave the order to run into Presque Isle. In entering the harbor, they steered west-southwest, and then doubled inside of a small shoal round to the southeast, in order to get to the pier. What purpose was to be accomplished by getting to the pier, it is not easy to perceive, as the mate testifies that they knew that the sea was so heavy that the steamer could not lie at the dock. They, however, came round to the southeast, and so near to the pier that the mate says he could see the snow on the beach, and then let go the large anchor, and the wind immediately caught the steamer on the larboard bow, and she commenced dragging the anchor. When they found that the steamer dragged, and that there was danger that she would go ashore, instead of casting the other anchor, their first endeavor was to get rid of the one already cast, in order, if possible, to work her off, and make another effort to get up to the dock; and, finding that they could not heave the chain with the windlass, their next effort was to slip it; and while they were endeavoring to unshackle the chain the steamer struck, and went on to the beach stern first, and immediately swung round broadside to the shore. No attempt was made to let go the small anchor, although it was hanging at the bow, and the mate admits that the steamer dragged more than a quarter of a mile before she struck. They presently tried the pumps, and it was found that she did not leak. Shortly after, she commenced pounding, and it was then ascertained that she was making water freely, when they started the engine pump, but it choked with sand, and they were obliged to desist. At the place where the steamer lay the water was seven or eight feet deep, and she filled to the level of the water outside in two or three hours, so that the water in the hold was four or five feet deep above the top of the keelson. It was about five o'clock in the morning of the 3d of December, 1854, that the steamer went on to the beach, and the master and all hands remained on board till ten o'clock in the forenoon, when he and the mate went on shore for the purpose, as he testifies, of ascertaining whether there were any facilities for storing the goods, and whether it would be possible to unload the steamer, and get her off. When he got on shore, he found the steamer Plymouth, bound down the lake, lying there, fastened at the dock, she having touched at Presque Isle for wood four or five hours before the arrival of the Niagara, and remaining there on account of the storm. Having made certain inquiries of the residents, and consulted with the master of the Plymouth, he came to the conclusion that it was the safest way to leave the goods on board, as more of them, in his judgment, would be protected in that mode than by removing them on shore; and on the morning of

the 6th of December, the master, other officers and all the crew of the Niagara, except three, took passage in the Plymouth, leaving the watchman, wheelsman and porter in charge of the steamer, with the hatches fastened down, and the goods in the condition in which they were when the steamer was stranded. During the night of the 4th of December, the storm subsided; but the following day was very cold, so that the steamers were frozen in, and persons walked on the ice from the pier to the place where the Niagara lay, which was more than a half mile. It moderated, however, during the night, and on the following morning the ice went out of the harbor, and two other steamers, the Republic and Kentucky, came in before the Plymouth left, and the former took the place of the Plymouth at the dock after she started on her voyage down the lake. Several witnesses testify — and among the number the master of the Plymouth — that the 6th of December, the day he left, was a fine day, although he says there was so much ice about his boat, where she lay at the dock, that he had to cut her out in the morning before he started.

One of the witnesses for the libelants, who resides at Presque Isle, testifies that after the Plymouth left it was clear, and made ice, but did not blow, and that not long after there was a thaw, which continued till the 13th of January, and that after the thaw there were two or three weeks of very nice weather. Navigation, however, closed in a few days after the Plymouth left, and the Niagara remained on the beach, where she was stranded, until the mate, who is now the master of the Niagara, returned to Presque Isle, on the 27th day of April, 1855. When he returned, he found her where he left her, in charge of the watchman. He immediately pumped her out with a steam pump, according to his account, and lightened her off with a steamboat, and, after she was lightened, got the steamboat to take her up to the dock, where he removed the residue of the goods, and then took her to Detroit and had her repaired. After she was repaired, he returned to Presque Isle, in the month of May, 1855, and conveyed the goods, or so much of them as had not been destroyed, to the place of destination. Some of the goods were in good condition or were slightly injured, while others were greatly damaged or wholly worthless. Those stowed below had remained entirely without ventilation from December to March, and then the hatch at midships only had been opened. They were heated, discolored and stained, and one of the witnesses testifies that sugar, coffee and dried fruit were all soaked together, and that the water pumped up was dark, exhibiting the appearance of the soakings of coffee and codfish, and that the goods had the offensive smell of dead water. They were taken out about the 1st of May, so that those stowed in the lower hold, not more than four or five feet above the keelson, had been submerged in bilge-water for nearly five months, and some of those above the water had been moistened by the dampness and become mouldy. Damages to the amount of \$3,763.76 were allowed by the district judge in the case first named, and in the other \$1,964.30, and it is not pretended in the argument that the respective amounts were either extravagant or unreasonable. It is not upon any such ground that the appellants seek to reverse the respective decrees in the court below. They deny that they are liable at all for any amount, and set up the first exception in the contract of shipment or bill of lading, and their counsel insist upon the following propositions:

I. That the damage to the goods resulting from the stranding of the steamer was wholly occasioned by the dangers of navigation, the risk of which was not taken by the master or owners of the steamer.

II. That after the Niagara was stranded and filled with water, and disabled from proceeding on her voyage, the appellants were responsible only for the ultimate delivery of the goods, and for reasonable care in preserving them from the effect of storms, bad air, leakage and embezzlement.

III. That the master, after the steamer was stranded, and the goods wetted, became and was the agent of the shippers of the goods as well as of the owners of the vessel, and as such, under the circumstances of this case, is responsible only for due and proper care and diligence, and that it cannot be successfully contended, from the evidence, that such care and diligence were not exercised.

These propositions, whether taken separately or collectively, necessarily involve mixed questions of law and fact, which in a case like the present must be determined by the court, acting instead of a jury, to find the facts, and as a court to determine the law. Such propositions, therefore, must be considered in connection with all the legal evidence exhibited in the record, and their accuracy must be tested by the true state of the facts as found by the court from the evidence, and by the rules of law applicable to that state of the case. According to the admitted or undisputed facts of the case, the Niagara was enrolled and licensed for the coasting trade, and was employed by the owners in transporting goods, under contracts for freight, upon navigable waters between ports and places in different states, and at the time of the disaster she had a full cargo of merchandise, of various descriptions, on board, consigned to merchants or parties residing either at her port of destination or at Milwaukee, and other intermediate ports or places along the course of her voyage. She was a general ship, laden with goods to be transported for hire; and the goods in question having been received and taken charge of, as goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, the question of liability in this case must be determined by the rules of law applicable to carriers of goods upon such inland waters.

§ 438. *Liability of common carrier stated.*

A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he take charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or, in the absence of any stipulation in that behalf, within a reasonable time.

§ 439. *Common carriers by land are insurers.*

Common carriers are usually described as of two kinds, namely, carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

§ 440. — *so are common carriers by water; duties of such carriers stated.*

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skilful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation; as they are, in general, in respect to goods transported for hire, responsible for his acts of negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage, unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners. A clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck. *Fland. on Shipp.*, sec. 192.

§ 441. *Duty with reference to voyage, deviation, etc.*

In the case of a parol shipment, the master is allowed to show a local custom to carry the goods on deck in a particular trade. It must, however, be a custom so generally known and recognized, that a fair presumption arises that the parties in entering into the contract agreed that their rights and duties should be regulated by it. Having received the goods for transportation, in the absence of any stipulation as to the period of sailing, the master must commence the voyage within a reasonable time, without delay, and as soon as the wind, weather and tide will permit. After having set sail he must proceed on the voyage, in the direct, shortest and usual route, to the port of delivery, without unnecessary deviation, unless there has been an express contract as to the course to be pursued; and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage. A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, or for the purpose of obtaining necessary supplies of water and provisions, or, in the case of a steamer, to obtain necessary supplies of wood or coal for the prosecution of the voyage, or for the purpose of assisting another vessel in distress.

§ 442. *Duty with reference to wreck or disability upon the voyage.*

As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by some

cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty, under such circumstances, to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. That rule, however, is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner or upon the security of the ship, he may sell a part or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery.

§ 443. *Legislation limiting the responsibilities of carriers by water.*

Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the constitution. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary. Some new and important provisions have been introduced into the law of carriers by water, by the act of the 3d of March, 1851, entitled "An act to limit the liability of ship-owners." Owners of ships under that act are not held liable for loss or damage to the cargo by reason of fire happening to or on board the vessel, unless the fire was caused by the design or neglect of such owner, except in cases where there is a special contract between the owner and the shipper, whereby the former assumes that risk. They are declared not liable as carriers for precious metals, precious stones or jewels, or for the bills of any bank or public body, unless at the time of their lading a note in writing of their true character and value be given to the owner or his agent, and the same be entered on the bill of lading; and in no case where that act applies will the owner be liable for the articles therein enumerated beyond the amount so notified and entered. It contains other provisions also of very great practical importance, and among the number the following: That for embezzlement, loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of the owner, his liability shall in no case exceed the amount or value of his interest in the vessel and the freight then pending. No part of the act, however, applies to the owner of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

A question may arise whether the lakes bordering on a foreign jurisdiction

are or are not excluded from the operation of the act under the term inland navigation; but it is not necessary at the present time to determine or consider that question, as the first exception in the contract of shipment is the only one set up in this case, and there is no pretense that there has been any transfer of the steamer under the fourth section of the act for the benefit of the libelants.

§ 444. *Except for legislation, common carriers by water, like carriers by land, are approximately insurers.*

Carriers by water are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land — that is to say, they are in the nature of insurers, and are liable, as before remarked, in all events, and for any loss, however sustained, unless it happen from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

§ 445. *Duty of common carrier to protect goods after stranding of vessel.*

Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied, or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel, in *King v. Shepherd*, 3 Story, 358 (§§ 532-537, *infra*), to maintain the proposition, assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities and duties, as a common carrier, still continued, and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that, where there is no provision in the contract of affreightment varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care except by proving that it was the result of some natural and inevitable necessity superior to all human agency, or of a force exerted by a public enemy. Kent, chief justice, said, in *Elliott v. Rossell*, 10 Johns., 7, decided in 1813, that it has long been settled that a common carrier warrants the delivery of the goods in all but the excepted cases of the act of God and

public enemies, and there is no distinction between a carrier by land and a carrier by water; and the same learned judge also held that the character, duty and responsibility of a carrier continues to attach to a master as long as he has charge of the goods. A master, says a learned commentator, should always bear in mind that it is his duty to convey the cargo to its place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible. His duties as carrier are not ended until the goods are delivered at their place of destination, or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. *King v. Shepherd*, 3 Story, 349; *Abbott on Shipp.* (8th ed., Perk.), 478.

§ 446. *Where loss is shown, carrier must bring himself within excepted peril.*

These authorities are sufficient, it is believed, to demonstrate the proposition that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in this case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence, however, in this case, shows the fact to be otherwise; that the goods did not perish at the time the steamer was stranded; and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions; so that the difference in the rule contended for, and the one here laid down, is much less than at first appears. Nevertheless there is a difference, and in a question of so much practical importance it is necessary to adhere strictly to the correct rule.

§ 447. *Losses arising from "dangers of navigation" defined.*

Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the excepted peril may be regarded as continuing its operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; and after the damage is established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they are exempted in

the contract of shipment or bill of lading. *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *supra*); *Rich v. Lambert*, 12 How., 347 (§§ 491-498, *infra*); *Chitt. on Carriers*, 242; *Story on Bailm.*, secs. 528, 529; 3 *Kent Com.*, 213; 1 *Smith Lead. Cas.*, 313; *Chouteaux v. Leech*, 18 Penn. St., 224; *Fland. on Shipp.*, sec. 257; *Marvin on Wr. & Salv.*, 21; *Parsons' Mer. L.*, 348; *Smith's Mer. L.*, 3d ed., 386.

§ 448. — *application of these principles to the present case.*

Applying these principles of law in the consideration of the case, we will proceed to a brief review of the evidence, in connection with that already given, bearing upon the questions of fact presented for decision. It has already appeared that the steamer made the light at Presque Isle on the 3d day of December, 1854, at four o'clock in the morning. At that time she was on the usual course, and was heading northwest. She had met with no difficulty up to that time, and was tight, staunch and strong, and in no want either of wood or water. Her master says, however, that he found it would be a great risk to haul her off to get round the point, doubtless referring to his previous statement that he had kept her off her course to ease her in the sea. She was then sailing northwest, and her course up to the straits would have been, as the witnesses say, either west-northwest, or northwest by west half west, and there is no difference of opinion among them that the course was direct and the wind was a fair wind for steamers; and one witness says that in a conversation with the mate, while he was at Presque Isle, he heard him say that they need not have entered the harbor. All or nearly all the witnesses agree that there is no difficulty in entering that harbor in the daytime, and that the anchorage, though rather limited in space, is safe and quite good just northwesterly of the end of the pier and out towards the light-house, and that the harbor affords a good shelter to vessels in a storm, except when the wind is blowing from a northeasterly direction or east-northeast, and then that its course is directly into the harbor, which fact must have been well known to the master and mate at the time they decided to make the attempt. Many of the witnesses say that it is more difficult to go in during the night, and several testify positively that it is dangerous, and some of the more experienced navigators say they would not risk the attempt in a dark night. One witness, the master of the *Plymouth*, called by the respondents, testified that the steamer did not come right in; that she broached to so near the mouth of the harbor, that she was detained at least a quarter of an hour. She, however, succeeded in entering the harbor, and cast her anchor as before stated. Four experienced navigators testify to the effect that she should have kept on her course; that it was not proper to enter the harbor. On the other side, one witness says that whether it was good seamanship or not would depend upon the position of the vessel; and that if she was near in, he thinks it was prudent, and that he should have entered. Another says that if he had considered either vessel or cargo in danger, he should have gone in by all means; and the mate says that they concluded that it was better to go in. One witness, called by the libelants, says he heard the mate say, after the disaster, that it was unnecessary.

These are the principal facts bearing upon the question whether the master exercised a sound judgment and discretion in entering the harbor. Most of the facts in evidence respecting the acts of the master after he entered the harbor, as they appear to the court, have already been stated, and need not be repeated. Experts were called and examined upon the question whether the master evinced proper skill and judgment in the attempt he made to anchor, and on

that point three or four witnesses, who are experienced navigators, were called and examined by the libelants. They testify to the effect that a master of a steamer about to enter a harbor under the circumstances of this case ought to have both anchors ready, so that if one will not hold the vessel he can cast the other; and they express the opinion that such precautionary steps are no more than ordinary prudence; and one of them says that it is customary to let go the small anchor first, and if that will not hold, then to let go the large anchor. On the other side, the mate of the steamer testifies that they had not time to let go the small anchor; and another witness expresses the opinion, that if the large anchor and the engine would not hold, then there was nothing that could be done; and the master of the Plymouth says that he knows of nothing else that could have been done except to cast the anchor. Numerous witnesses were examined on the question whether it was practicable to have removed the goods and stored them; and whether, if it had been done, it would have afforded any better protection to the goods. On this point the testimony of the witnesses is very conflicting. All that can be done is to state the principal facts, as they appear to the court.

Nineteen men were residing at Presque Isle at the time of the disaster, mostly temporary residents, in the employment of Frederick Barnham, a witness for the respondents. There were four dwelling-houses there in which people lived, and two unoccupied, and there were two barns and a vacant shop; all, or nearly all the dwellings, were built of logs, and were rudely finished. Three of those dwellings were within a half mile of the place where the steamer lay, which was within a quarter of a mile of a road extending round on the beach from the pier, where the Plymouth lay with her officers and crew on board. Several days previously the steamer Grand Turk had been wrecked, twelve miles distant from Presque Isle, and her officers and crew were there, consisting in all of eight or nine men. There was a large scow in the harbor, in good order, anchored near the pier, and not in use, which several witnesses testify might have been obtained to lighten the steamer; and one witness testifies that the same scow was used by the mate in the spring following to carry the goods from the steamer to the dock, before she was taken off by the tug. Nine pumps, such as are used on board vessels, and brought up to use on the other disabled steamer, were lying on the beach, within a half mile. All the witnesses agree that the master of the Niagara never applied to any one of them for any assistance, either in respect to the goods or the steamer; and the mate admits that they had made up their minds to leave the evening of the day after the disaster. Some of the witnesses offered assistance, and it was declined. Courtwright testifies that he heard a conversation between the master and the mate, in presence of fifteen or twenty persons, in reference to taking out the cargo of the steamer. The mate said to the master that they could get the goods out of the steamer and get her alongside of the dock, to which the master replied that it was too late in the season to do anything with her; that he was bound to go home; that he would not stop there for the steamer and all that was in her. Other declarations of the master, equally expressive of his determination to return home, are also in evidence; and being a part of the *res gestæ*, are clearly admissible to explain the motives of the master, in connection with his acts. Many witnesses on the side of the respondents express the opinion that the goods could not have been removed; and an equal or greater number called by the libelants express a contrary opinion, and suggest various modes by which it might have been accomplished in a very short time.

Such opinions, however, cannot have much weight in determining the question. One important fact is clearly proved, namely, that the ice went out of the harbor the night before the Plymouth left, and it was mild weather after that, for the most part, till near the middle of January, 1855.

§ 449. *Master may exercise reasonable discretion as to entering harbor in storm.*

Our conclusions upon these several questions may be briefly stated. In respect to the one first presented it is proper to remark that it depends upon the proof whether the act of the master, in seeking shelter in the harbor, was reasonably necessary, and if it was, then he is not in fault on that account. None of the circumstances exhibit such clear and decisive indications as would justify the conclusion that he did not think at the time that it was the most expedient course to be pursued. That he was without much experience as a master of a steamer of this description does not seem to be denied; and it is equally clear that he had a strong preference for a sailing vessel, as is made evident by his own remarks, as well as in another fact proved in the case, that he has resumed his more favorite employment upon the water, for which, perhaps, he is better qualified than for the one in which he was then engaged. He says, in effect, that he found it would be dangerous to proceed on the voyage, and the mate says they concluded that it would be better to go into Presque Isle; and on their own opinions thus expressed, and the proofs as to the violence of the storm, his vindication mainly rests. Strong doubts are entertained whether he acted wisely in departing from the course of the voyage, and yet the evidence is not so full and clear in the case as to induce the court to place the decision upon that ground. Whatever dangers there were in entering the harbor he succeeded in surmounting, and he cannot be held responsible for any accident which did not happen. Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course may be more apparent now than it could have been to any one at the time. Something must be deferred to the judgment and discretion of the master on such occasions, so that although the circumstances tend strongly to prove that he misjudged, or was wanting in that fearless, prudent energy which he ought to have displayed, still they are not of that decisive character which incline the court to make the decision turn upon that ground; and the same remarks also apply to his acts and endeavors to anchor the steamer after he entered the harbor. Knowing, as he did, that the wind was blowing directly into the harbor, it is difficult to see why it was that he brought the steamer round to the position in the wind, so as to expose her to the danger which finally overcame his efforts to accomplish the purpose for which he says he sought the harbor. He knew the course of the wind and the difficulties of the undertaking before he entered, and ought to have been prepared to encounter them with the best precautions in his power to make. When he found that the anchor dragged, a great majority of the witnesses say he ought to have let go the other. His own description of what took place on the deck of the steamer after she entered the harbor, as well as that given by the mate, evinces an indecision and want of energy quite unsuited to the emergency in which he was placed, and tends strongly to show that he was wanting in the proper qualities of a skilful and well instructed master. These considerations create strong doubts in the mind of the court whether the respondents are faultless in this particular, and yet the court is disinclined to place the decision entirely on that ground, as several witnesses of some nauti-

cal skill, have testified that they are unable to see that anything more could have been done.

§ 450. *Master considered grossly negligent in failing to protect cargo after his vessel was stranded.*

On the remaining ground of complaints against the master, we are all of the opinion that he was guilty of gross negligence. His steamer lay within ten or fifteen rods of the beach, and within a little more than a half mile of the settlement, the number of whose residents was temporarily augmented by the presence of the officers and crew of the steamer Plymouth and those of the Grand Turk; and yet all he did, so far as appears, to secure or recover the large amount of property he had on board, was to go on shore, consult with one or more of the residents, advise with the master of the Plymouth, and then came to the conclusion that nothing could be done, and that it was best to leave the goods on board, under the charge of three of his crew. He remained, however, for two or three days, until the storm had subsided and the weather had moderated; and, after two other steamers had arrived in the harbor, he took passage on the Plymouth and returned home, without having made any effort himself, or requested the aid of others, either to get off the steamer, or to remove and store the goods. We are satisfied from the evidence that the goods might have been removed between the time he left and the middle of January, and we are not satisfied that it could not have been done or successfully commenced during the time he remained in Presque Isle. A removal of a part would have enabled him to protect the residue on board; and there is no sufficient ground from the evidence to conclude that he would have encountered any serious difficulty in finding places enough for storing to have enabled him to remove from the steamer all of that class of goods exposed to damage and store them on shore. At that time the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill and prudence, to save them from the impending peril.

This view of the evidence renders it unnecessary to consider the other grounds of defense set up by the respondents. The decrees, therefore, of the district court in the respective cases are affirmed, with costs, in each case, for the libelants.

THE SCHOONER REESIDE.

(Circuit Court for Massachusetts: 2 Sumner, 567-575. 1837.)

STATEMENT OF FACTS.—A carrier being sued for damage to goods set up a local usage that ship-owners, having seen that goods are properly stowed, should not be liable for any damages not occasioned by their own neglect. An exception to this defense was considered separately.

§ 451. *For what purposes evidence of local usage is admissible.*

Opinion by STORY, J.

I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade to control, vary and annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to

me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties and to ascertain the nature and extent of their contracts arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument when the word or words have various senses, some common, some qualified and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications properly arising in the absence of any positive expressions of intention, to control, vary and contradict the most formal and deliberate written declarations of the parties.

§ 452. *A usage cannot be permitted to modify the contract expressed in the bill of lading.*

Now, what is the object of the present asserted usage or custom? It is to show that, notwithstanding there is a written contract (the bill of lading), by which the owners have agreed to deliver the goods, shipped in good order and condition, at Boston, the danger of the seas only excepted, yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is to substitute for the express terms of the bill of lading an implied agreement on the part of the owners that they shall not be bound to deliver the goods in good order or condition, but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me that this is to supersede the positive agreement of the parties, and not to construe it. The exception must, therefore, be sustained.

ON THE MERITS.

Opinion by STORY, J.

The only remaining question, then, is whether the damage to the goods in this case has been occasioned by the danger of the seas, for there is no dispute as to the fact of the actual damage. I am not satisfied that there was any bad stowage in this case; though it does appear to me, that, considering the nature of the principal cargo (two hundred barrels of oil), it would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel. I cannot attribute the damage in this case to any danger of the seas. It seems to me that the weather was not worse than

what must ordinarily be expected to be encountered in such a voyage; and the rolling of the vessel by a cross sea is an ordinary incident to every voyage upon the sea.

§ 453. *What is meant by "the danger of the seas."*

The phrase "danger of the seas," whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. See Story on Bailm., §§ 512-525; 2 Marsh. on Ins., ch. 12, § 1, pp. 487, 492; Abbott on Shipp., Pt. 3, ch. 4, § 1; 3 Kent Comm., Lect., 47, p. 216 (3d ed.); id., 217; Elliott v. Rosell, 10 Johns., 1. It is scarcely necessary to do more upon such a subject than to refer to the cases collected on this head by Lord Tenterden in his Treatise on Shipping (Abbott on Shipp., p. 3, ch. 4, §§ 1-8), and by Mr. Chancellor Kent in his learned Commentaries (3 Kent Com., 299, 300 (3d ed.), and note); id., 216, 217.

§ 454. *Carrier held liable for damage to goods by placing other articles near, which were shipped in bad order.*

There is no evidence, in the present case, which satisfies my mind that, if the oil had been properly coopered and properly stored, the rolling of the vessel in the manner stated would have produced any such damage as occurred in this case. It is remarkable that none of the witnesses who have been accustomed to carry oil on similar voyages speak of any damage having occurred under like circumstances from the mere rolling of the vessel in a cross sea, or, indeed, of any damage at all. But the evidence does establish to my mind most conclusively, that the casks of oil were in very bad order, and very improperly coopered, when they were shipped; and that the whole damage was occasioned by the uncommon leakage from the casks, arising from their bad condition when shipped. If the casks had been shipped in proper order, it is incredible that the leakage should have been so extraordinary, especially when it abundantly appears that the rolling of the vessel was for a short time, and did not start any of the casks from their original position. The appearance of the casks, upon their being landed at Boston, struck one of the most favorable of the respondent's witnesses (Capt. Nichols) with great surprise, and produced an inquiry on his part whether they were in good order when taken on board. To which the reply of the mate was, that they were. But Capt. Nichols said that the hoops were loose, more than usual, and that he does not know whether they were properly coopered or not.

It is true that the New York witnesses, who did the work under the principal cooper in that port, express a positive opinion that the casks, when shipped, were well coopered and in good order; and that they did all the necessary cooperage. But though they are competent witnesses, it is impossible to wink out of sight that they stand in a position somewhat peculiar, and under influences not wholly without a bearing upon the cause. They come to purge themselves and their employer from the imputation of gross neglect in the discharge of duty. On the other hand the Boston witnesses are in an entirely different predicament, and disconnected from all influences which can fairly be supposed to disturb their judgment. They also speak, not to matters of opinion merely, but to facts also. They not only declare, in the most unequivocal terms, that

the casks were in very bad order when they were unladen in Boston, and that they did not, with the exception of three or four, bear any marks of having been recently coopered, and that, in their judgment, they had not from their appearance been recently coopered, but were a lot long put up, but they state the fact that they were obliged to cooper a large number of them, when unladen, on account of their bad leaking at the time. Indeed, the leakage was so great, that out of one lot of fifty casks belonging to Mr. Brown (one of the shippers), he stated that one hundred and thirty-four gallons and a half of oil had actually leaked out during this very short voyage; and the whole testimony shows that the vessel was not even subjected to a heavy cross sea for more than an hour or two. If, indeed, under the circumstances testified to, the rolling of the vessel from the cross sea could have occasioned so much leakage, it would be difficult to satisfy my mind that there was not grossly improper stowage; for it would be impossible to treat it as a peril of the sea, which could not have been avoided by the ordinary exercise of human prudence and skill.

There is a most significant circumstance in the evidence, established, as I think, beyond all reasonable controversy, which shows that Capt. Mayo, the master of the *Reeside*, took the same view of this matter, *recenti facto*. It seems that Mr. Brown had procured insurance on his shipment of oil; and finding, on the arrival, that the oil was in such very bad order, and that there had been such an extraordinary leakage, he applied to Capt. Mayo to ascertain what had been the weather during the voyage, so as to know whether he might claim the loss from the underwriters, as arising from the perils of the seas. Capt. Mayo, with a knowledge of his object, so far from encouraging any hope of this sort, explicitly stated "that he had had a very good passage, and a blow only for an hour or two."

Mr. Ellison (a clerk in the store of the libelants) has given a statement which entirely corroborates that of Mr. Brown, if indeed it should be thought to require (as I do not think it does) any corroboration. He also had a conversation with Capt. Mayo respecting the damage done to the carpeting, and said to him that it could not have arisen from the perils of the sea, because there had been good weather; to which Capt. Mayo assented, as he did to the additional statement by the witness, that, if the libelants had been insured, they could not have recovered of the underwriters. And Capt. Mayo then added, "that if the port warden gave them a certificate that the goods were properly stowed, they were not liable to pay for damage; otherwise they were."

There is another fact, which, I cannot but think, adds no inconsiderable strength to the case for the libelants. It is that the carpeting was folded and pressed by a power press in the bales in so close a manner, that, unless the leakage was to a very extraordinary extent, the oil never could have penetrated farther than through the external folds or than through the mere edges of the bales; whereas in fact it penetrated or was absorbed through the edges of every successive fold of the carpeting (the bales of carpeting being stowed on their ends) to the depth of from six to eighteen inches. This circumstance demonstrates not only that the leakage was very great, but that the carpeting was exposed to the action of the oil for a considerable length of time.

Upon the whole, after examining the testimony, I am fully satisfied that the injury did not arise from the dangers of the seas, properly so called, but from the oil not being properly coopered and shipped in good order; and, therefore, the libelants have maintained their libel; and the decree of the district court

ought to be affirmed with costs. It has been suggested that this case is of great importance to the packet ship interest. It may be so. But in my judgment it is quite as important to the shipping interest. And if packet owners could, under circumstances like the present, escape from responsibility for like losses, it would be in the highest degree mischievous to the best interests of trade and navigation. No honorable merchant, tolerably attentive to his own interest, ought to be willing to risk his goods upon any voyage, unless he can have some adequate security against losses of so serious a nature. It would be to hold out to packet masters a premium for indifference, or carelessness, or want of vigilance in protecting the shipments confided to their care. I cannot but deem every relaxation of the common law in relation to the duties and responsibilities of the owners of carrier ships to be founded in bad policy, and detrimental to the general interests of commerce. The decree of the district court is affirmed with costs.

THE WELLINGTON.

(District Court for Wisconsin: 1 Bissell, 279-283. 1839.)

STATEMENT OF FACTS.—Proceeding to recover the value of one hundred and ninety-five barrels of apples which were to have been delivered at Milwaukee as per bill of lading, but which were necessarily jettisoned in a storm. The libellant shipped at a port in Ohio six hundred and thirty-five barrels, to be delivered at Milwaukee, receiving a bill of lading therefor from the master, dangers of navigation alone excepted. It appeared from the master's testimony that libellant had verbally consented that any barrels which could not be stowed below might be stowed on deck. Libellant, however, testified that he had given no directions of any kind as to their stowage, and had left two days before they were received on board. Full freight is charged without exception upon all the barrels.

§ 455. *General principles of liability where goods are stowed on deck.*

Opinion by MILLER, J.

It is well understood that when goods are stowed on deck, with the consent of the owner, no loss by justifiable jettison can be recovered for, unless the accident by which they are lost would have been equally fatal if they had been under deck. *Lawrence v. Minturn*, 17 How., 100 (§§ 463-470, *infra*); *The Waldo*, Dav., 161. Between the shipper and the carrier the bill of lading is not conclusive as a receipt. *Abbott on Shipp.*, 320, and cases cited; 324 and cases cited; *Goodrich v. Norris*, Abb. Adm., 196; *Manchester v. Milne*, id., 115; *Zerega v. Poppe*, id., 397; *Baxter v. Leland*, id., 348; *Worden v. Greer*, 6 Watts, 424; *Barrett v. Rogers*, 7 Mass., 297. The quantity and condition of the goods receipted for can be proved by parol to vary the bill of lading as a receipt.

§ 456. *Goods are to be stowed under deck, unless otherwise stipulated; parol evidence cannot control or vary bill of lading in this respect.*

The bill of lading does not state in express terms that the six hundred and thirty-five barrels of apples shall be stowed under deck; but this is a condition tacitly annexed to the contract by operation of law, and it is equally binding on the master, and the shipper is entitled to its benefits as a contract, as if it were stated in express terms. And this bill of lading not making distinction as to the amount of freight per barrel, implies a contract to stow the whole number of barrels under deck. Full freight is charged without exception. The parol

evidence offered of conversations between the owner and the master before the bill of lading was signed and delivered, respecting the stowing of such barrels as the hold would not receive, is inadmissible, as not evidence controlling the contract afterwards reduced to writing and delivered. Nor could such evidence of conversation at the time of the execution and delivery of the written contract be received, to control or vary the bill of lading, whether it expressly stated that all the goods should be stowed under deck or not. In the case of *Lawrence v. Minturn*, there was a written contract that the article shipped should be placed on deck. In the case of *The Waldo* a quantity of potatoes were stowed on deck, and being damaged by water were thrown over. Parol proof, offered to show consent on the part of the shipper that they should be placed on deck, was rejected. In *Barber v. Brace*, 3 Conn., 9, the defendant offered parol testimony to prove that at the time the bill of lading was executed there was a verbal agreement to transfer the gin on the sloop's deck. The testimony was rejected, on the ground that the conversation both before and at the time the writing was given was merged in the written instrument. In *Sayward v. Stevens*, 3 Gray, 97, the bill of lading was in the usual form except "seven boxes of shingles on deck." The plaintiff offered to prove by parol that all the articles stowed on deck were so stowed with the defendant's knowledge and assistance. The evidence was rejected. In the case of *Croery v. Holly*, 14 Wend., 26, it appears that ninety barrels of wrought iron shipped on a clean bill of lading were placed on deck, and thrown overboard in a storm. Parol evidence of consent of the shipper that the goods might be so stowed was not received. The court, by Nelson, C. J., remarks, "It is true that nothing is said in the bill of lading as to the manner of stowing away the goods, whether on or under deck; but the case concedes that the legal import of the contract, as well as the understanding of the usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of the law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract. 8 Johns., 189. It seems to me it would be extremely dangerous and subject to the full force of every objection that excludes the admission of this species of evidence, to permit any stipulation, express or implied, in those instruments, when free from ambiguity, to be thus varied; and besides, from the high character given to those instruments in commercial business, would expose the insurer and purchaser to frauds." In *Vernard v. Hudson*, 3 Sumn., 405, a witness was permitted to testify to a verbal agreement that a portion of the goods might be stowed on deck. The court declared the implied condition of a clean bill of lading, that the goods should be stowed under deck, but thought the evidence admissible, as not contradicting or varying an express written contract. The court in commenting on the case says, "there is the clear fact, that a full under-deck freight is stipulated for in the bill of lading, a fact certainly not easily reconcilable with the supposition that they were to be carried on deck. So that the preponderance of the evidence decidedly is, that there was no such agreement to carry the goods on deck. If it had existed, one of two things ought to have occurred—either that under-deck freight should not have been payable, or that there should have been some written memorandum on the bill of lading to repel the inference from a full freight being stipulated for." In the case of *Knox v. The Ninetta*, Crabbe, 534, a cargo of wheat was shipped on a clean bill of lading. It was alleged on the part of libellant that a parol agreement was also made, that no other cargo

should be received on board, and that the voyage should be made directly and without deviation. Evidence of this parol agreement was received by the court, on the ground that the bill of lading was a mere receipt. But it seems to me that parol evidence was proper in that case to show the deviation. The verbal agreement was nothing more than an acknowledgment on the part of the master of his implied duty. And if, by receiving additional cargo on deck, the cargo of wheat became damaged, the liability of the vessel had attached without the verbal agreement.

If the shipper of his goods was warned as to the manner in which they would be stowed, he cannot maintain an action occasioned by bad stowage; or if he interfered and directed in the manner of stowing. *Meyer v. White*, 32 Eng. Ch., 429; *Flanders on Shipp.*, §§ 215, 201. But that is not in this case. The bill of lading was made out and delivered to the owner, who had left for his home two days before the apples were received on board. There is no complaint of bad stowage. The apples stowed under deck were carried safely and delivered. The master should have made a memorandum on the bill of lading, or have required the written consent of the shipper on the bill, that the number of barrels not receivable under deck might be shipped on deck,—or have discriminated on the bill as to the price of freights of the barrels to be shipped on deck. Here was a clean bill of lading, the transfer of which would vest the title to six hundred and thirty-five barrels of apples in a purchaser. The transfer of goods shipped by indorsement of bills of lading has become so common, that the interests of commerce require that such instruments should not be controlled by parol evidence. Decree for libellant.

THE PARAGON.

(District Court for Maine: 1 Ware, 322-331. 1836.)

STATEMENT OF FACTS.—Three libels, one on a bill of lading, one on a parol agreement to carry goods, and one for wages. Certain goods carried on deck were thrown overboard in a storm.

§ 457. *Every contract of the master, within the scope of his authority as master, binds the vessel, and gives a lien accordingly.*

Opinion by WARE, D. J.

The liability of a vessel to answer for the non-execution of a contract of affreightment, entered into by the master, is not controverted; and it makes no difference, in this respect, whatever be the form of the contract, whether it be by charter-party or by bill of lading or whether the contract be in writing or by parol. By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel and gives the creditor a lien upon it for his security.

§ 458. *"Dangers of the seas" under a bill of lading should include loss by a proper jettison.*

But it is contended that the goods, in this case, having been lost by the dangers of the seas, both the master and the vessel are exempted from responsibility within the common exemption in bills of lading; and the goods having been thrown overboard from necessity, and for the safety of the vessel and cargo, as well as the lives of the crew, that it presents a case for a general average or contribution, upon the common principle that when a sacrifice is made for the benefit of all, that the loss shall be shared by all. In *Moody's* case, the contract is by bill of lading, and the danger of the seas is expressly

excepted by the terms of the contract. The contract in Mitchell & Cobb's case, being by parol, is silent on this subject. But in every contract of afreightment, losses by the dangers of the seas are excepted from the risks which the master takes upon himself, whether the exception is expressed in the contract or not. The exception is made by the law, and falls within the general principle that no one is responsible for fortuitous events and accidents of major force. *Casus fortuitos nemo præstat*. But then the general law is subject to an exception, that when the inevitable accident is preceded by a fault of the debtor or person bound, without which it would not have happened, then he becomes responsible for it. Pothier des Oblig., No. 142; Pret. a Usage, No. 57; Story, Bailm., ch. 4, No. 241. *In majoribus casibus si culpa ejus interveniat tenetur*. Dig., 44, 7, 1, § 4.

§ 459. — *but it is otherwise where the loss was caused by stowing goods on deck without permission.*

It was abundantly proved in this case, nor has it been questioned at the argument, that the jettison was, by the violence of the tempest, rendered necessary for the common safety. But then it is answered that it was rendered necessary only in consequence of the goods being laden on deck, and that if they had been properly secured under deck they would have been saved, as all the goods which were thus secured were delivered uninjured. It is evident, therefore, that the loss was occasioned solely by their being placed in this exposed and hazardous situation. And this presents the principal question which has been argued in the present case, whether the master was authorized to stow the goods in this manner. If he was, without any special agreement with the shippers for that purpose, then no fault is imputable to him, and the consequence contended for by the counsel for the respondents seems naturally to follow, that the loss having been clearly a sacrifice for the common safety, is a proper case for contribution. Boulay Paty Cours de Droit Maritime, vol. 4, p. 566, and vol. 2, p. 31. Phillips on Ins., 332.

The master is responsible for the safe and proper stowage of the cargo, and there is no doubt that by the general maritime law he is bound to secure the cargo safely under deck. The only exception to the universality of this rule which our books on maritime law furnish, if that can be considered an exception, is in the Commercial Code of France. That, after stating the general principle that the master is responsible for goods laden on deck, excepts from the rule *petit cabotage*. Art. 219. But this can hardly be considered an exception, because it is confined to a trade that is carried on principally in undecked boats. 1 Valin, 397; 2 Valin, 203; Rogron sur Code de Commerce, art. 219. If the master carries goods on deck without the consent of the shipper, unless he can bring himself within some such exception, he does it at his own risk. If they are damaged or lost in consequence of their being thus exposed, he cannot protect himself from responsibility by showing that they were damaged or lost by the dangers of the seas. If, from stress of weather, it becomes necessary to throw them overboard for the common safety, this will not be a loss to be divided with the rest of the cargo, by a general average, but will be the particular loss of the master and the ship-owners, who are responsible for his acts; because it was in consequence of the fault of the master, in overloading the vessel, that the jettison was rendered necessary. When the shipper consents to his goods being carried on deck, he takes the risk upon himself of these peculiar perils, and if it becomes necessary to sacrifice the goods for the safety of the ship and the rest of the cargo, he cannot call on the

other shippers for a contribution. They enter into no partnership with him in this peculiar and extraordinary risk, but he takes the whole upon himself, though his own goods are liable to contribution if they are saved by a sacrifice of any of the cargo under deck. This is the doctrine of all the authorities, ancient and modern. The reason of the law is obvious. Goods thus situated are too much exposed themselves; and not only this, but by incumbering the deck they embarrass the crew, render the manœuvring of the vessel difficult, and in tempestuous weather endanger the safety of the vessel and the rest of the cargo. Consulat de la Mer, ch. 186; Peckius Ad rem Nauticam, Vinnius, note, p. 236; Emerigon de Assurances, ch. 12, sec. 42; 5 Greenleaf's Rep., 286, Bartol v. Dodge; 1 Phillips' Ins., 332 and 364; Stevens on Average, Phillips' ed., pages 64–210.

§ 460. *It will not be presumed that the owner consented to the stowing of goods on deck.*

It is contended that in this case there was a special agreement that the goods should be carried on deck. But it is to be observed, in the first place, that neither of the libelants were in Boston at the time of the shipment, so that no consent could be given by them personally. The goods were shipped by their correspondents, to their order, and the merchants who shipped them expressly deny that they gave any consent to their being carried on deck. The mate, and Edwards, one of the crew, did, indeed, testify that something was said about some of the goods going on deck. But their testimony was not very explicit, and by no means sufficient to overcome the direct testimony on the other side. Besides, the master gave, in Moody's case, what is called a clean bill of lading; that is, one in the common form, without any memorandum in the margin stating that the goods were on deck. Now the witnesses who have testified to the usage generally, say that a clean bill of lading implies that the goods are under deck. But independent of any proof, such would be the legal effect of the contract. The bill of lading being in the usual form, it binds the master to secure and carry the goods in the usual way, that is, under deck, unless he can prove the custom set up, exempting him from this obligation. The same remark, substantially, may be applied to the case of Mitchell & Cobb. The verbal contract of affreightment will be presumed to be a contract to stow and carry the goods in the usual way, unless a different agreement is proved. But upon this point the proof fails.

§ 461. *A local custom must be strictly proved to justify stowing on deck.*

In the second place, it is contended that this case is withdrawn from the general rule by the usage of this particular trade, it being, as it is said, an established custom in the trade between this port and Boston, for vessels to carry a part of their cargo on deck; and it is proved that vessels built specially for this trade are constructed with an express view to their carrying a deck load. This is, indeed, the principal question in the case, and it is one of grave importance, as affecting the trade of this port, and deserves a very mature consideration. It is not denied that such a custom may exist in a particular trade as will authorize the master to carry a part of his cargo on deck, without subjecting himself to responsibility for its loss, or any damage it may sustain from the dangers of the seas in being thus exposed. Story on Bailm., p. 339. The French Ordinance de la Marine, liv. 2, tit. 1, art. 12, in conformity with the general maritime law, prohibits the master from lading goods on deck, under the penalty of answering personally for any damage that may happen to them on that account. But notwithstanding the positive text of the law, a custom has

always prevailed in some of the ports of the kingdom, of lading goods on deck in small vessels employed in *petit cabotage*. This custom was sanctioned by the courts, and the master relieved from his responsibility under the general law. 1 Valin's Com., 397; 2 id., 203. The exception, which was introduced by usage and confirmed by the jurisprudence of the courts, has been incorporated into the text of the Code de Commerce, No. 219.

In our law, the rule requiring the cargo to be safely stowed under deck does not stand upon express text of any act of the legislature, but upon the authority of general usage and custom. A rule of law that is established by custom may be repealed or restrained by a contrary custom. But the general rule being founded on the common custom of the country, universally known, and having the force of a general law, he who would exempt himself from its obligation by a special local custom is bound to prove the local custom by clear and conclusive evidence. Because the legal presumption is, that every contract is entered into with the understanding and intention of the parties that their rights under it are to be governed and determined by the general law. A local custom, in order to be binding on the parties, and withdraw their contracts from the application of the common law, must be so generally known and understood that it may fairly be presumed that all persons engaging in that particular trade are acquainted with it and assenting to it, as they are presumed to know the general law. The presumption then will be that they form their engagements with a silent reference to the special custom. And the custom, to be obligatory, must not be a loose practice, but precise, definite and certain, so as to supply the place of the common law in the given case, and be capable of being applied to the contract and defining and fixing the rights of the parties under it. Such a custom, when it is established, and so generally known and recognized that parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and within its proper sphere is equally binding with the general law. The doctrine that, *in conventionibus tacite veniunt ea quæ sunt moris et consuetudinis*, is peculiarly applicable to commercial law.

Let us then look at the evidence, and see if any such custom is proved. A large number of witnesses were examined to this point, both by the libelants and respondents. It was very fully proved that it was customary, in point of fact, for vessels trading between this port and Boston to carry a deck load, and that usually, though not universally, the same freight is charged for goods on deck as under deck. The packets, which are built for this particular trade, are made strong in their upper works, for the express purpose of carrying a deck load, and it appeared to be the opinion of packet-masters that goods, not liable to be injured by being wet, were about as safe in these vessels above as under deck. But vessels built for the fishing business, as was the case with the *Paragon*, are not considered to be safe in tempestuous weather with a heavy deck load. The general practice, though it is not always done, is to specify in the margin or in the body of the bill of lading, those goods which are placed on deck. If the shipper does not object when he sees the bill of lading, he is considered as assenting to his goods going in that way, and the understanding is then that the master is exempted from any special responsibility. Whether the master has a right to carry goods on deck, when nothing is said by the shipper as to the manner in which they shall be carried, is a point in which there is some variation in the testimony. Some of the ship-masters think that, under the custom,

it is left to the discretion of the master how the goods shall be stowed, and if they are goods of that description which it is customary to carry on deck, that he does not incur any extra responsibility by carrying them in that manner.

Such is the substance of the testimony. It would be dangerous to the best interests of commerce to hold that a special custom, derogating in an important particular from general principles, could be established, and the uniformity and certainty of the law be destroyed by evidence so loose and indefinite as this. The practice of carrying a deck load is, indeed, abundantly proved. And it may also be admitted to be proved that if the shipper consents to his goods being carried on deck, the master will not be liable for any loss or damage that is occasioned by the dangers of the seas. But this is no more than follows from the general principles of law, independent of any special custom. *Modus et conventio vincunt regulam*. In any case, if the owner consents to his goods being carried on deck, the master will be exempted from his responsibility. But when we come to the principal question, that which constitutes the essence of the custom, if there be one departing from the general rule, that is, whether the master is authorized to carry goods on deck when the parties in entering into the contract are silent on that subject, then we find that the witnesses disagree. The preponderance of the testimony is against the custom. But in order to prove such a custom as is allowed to have the force of law, it is not enough to show that the act which it is pretended that the custom authorizes is sometimes or is often done; you must go further, and show that the right to do it is so generally recognized that a fair presumption arises that the parties, in forming their engagements, silently assent to it, and tacitly agree that their rights shall be determined by the custom. No such general understanding is proved in this case. The evidence, therefore, entirely fails in establishing the custom set up by the respondents. The consequence is, that the rights and obligations of the parties must be determined by the general law. That clearly is, that if the master carries goods on deck, without the consent of the shipper, he is personally responsible, and through him the ship, for any loss or damage the goods may sustain from being thus exposed; and if it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, it having been occasioned by his own fault. The vessel being bound for the acts of the master, the decree must be that she is liable to the shippers for the loss of their goods.

§ 462. *When the vessel is insufficient to pay all the debts, they must be marshaled according to the order of legal preference.*

It is suggested that the vessel will be insufficient to pay all the claims against it. That being the case, it will be necessary to marshal the debts according to the order of preference in which they are privileged. When all the debts hold the same rank of privilege, if the property is not sufficient to fully pay all, the rule is that the creditors shall be paid concurrently, each in proportion to the amount of his demand. But when the debts stand in different ranks of privilege, then the creditors who occupy the first rank shall be fully paid before any allowance is made to those who occupy an inferior grade. Among privileged debts against a vessel, after the expenses of justice necessary to procure a condemnation and sale, and such charges as accrue for the preservation of the vessel after she is brought into port (1 Valin's Com., 362; Code de Commerce, No. 191), the wages of the crew hold the first rank, and are to be first paid. And so sacred is this privilege held, that the old ordinances say that the savings of the

wreck are, to the last nail, pledged for their payment. Consulat de la Mer, ch. 138; Cleirac sur Jugemens d'Oleron, art. 8, n. 31. And this preference is allowed the seamen for their wages, independently of the commercial policy of rewarding their exertions in saving the ship, and thus giving them an interest in its preservation. The priority of their privilege stands upon a general principle affecting all privileged debts; that is, among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin's Comm., 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry bond is preferred to those of older date, and that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved and brought to a place of safety. To all the creditors they may say: *Solvam fecimus totius pignoris causam*. The French law, Ordinance de la Marine, liv. 1, tit. 14, art. 16; Code de Commerce, 191, confines the priority of the seamen for their wages to those due for the last voyage, in conformity with the general rule applicable to privileged debts; that is, that the last services which contribute to the preservation of the thing shall be first paid. But this restriction is inapplicable to the engagements of seamen in short coasting voyages, which are not entered into for any determinate voyage, but are either indefinite as to the term of the engagement and are determined by the pleasure of the parties, or are for some limited period of time.

LAWRENCE v. MINTURN.

(17 Howard, 100-116. 1854.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is an appeal from a decree of the district court of the United States for the northern district of California sitting in admiralty. The appellee filed his libel in that court against the ship *Hornet* for the non-delivery of two steam-boilers and chimneys shipped on board that vessel in the port of New York and consigned to the libelant. The appellants intervened as owners of the ship, and upon the pleadings and proofs the district court made a decree in favor of the libelant. The claimants appealed. The first question to be determined on the appeal is whether the libelant had a right to sue in his own name. The facts bearing on this question are that on the 19th day of July, 1851, Edward Minturn, at New York, made a contract with the agent of the ship *Hornet*, which was reduced to writing as follows:

Memorandum of agreement to ship on board the ship *Hornet*, by Edward Minturn, Esq., two boilers, two chimneys or steam-chests, smoke-pipes in sheets and some grate bars; in all about forty tons weight, from this port to San Francisco, California, for the sum of \$4,500, with five per cent. primage; the whole to go on deck except the grate-bars and sheet iron for smoke-pipe. It is understood that the shipper is to put them on the deck of the vessel at his expense, and the ship is to discharge them as soon as convenient, and they are to be received at Cunningham's wharf, in San Francisco, without other than the ordinary charge per day for discharging. It is further understood that the said boilers are to be ready to go on board the vessel on the 9th day of August, or as soon thereafter as the ship may require them, giving shipper two days' notice thereof. (Signed)

EDWARD MINTURN.

E. B. SUTTON,

Agent for the Ship *Hornet*.

It appeared that the boilers and chimneys were manufactured in New York, upon an order given by James Cunningham; that they were intended for the steamer Senator, a boat then in California; that James Cunningham and Edward Minturn were part owners of The Senator, and that they paid the makers for these articles. The bill of lading was as follows:

210. Shipped in good order and well conditioned, by Edward Minturn, on board the ship called The Hornet, whereof Lawrence is master, now lying in the port of New York, and bound for San Francisco, California, to say: two boilers and two steam-chimneys for ditto, eight pieces sheet-iron work, three pieces pipe, one band, two hundred and four grate-bars, sixteen grate-bar bearers, eight boiler bearers, six man-hole plates, eight boiler doors, one bundle (four) bolts, two boxes; the whole to be discharged as soon as convenient, and to be received at Cunningham's wharf, in San Francisco, without other than the usual or ordinary charge for discharging per day; being marked and numbered as in the margin.

Freight.....	\$4,500 00	Contents unknown.	Goods to be delivered at the vessel's tackles when ready to be delivered. Not accountable for breakage, leakage, or rust; freight payable before delivery, if required; and are to be delivered in like order and condition, at the port of San Francisco (the dangers of the seas, fire and collision only excepted), unto Charles Minturn, or to his assigns, he or they paying freight for the said boilers, steam-chimneys, and other iron work, \$4,500, with five per cent. primage, and average accustomed.
5 per cent. primage..	225 00		
	\$4,725 00		

E. B. SUTTON,
84 Wall street.

Dispatch line California packets.

In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, the 19th day of August, 1851.

(Signed)

WILLIAM W. LAWRENCE.

§ 463. *The consignee under a bill of lading may sue for non-delivery.*

Upon the proofs, we are of opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading; and, in the absence of evidence to control the effect of that document, the property is presumed to be in him. In *Evans v. Marlett*, 1 Ld. Raym., 271, it is laid down that "if goods, by bill of lading, are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A., to the use of B., B. ought to bring the action." Whether it be strictly correct to affirm that in the case first put, A. shall have a right of action against the carrier, though in point of fact he be only an agent for the consignor, has been much controverted. In *Griffith v. Ingledew*, 6 Serg. & R., 429, goods were shipped by A. for his own account and risk, but deliverable under the bill of lading to B. or his assigns. The previous decisions were examined with great care. There was difference of opinion on the bench, Mr. Justice Gibson dissenting; but the majority of the court held that, by force of the bill of lading, the legal title was in the consignee, and he could maintain the action. Since that decision was made the question has been much discussed, both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here; the case does not require it. For, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficial interest in the goods,

it still remains true that a presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns. This is admitted in the cases in which it has been held that the consignee had not the right of action or was not liable for the freight. *Coleman v. Lambert*, 5 Mees. & W., 502; *Wright v. Snell*, 5 Barn. & Ald., 350; *Chandler v. Sprague*, 5 Metc., 306. In *Grove v. Brien*, 8 How., 439, this court said: "The effect of a consignment of goods generally is to vest the property in the consignee;" and though it is also there declared that this effect may be controlled by special clauses in the bill of lading, or by evidence *aliunde*, yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded. This is in accordance with the rule given in *Abbott on Shipp.*, pp. 415, 416.

Such being the presumption arising from the bill of lading, we do not find it to be controlled by any proof in this case. It does appear that Edward Minturn and James Cunningham were part owners of *The Senator*, for which boat these boilers and chimneys were intended, and that they contracted with the makers of the articles and paid for them, and that Edward Minturn shipped them in New York. But all this leaves open the question, whether the libellant was not the managing owner and ship's husband of *The Senator*, residing in California, where that boat was employed, attending to its repairs and supplies, for the joint account of himself and the other owners. Indeed, the testimony of Squire, an agent of the libellant, in the absence of all other evidence, tends to prove that such was the fact; for he speaks of himself as acting for the libellant in reference to the management of *The Senator*, and says that, her boilers being worn out, an order was sent out to obtain new ones, to replace the old. We understand this order to have been given by the libellant, for the boilers now in question. Considering the burden of proof to have been on the respondents to displace the *prima facie* right of action of the consignee, arising from the bill of lading; that for aught he has shown, and upon the proof, we may conclude that the consignee ordered these articles as managing owner of *The Senator*; and that, if so, he, as consignee and managing owner, might sustain the libel in his own name, this objection to the decree must be overruled.

The next inquiry is, whether the failure to deliver the boilers and chimneys is justified. The *Hornet* sailed from New York on the 23d of August, 1851, having these articles on deck. On the 5th of September, the chimneys, and on the 12th of September the boilers, were thrown overboard. Two questions arise: 1. Was the jettison necessarily made for the common safety? and if so, 2. Was the necessity attributable to any, and what, fault on the part of the master of the vessel?

The material facts upon which the first of these questions depends are, that *The Hornet* was a clipper-ship of about sixteen hundred tons burden, built at New York, in the years 1850 and 1851, of the best materials in use for first-class ships at that port. She had a cargo under deck, and the weight of these boilers and chimneys on deck was somewhat over thirty-one tons. The height of each of the boilers, above the deck at the forward end, when stowed, was about twelve feet. The steam-chimneys were between five and six feet in diameter, and besides these there was a piece of steam-pipe weighing six hundred and sixty-seven pounds. The ship sailed on the 23d of August, and on entering the Gulf Stream encountered rather heavy weather and a cross sea. The performance of the vessel in this sea was found to be bad. On the 26th, a

gale came on from the south, veering to the northwest, and lasted until the night of the 27th.

Though this gale was not of uncommon severity, it raised a heavy cross sea. The effect of this sea was to cause the ship to roll down to leeward, so as to take in water over her rail; she rose very slowly and then rolled over to windward, straining and laboring in a manner described by the witnesses as very unusual. She would not mind her helm, but would fall off; she would settle down aft and take in water over her stern, and plunged heavily forward. At sundown on the 27th, the wind lulled and the sea became more smooth. It was found during and immediately after the gale, that the ship was very severely strained, so as to open some wood-ends aft, one-half to three quarters of an inch, and her water-way seam half an inch, and that other injuries, of an alarming character, had been received. The master then held a consultation with his officers and drew up the following protest:

August 29, 1851, latitude 31° 0' N., longitude 61° 5' W. At sea, on board ship *Hornet*, of New York, William W. Lawrence, master, bound from New York to San Francisco, California. We, the undersigned, master, officers and mariners of the ship *Hornet*, of New York, do, after mature and serious deliberation, enter this solemn protest: That on the 26th day of August, 1851, the ship *Hornet* being then in or about the longitude of 49° W., latitude 37° N., experienced a gale of wind from the south, veering to N. W.; and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam-chimneys (the whole supposed to be of the weight of forty tons, or thereabouts), did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks, causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship and cargo, in imminent peril for their safety. We now, therefore, do most seriously and solemnly assert, that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting.

In testimony whereof to the above, we hereby subscribe our respective names.

This protest was signed by all the officers and by such of the crew as could write, and its substantial facts are testified to by the master and officers who were examined in the cause, in such a manner as to satisfy us of their truth. Upon these facts, we have come to the conclusion that the jettison was necessary for the common safety. The nature of the case imposes on the master the duty, and clothes him with the power, to judge and determine upon the facts before him, whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment, and courage; and they are liable, if through his failure to possess or exert these qualities, in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best. If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be

deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority.

§ 464. *Jettison considered lawful in present case.*

Applying these principles to the case before us, we find no reason to doubt that this jettison was thus necessary. It is true that, when it was actually made, the sea was smooth, and the ship in no immediate danger. But it satisfactorily appears that these boilers and chimneys could not be thrown overboard, without the greatest risk, when there was any considerable sea. To require delay until a storm, would be, in effect, to prohibit the sacrifice. Precaution against dangers, which are certain to occur, is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so.

§ 465. *Whether necessity for jettison was due here to fault of carrier.*

We find the conduct of the master and crew in making the jettison to have been lawful; and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners. The libel alleges the loss of the goods to have been "through the mere carelessness, unskillfulness and misconduct of the said master, his mariners and servants." We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libelants have at the hearing much relied on, and what we think is the main question in this part of the case — the sufficiency of the ship to carry this cargo. It is, no doubt, the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owners does not amount to negligence, or want of skill of the master or mariners. There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let the libellant in to prove unseaworthiness of the vessel.

§ 466. *Whether jettison was here occasioned by negligence in loading and trimming.*

But it must be observed that this libellant relies not on general unseaworthiness, but upon the fact that a vessel, staunch and sufficient to carry a cargo, was overloaded by this burden on the deck; and as the quantity of lading and the consequent trim and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence, for which the owner may be liable. While, therefore, we have some difficulty in respect to the sufficiency of this allegation, we think it is such as necessarily leads us into the inquiry, whether the loss by jettison was occasioned by negligence of the master in overloading the ship. And as we find it extremely difficult, if not impossible, to distinguish between the obligation of the owners and master, in these particulars, we shall proceed to consider the question whether the case is one of culpable negligence, or is within the exception of perils of the seas, contained in the bill of lading.

§ 467. *When jettison is a loss by peril of the sea.*

There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea. In that case the sea-peril is deemed the proximate cause of the loss. But, if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the

jettison is attributable to that fault or breach of contract, and not to sea-peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance. *General Mut. Ins. Co. v. Sherwood*, 14 How., 365, and cases there cited. In this case, did the necessity for the jettison arise from any fault or breach of contract by the master or owners? Two grounds are assumed by the libelant. The first is, that considering the great weight of these articles, resting upon a small part of the upper deck, sufficient means were not used to support the weight and stiffen the ship, so as to prevent the deck from being strained. This was a new ship, built of such materials, and so fastened and braced, as to be uncommonly strong. The owners employed a ship-carpenter, who had worked on the vessel when built, to do what he deemed necessary to support this unusual weight on the deck. He describes what was done. The master superintended these alterations. He and the carpenter deemed them sufficient. They were both going to sea in the vessel, the one as commander, the other as carpenter, and can hardly be supposed to have omitted anything which they thought necessary for safety. The owners do not appear to have restricted them in point of expenditure. We cannot avoid the conclusion that everything was done which these men thought necessary; and possessing, as they must be presumed to have done, competent skill in their respective occupations, they believed this part of the cargo was securely stowed and fastened and stayed, to go safely on the voyage. In point of fact, however, after being subjected to the action of the sea in a storm, it was found the deck had settled. The second ground taken by the libelants is that the ship was so overloaded by the great weight of these articles on deck as to be unseaworthy; and as the jettison was made to relieve the vessel from this condition, the owners are responsible for the loss. In part, at least, the same principles of law will be found applicable to both these grounds, and therefore we consider them together.

§ 468. *Exception of "peril of sea" applied where goods are agreed to be carried on deck.*

The principal question, and it is one of much importance, is, what is the extent and operation of the implied contract of the owner respecting the ability of his ship to carry a particular deck load which he receives on board, under a contract that it shall be carried on deck, dangers of the seas excepted? In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this, he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel. But in applying these rules to cargo on deck, some peculiar considerations must be borne in mind. This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure which the contract of affreightment shows was contemplated by the parties. Under this bill of lading the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load? If a very burdensome cargo, like iron, is taken on board, and heavy weather met with, and a jettison made, it would not be a ground of claim against the owner that the weather encountered would not have been sufficient to justify a jettison if the cargo had been cotton.

And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that

their necessary effect might be to embarrass the sailing of the ship in a gale of wind, and cause her to labor in a heavy sea? The grounds upon which the rights and obligations, as to contribution, of owners of cargo on deck, in case of jettison, have long rested, have an intimate connection with this question. Valin, lib. 3, tit. 8, art. 12, giving the reason of the rule that goods jettisoned from the deck are not paid for in general average, but contribute if not thrown over, says: "The reason why articles on deck thrown overboard or damaged are not contributed for is that, as they cannot but embarrass the working of the ship, the presumption is that they have been jettisoned before a full necessity for a jettison of cargo arose, and only because they hindered and confused the manœuvring of the vessel." This has been still more clearly expressed by Locré, in his Commentary on the Code du Commerce Maritime, lib. 2, tit. 12, art. 421. He says: "Perhaps the common safety would not have made a jettison necessary if the lading had not been in contravention of rule, if it had not brought the dangers on the vessel, or contributed to enhance them." Similar views have been taken by the most approved writers on the law of insurance in this country and in England, and they have been applied in many cases. Abbott on Shipp., 481, 490, and notes; 3 Kent's Comm., 240; 2 Phillips on Ins., 71; 2 Arnould on Ins., 890. It was remarked by Lord Denman, in *Milward v. Hibbert*, 3 Ad. & Ell. (N. S.), 120, that the reason assigned by Valin, that goods on deck embarrassed the navigation of the ship, is not sufficient to form the basis of a universal rule excluding goods on deck from the benefit of contribution; because it may be that, in many cases, goods can best and most safely be stowed on deck; and that they may, in some cases, be so stowed as not to be in the way of the crew in their operations. This may be true; but the point here is, not whether there may be cases in which the deck load does not embarrass the navigation or increase the danger, but whether, in case it does so, the shipper who has consented to his goods being placed on deck under a special contract, and not pursuant to any general custom which might be evidence of the safety of the practice, must not be taken to have known that such might be its effects.

It was strongly urged by the libellant's counsel that the shipper could not be supposed to have, and should not suffer for not possessing, a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument by which he agreed to perform a particular service, was sufficient for that service; and that, as these carriers contracted to convey this deck load to San Francisco, they were obliged to ascertain whether placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

§ 469. *Shipper must take risk arising from loading on deck with his consent.*

This reasoning would be quite unanswerable if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea were not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck. There is not one of them which gives a recourse against the master, the vessel or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship-owners. Consolato, par Pardessus, c. 186, Ord. de Mer, Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locré, art. 229, lib. 2, tit. 4, art. 229; Emerigon, c. 12, § 42; Boulay Paty,

tom. 4, 566, 568. So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship in case of jettison. The received law on the point is expressed by Chancellor Kent, with his usual precision, in 3 Com., 240: "Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss."

The cases of *Smith v. Wright*, 1 Caines, 43; *Dodge v. Bartol*, 5 Greenl., 286; *Hampton v. The Brig Thaddeus*, 4 Mart. (La.), 582; *Story on Bailm.*, 339, § 531; and *Gould v. Oliver*, 4 Bing. N. C., 142, support this statement. In the last-mentioned case, Tindal, C. J., says: "Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion." It must be admitted that no one of the authorities referred to goes so far as to maintain that the ship-owner contracts no obligation whatever to the merchant, respecting the sufficiency of the vessel to carry the deck load received on board. They should not be understood as supporting such a position. The extent to which we understand them to go, and the law which we intend to lay down, is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners or vessel for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden. It is not for him to say that, in the first storm the vessel encountered, though not of unusual severity, she proved to be unable to carry the deck load, and so was not of sufficient capacity to perform the contract into which the carrier entered.

§ 470. — *carrier does not warrant sufficiency of vessel to carry when thus laden with shipper's consent.*

The carrier does not contract that a deck load shall not embarrass the navigation of the vessel in a storm, or that it shall not cause her so to roll and labor in a heavy sea as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise staunch and seaworthy, to withstand any extraordinary action of the sea when thus laden. If the vessel is in itself staunch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on the deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners on the ground of negligence or breach of an implied contract respecting seaworthiness. His right to contribution is not involved in this case. Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly staunch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, nor until heavy seas were encountered. Her inability to carry these boilers and chimneys arose solely

from their particular position on deck. The libellant, through the shipper in New York, consented to their being placed in this position. He took the risk of their rendering the ship unmanageable in a storm; and he, and not the ship-owners, must bear the loss occasioned by their being placed on the deck, so far as the liability for the loss rests upon any ground of negligence in the place of stowage, or breach of warranty respecting the seaworthiness of the vessel. As to the argument that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient. We are of opinion that due diligence and skill were used. Besides, we do not find the necessity for the jettison attributable to any defects in these particulars. It may be that additional supports of the lower deck would have assisted the vessel in bearing the weight, but we see no reason to believe they would have enabled it to carry this unusual burden through a storm; and, therefore, if we found negligence in this particular, we could not declare that the loss was to be attributed to it.

The decree of the district court is to be reversed and the cause remanded, with directions to dismiss the libel, with costs.

THE SHIP INVINCIBLE.

(District Court for California: 3 Sawyer, 176-186. 1874.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—In the spring of 1864, the libellants shipped on board the *Invincible*, then lying at the port of New York and bound on a voyage to San Francisco, seven hundred and fifty baskets of champagne in two lots, one of five hundred baskets and the other of two hundred and fifty. By the terms of the bills of lading given for the first lot, the wine was to be stowed in the house on deck. The second lot was to be stowed in the cabin state-rooms and house on deck. Under these contracts six hundred and fifty-nine baskets were placed in the house on deck and the remainder in the cabin state-rooms. On the arrival of the ship the wine stowed in the state-rooms was found to be in perfect order. But that stowed in the house was damaged to the extraordinary and almost unprecedented extent of fifty-seven per cent. of its entire value. At the hearing the carrier, after proofs of this loss had been given, attempted to excuse himself by showing that the house on deck was an unfit place for the stowage of goods, and that goods so placed were exposed to extraordinary perils to which cargo below decks was not liable. Although it appeared that the voyage was somewhat rough and boisterous, the claimants failed to show that the injury to the goods was attributable to the direct operation of any peril of the sea, in the strict sense of the term, but he established beyond doubt that the loss of the wine was caused by what is known as "blowage and breakage"—that is, escape of the contents of the bottles, either through their mouths or by their bursting. He thus proved *prima facie* that the injury was occasioned by natural causes, arising from the inherent qualities and perishability of the goods themselves and the nature of the voyage. To this the libellants replied that the damage was excessive and unprecedented, and that it could not be ascribed to the intrinsic infirmity of an article which is every year brought to this port in enormous quantities without serious loss. Some other cause for the injury must therefore be sought for, and this was to be found in

the total neglect of the master during the entire voyage to give to the wine proper and necessary ventilation by opening, as occasion permitted, the doors and windows of the house. That through this omission the temperature of the house became so high as to cause the wine to "blow" and the bottles to burst.

It is not pretended on the part of the carrier that any effort whatever was made to ventilate the goods during the voyage by opening the windows or doors of the house. The master seems to have considered it his right and his duty to leave the goods, and the house which contained them, in the same condition during the voyage as when they left New York, and this, though apprised by the leakage of wine through the scupper holes of the house for a considerable period, that the goods from some cause were sustaining great injury. The answer sets up that the excessive heat arose upon the decomposition or fermentation of the straw in which the bottles were packed, caused by its being wetted with salt or fresh water. But the evidence fails to sustain this allegation. No noticeable accident happened to the deck-house during the voyage. The chemical experts failed to detect in the straw, when examined here, any trace of the presence of salt, or to discover any signs of chemical changes which could have generated excessive heat. But even if the heat was due to this cause, it was as much the duty of the carrier to endeavor to mitigate its effects by opening the doors and windows of the house, as to resort to the same expedients to diminish heat caused by the sun's rays. Whether his omission to do so was negligence for which he is liable, is the real point of the case.

The answer also alleges that the champagne in question was a spurious article of inferior quality, and the loss arose from its inherent perishability caused by "defective manufacture, preparation, bottling, corking and packing." In support of these allegations no proof whatever is offered, save that a few of the baskets were somewhat rat-eaten. The wine was the "Charles Heidseck Champagne," so well known and extensively used in this country, and does not appear to have differed in the mode in which it was manufactured, prepared, bottled and corked, from the wine which the libelants, whose commercial house is of the highest respectability, have for years been in the habit of importing. The fact that all the wine stowed in the cabin arrived in perfect order would seem to afford decisive proof that there could have been no such defective preparation and packing as the answer alleges. The whole evidence points, I think, unmistakably, to the conclusion that the blowing and breaking of the bottles was caused by the excessive heat to which they were subjected by being stowed, during the whole of a voyage in which the equator was twice crossed, in a deck-house, tightly closed and exposed on its roof and sides to the direct and reflected rays of the sun.

The question is thus presented, was the omission on the part of the master to cool and ventilate the deck-house, by opening its doors and windows when the weather permitted, negligence for which the vessel is liable? The libelants contend that he was bound to do so by express stipulation, and by his general duty as a carrier—especially when apprised by the leakage of the vessel that the wine was sustaining serious injury. The claimants excuse their omission on the grounds: 1st. That by express agreement the goods stowed in the deck-house were to be at the sole risk of the shipper, and the ship was in no case to be liable for any injury that might befall them. 2d. That the doors and windows were closed and fastened with the full knowledge of Mr. Crosby, the shipper, and with the understanding that they were so to remain during the voyage. 3d. That it was impracticable to open the doors and windows with-

out exposing the goods to injury from salt or fresh water or from the depredations of the crew, and that it was not the duty of the carrier, nor had he the right, to meddle in any way with cargo stowed under the supervision and by direction of the shipper.

1. In regard to the alleged agreement, Mr. Hastings, part owner of the ship, testifies that he consented with much reluctance, and at Mr. Crosby's earnest request, to the stowage of the wines in the deck-house, and that it was the express understanding that the ship should assume no responsibility and incur no liability "of any name or nature." That the carpenter and stevedore were to fit up the house and stow the goods as Mr. Crosby should direct, and that thereafter the goods were to be at the sole risk of the shipper. In these statements Mr. Hastings is corroborated by Deane, the ship-keeper. Mr. Crosby denies that any such agreement was entered into. The disputed matter of fact I do not deem it necessary to determine. If the agreement was as broad and absolute as is alleged, parol testimony to prove it was inadmissible, for it is inconsistent with and contradictory to the written stipulations of the bill of lading. Nor if reduced to writing would its legal effect be to exonerate the carrier from the consequences of his actual negligence. The policy of the law will not permit a common carrier to stipulate for exemption from responsibility for the negligence of himself and his servants. *Railroad Co. v. Lockwood*, 17 Wall., 357 (§§ 1379-1400, *infra*). Whether there was in this case actual negligence is the very question at issue.

2. The alleged understanding with Mr. Crosby, that the doors and windows of the deck-house should be tightly closed and so remain during the voyage, was, if made, unquestionably binding on him. An agreement between the parties as to the degree and kind of attention and care to be bestowed on the merchandise during the voyage in no degree contradicts or varies the obligations of the bill of lading. It merely establishes by mutual consent what shall be accounted, under the circumstances of the case, due care and diligence. The proofs of this agreement rest on the depositions of Mr. Hastings and Mr. Deane. The testimony of these witnesses, with regard to the release of the ship from all responsibility for the goods, "of every name and nature," has already been noticed. Mr. Hastings testifies in addition: "Mr. Crosby never said one word to me about ventilation of any name or nature. Never raised the question and never mentioned the word ventilation.

"I know that the windows and holes in the top of the house were stopped up by Mr. Deane at Mr. Crosby's request. The doors were locked and fastened with screws. Mr. Deane, the carpenter, fastened them. Mr. Crosby was there at the time and saw they were fastened, and expressed himself perfectly satisfied with the stowage, and everything appertaining to his wine. Mr. Crosby was present at the fastening. I told him the captain said that without their being fastened the locks would be no protection against the crew. I further said I did not think it would be seaworthy, and might vitiate his insurance, as all policies required the hatches to be fastened securely down and made impervious to wet."

Mr. Hastings further states that the only reason assigned by Mr. Crosby for not wishing to stow his wine between decks was the danger of injury by moisture or sweat. Mr. Deane corroborates, in a very positive manner, Mr. Hastings' statements. He testifies to Mr. Hastings' reluctance to allow the goods to be stowed in the deck-house, and to his positive and repeated declarations to Mr. Crosby "that he would take no risk whatever—neither from

sailors, heat of galley nor heat of the sun upon the top of the house." He also testifies that the windows were boarded over by Mr. Crosby's direction; that when the goods were all stowed Mr. Crosby told him to fasten the doors with screws or nails, and that he would take all the risk if he (the witness) would fasten up the doors and windows as directed. The credibility of this witness is somewhat impaired by his evident anxiety to shield the vessel from liability. He iterates and reiterates, on almost every page of his deposition, that Mr. Crosby expressly assumed the whole risk of the adventure and released the ship from all liability, being apparently under the impression that such an agreement would be decisive of the suit.

Mr. Crosby's testimony is substantially as follows: That about the middle of March, 1863, "he made a verbal agreement with Mr. Hastings for stowage of the champagne in the deck-house. That it was to be ventilated and protected from heat when at sea, and during the voyage, by keeping the doors and windows of said deck-house open. Mr. Hastings replied that he would do anything I required to secure ventilation of the champagne. . . . I directed Mr. Hastings to have strips of boards nailed or fastened across the doors a few inches apart on the inside of the deck-house, to secure the wine from falling out when the doors should be opened for ventilation. He replied that it should be done, and called the carpenter and requested me to give directions to him."

In reply to the ninth interrogatory he states, after repeating the verbal agreement with Mr. Hastings above detailed, that the latter proposed putting in an iron ventilator, but that he told him he considered it of no importance—that the doors and windows would afford a free circulation of air, and was the ventilation he wanted, which Mr. H. agreed to furnish. He further states: "I had no knowledge whatever of the fastening and boarding of the windows or the fastening and caulking of the doors of the deck-house." The testimony on this turning-point of the case is thus found to be irreconcilably conflicting. Neither of the witnesses was examined in court. Their testimony was taken by deposition. They are both believed to be merchants of wealth and respectability. The duty of determining which of them is to be believed is delicate and unpleasant. I shall briefly state the considerations upon which my determination is founded:

Several years previous to the shipment by the *Invincible*, the attention of the libelants, who were largely engaged in the business of importing champagne into this state, had been drawn to the very serious losses sustained by the goods during their transit. After much consideration they came to the conclusion that ventilation and a free circulation of air were indispensable to the preservation of the wine. They therefore determined to ship in the cabin and deck-house exclusively, and this mode they had pursued for six years previous to the shipment in this case. The results were of the most satisfactory character. The losses which had previously been so great as to create apprehensions that they would be compelled to relinquish the business became almost nominal. Mr. Dibblee states that out of eighteen thousand baskets imported during five years, and stowed on deck, the percentage of loss by breakage was less than one-half of one per cent., and by blowage less than one per cent. The clerk of the libelants gives the exact figures taken from their books: Total loss on eighteen thousand six hundred and two baskets champagne, imported on sixty different vessels (exclusive of the nominal), two hundred and forty-five baskets; one hundred and sixty-nine by blowage, seventy-six by breakage. Nor was this practice confined to the libel-

ants alone. It appears in evidence, and is admitted by the claimants' witnesses, whose testimony was taken in New York, that it is the general practice of shippers of champagne wine to require that it be stowed in the cabin or house on deck, and that such is the usual mode of carrying it. Under these circumstances, it has appeared to me incredible that Mr. Crosby, while accepting the increased risk of sea damage incidental to stowing the goods in a deck-house, should have renounced the only possible benefit or advantage which he could expect from that mode of stowage; should have consented that the easy and efficient means of ventilation afforded by the deck-house should be wholly neglected, and that the goods should remain during an entire voyage, in which the tropics were to be crossed twice, in a room with windows closed and doors fastened and caulked, and exposed to a temperature which, as one of the witnesses remarked, would be like that of an oven.

The proofs disclose a fact which affords an important corroboration of the conclusion derived from *a priori* considerations. Mr. Crosby states he requested that slats should be nailed on the inside of the door-ways to prevent the wine from falling out when the doors should be opened. This, Mr. Deane informs us, was in fact done by Mr. Hastings' order. He omits to state the reason for doing it. But what reason can be assigned save that stated by Mr. Crosby? And can the fact that Mr. Hastings gave orders for the purpose be reconciled with the supposition that he did not expect that the doors would be opened at all during the voyage? I think these considerations are decisive, and that it may be concluded with tolerable certainty that Mr. Crosby did not expressly or by implication agree to renounce the advantages to be derived from the mode of stowage, on which he insisted, or relieve the carrier from his obligation to exercise reasonable care and diligence for the security and preservation of the goods during the voyage. I also think that Mr. Crosby expressly stipulated for the employment during the voyage of means of ventilation which the deck-house afforded whenever those means could reasonably and properly be used. But if this last proposition be deemed not to have been satisfactorily proven, I will briefly consider whether, in the absence of express stipulation, it was not the carrier's duty, under the circumstances of this case, to secure the safe transportation of the goods by the employment of the means which Mr. Crosby states he expressly promised to adopt.

§ 471. *Negligence in precautions against damage arising from the nature of the goods or the voyage will charge the carrier.*

That under the common bill of lading the carrier is exempted from liability, not only for loss by perils of the sea, but also for damage or deterioration arising from the nature of the articles or the voyage, is not disputed. But if there has been a want of proper care or skill on his part in guarding against such dangers, the damage will be ascribed to negligence and not to the perils of the sea or the nature of the articles or voyage. *Lamb v. Parkman*, 1 Spr., 343. "It is the master's duty, as representing the ship-owner, to take reasonable care of the goods intrusted to him, not by merely doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also by taking reasonable measures to check and arrest their loss or deterioration, by reason of accidents, for the *necessary* effects which there is by reason of the exception in the bill of lading no original liability." *Notara v. Henderson*, IV. Mar. Law Cas., p. 281. In this case the carrier was held liable for the neglect of the master to take reasonable care (by drying them) of beans which had been wetted by a peril of the sea.

So in the case of "The Bark Gentleman," Olcott's Rep., 110, it was held culpable negligence in the master to have omitted to take proper means for the preservation of a cargo of hides by beating or ventilation during a detention of the vessel for thirty days at the Cape de Verde Islands by reason of unseaworthiness. What is the reasonable care which the master must exercise will depend upon the circumstances of the case; and the question under consideration is: Did the failure of the master to take any measures whatever to prevent or arrest damage to the goods, caused by the heat to which they were exposed, constitute a want of reasonable care on the part of the carrier? A large number of witnesses testify that it is neither usual, safe nor proper to open the windows and doors of a deck-house for the purposes of ventilation, and that to do so would expose its contents to danger from seawater, from rain, and from the depredations of the crew. On the part of the libelants many witnesses testify precisely the reverse. I have not ascertained by counting, on which side the witnesses are the more numerous. As to the comparative weight to be given to their testimony, there can be, I think, no room for doubt.

The experience of any one who has sailed in tropical latitudes is sufficient to apprise him that for a large part of the time the doors and windows of a house on deck may be kept open with no appreciable danger of damage to its contents by fresh or salt water. The houses commonly contain rooms used as a galley, a carpenter's shop, a sail-room, and often a forecastle for the crew, and a steerage for passengers. The uses to which these rooms are applied render it indispensable that the doors and windows should be frequently if not constantly open. They can be readily closed at a moment's notice. The fact that the houses are constructed with windows would seem to indicate that the latter are intended to be used and used with safety, and the pretension that it would have been imprudent or improper to open them during any part of a voyage, in which the tropics were twice traversed, appears to me repugnant to common experience and common sense.

The danger from the depredations of the crew, to baskets of wine, by opening in the day-time the doors and windows of a room where the doorways have slats nailed across them on the inside, and the windows are protected by rods, seems to me wholly imaginary. I think it clear that in this case it was the obvious duty of the master to use the efficacious means at his disposal to prevent or check the damage which the goods might sustain from natural causes, and that to relieve him from that duty he must establish, by a preponderance of proofs, that the shipper dispensed with its performance. This, he has, in my view of the evidence, failed to do. The ship is, therefore, liable for his neglect.

I have not found it necessary to pass upon the questions whether certain notes of counsel, offered as substitutes for depositions which have been lost, are admissible in evidence, as my determination of the case would not be affected by their reception or rejection. At the hearing, the arguments of counsel were directed exclusively to the question of liability of the vessel. The amount of loss was not discussed. I have not been able exactly to ascertain it from the evidence, although it is probable that the data for its computation are contained in the proofs. It will therefore be referred to the clerk to ascertain and report the amount of damages, unless the parties can fix it by agreement.

THE STAR OF HOPE.

(17 Wallace, 651-655. 1873.)

APPEAL from U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—The vessel was libeled for damages caused by a violation of a bill of lading in stowing nuts in such a manner that they were injured by "sweating." Decree for the libelants.

§ 472. *Negligent stowage is not excused merely because bill of lading specifies no place of stowage.*

Opinion by MR. JUSTICE BRADLEY.

The claimant insists that the bill of lading is the only contract binding on him, and as that did not specify any particular place for the stowage of the goods, they were properly stowed between decks in the hold. This is not a sufficient answer to the libelant's case. The contract of the bill of lading was, that the goods should be delivered in San Francisco "in good order and condition, dangers of the seas, fire and collisions excepted."

§ 473. *Injury produced in consequence of negligent stowage is not a "danger of the seas."*

The defense is to the effect that "sweating" is one of the dangers of the seas. But if the sweating be produced in consequence of negligent stowage, the claimant is precluded from setting up the defense. If costly mirrors are stowed amongst loose articles of hardware, or if a case inclosing valuable statuary, and marked "This side up with care," is placed upside down amongst a lot of pig-iron, the claimant could hardly contend that he is protected from responsibility by the clause relating to the dangers of the seas. In this matter, as in all others, due care and its opposite, negligence, are relative terms, having respect to the nature of the duty to be performed, the knowledge communicated to the party to be charged, and the prevailing usages of the business.

§ 474. *Carrier liable for injury to nuts by "sweating" where he stows them in the hold.*

In view of the almost invariable practice as to the stowage of nuts on this voyage, of the well-known fact that if stowed in the hold they are extremely liable to be injured by sweat, and of the marks and directions on the package in question in this case, it was culpable negligence in the master of the vessel to stow them in the hold. If he could not stow them as directed, he should, at least, have given notice to the shippers. This view of the case is sufficient to dispose of it without deciding whether the evidence in reference to the stowage of nuts established a custom of the trade in the proper sense of that term, or whether the shipping receipts were a part of the contract of affreightment. Decree affirmed, with interest and costs. (a)

BAXTER v. LELAND.

(District Court for New York: Abbott's Admiralty, 348-360. 1848.)

STATEMENT OF FACTS.—Libel for freight and primage upon barrels of flour. Defense, that the flour was delivered in a damaged condition. Other facts appear in the opinion of the court.

§ 475. *As between the original parties, the bill of lading is not conclusive as to the condition of the cargo when shipped.*

Opinion by BETTS, J.

As between the original parties to the shipment, it is competent for them to

show by evidence outside the bill of lading, the actual condition of the flour at the time of shipment (Howard v. Tucker, 1 Barn. & Ald., 712), without the aid of this exception; and the reservation by the master, in executing the bill of lading, imposed on the shipper no obligation to give other evidence than the bill of lading itself, that the contents of the casks corresponded with the admissions in it, until affirmative evidence is furnished tending to show a mistake in the receipt in that respect. The memorandum made by the master, that the contents and weight of the casks were unknown, does not change the character of the instrument. It operates as it would without that reservation, as *prima facie* evidence that the shipment corresponded with the representation, but subject to be rectified by proof that it was otherwise. The libelants show that ten barrels were stained upon the outside when received on board, but they furnish no evidence raising a reasonable presumption that the contents of any part of the shipment were injured. The gist of the controversy has been, on the part of the libelants, to show that the damage the flour had received arose from its inherent qualities,—from dangers of the sea,—or from the usual and ordinary damp and sweating of the ship on the voyage. The struggle on the part of the respondents has been to make it appear that the cargo of the ship was improperly stowed, and that the injury received by the flour was occasioned by placing it in the hold of the ship on the top of hogsheads of new sugar, and laying over it sacks or bags of Indian corn.

§ 476. *Usage as to stowing cargo in vessels freighting from New Orleans ports considered.*

The libelants deny their liability for the damage, should it be found to have been so occasioned, upon the assertion that the stowage was in consonance with the common and well-known usage of ships engaged in freighting from New Orleans to the northern Atlantic ports. I do not think a custom has been established in this respect, which, if the loss sustained by the respondents is owing to wrongful stowage of the ship's cargo, will, of itself, exonerate the libelants from their liability as carriers. As to the essential damage, the case hinges, then, in my view of it, on the point whether it is satisfactorily made out by the respondents that the injury to the flour was caused by stowing it in juxtaposition with the sugar and corn, and that such stowage was improper and unsafe. There seems to be no essential disagreement in the evidence respecting the condition of the hold when opened to unlade the cargo. It was found heated to a high degree. The corn in some of the bags had sprouted, and the grain was so hot as to render moving it by hand painful. This part of the vessel was also filled with a strong vapor and dampness. The flour in many of the barrels was found caked or coagulated, so that it could not be separated by the hand, and in others it was soured; and there is no reason to question, upon all the proofs, that the condition and temperature of the hold would ordinarily and probably produce the consequences found to exist in respect to the flour, had it been sweet and in good condition when laden on board at New Orleans. The disagreement in the testimony is as to the probable cause of that state of the hold of the vessel.

The ship, when she took in cargo, was in sound condition, and on her arrival here was found not to have leaked at all. It is proved by numerous witnesses of great experience in the New Orleans trade that vessels running north will almost invariably sweat, or disclose an interior moisture or dampness, sufficient often to be productive of serious injury to goods on board, and that this condition of the ship, except as to degree, is irrespective of the cargo she carries.

The cause of this cannot be ascertained with certainty, but it appertains in no way to the insufficiency of the ship; it is generally ascribed to the sudden change of climate, and augmented, as has been usually noticed, by rough weather, and also by any natural moistness in the cargo, yet exhibiting itself to the highest degree in the cold seasons of the year.

§ 477. *The terms "dangers of the sea," "dangers of navigation," are equivalent to "perils of the sea."*

The libelants contend that, if the damage to the flour is imputable to the state of the vessel, whether produced by the sweating of the ship or the character of the cargo, they are exonerated from liability; on the first supposition because their undertaking does not guaranty against loss; and on the second upon the custom or usage of the trade, which justifies this method of stowage; and also on both, by the exception in the bill of lading of "*the dangers of the seas,*" in one copy, or the "*dangers of navigation,*" as expressed in the other. It is to be remarked that this change of phraseology is not to be understood to indicate any different intent with the parties; and either mode of expression, standing without qualification in an instrument of this character, should be accepted as equivalent to "*perils of the sea,*" and all are treated in the cases as convertible terms. In *The Reeside*, 2 Sumn., 568, and *Aymar v. Astor*, 6 Cow., 266, the exception was of "*dangers of the seas,*" and in *Fairchild v. Slocum*, 19 Wend., 329, the "*dangers of Lake Ontario;*" and these exceptions were regarded by the courts as of the same significance as the common one of *perils of the seas*. It is, however, plain that the exception is not to be understood as embracing those losses flowing from culpable or negligent stowage of cargo (2 Sumn., 568; §§ 451-454, *supra*), or other improper acts of the master or owner which are proximate causes of the loss. Story on Bailm., § 512; Abbott on Shipp., 384, 385; 3 Kent, 300.

§ 478. *Dampness or sweating of the ship is not to be classed as "perils of the seas;" how far excused on general principles.*

So, also, upon the authorities referred to, the dampness or sweating of the ship cannot properly be ranked in the class of perils of the sea. Tempestuous and violent weather tends to increase this difficulty, but does not produce it; all the testimony showing that it occurs in smooth and quiet voyages, when there is no straining or unusual rolling or pitching of the ship. Its causes are probably atmospheric, but whether ascribable to that source or to others more occult, it is attended but imperfectly with those characteristics which might class it with perils of the sea. Story on Bailm., § 512; 3 Kent, 216, 217. It is of ordinary occurrence, scarcely failing to exist in any case of navigation from New Orleans to northern ports in the cold seasons of the year. It does not result from, nor is it accompanied by, any irresistible force or overwhelming power, nor does it take the aspect of inevitable accident in the sense of a sudden or violent occurrence, although it cannot be guarded against by the ordinary exertion of human skill and prudence. Story on Bailm., § 512. It is a quiet, secret exhalation generated from the hold of the vessel, and in no other known way produced by winds and waves and navigation than that these are the agents and accompaniments of her transit out of a warm into a cold climate. But although, within the fair import of the exception in the bill of lading, the master or owners may not be protected from answering for such injury, I think they are not, in their capacity of carriers by water, absolutely responsible for the injury, in so far as the damage is not incontestably traceable to faulty stowage; because, if occurring otherwise, or if the testimony leaves it doubtful

whether the damage was not occasioned as well by other causes as the manner of stowage, they are entitled to the benefit of the known custom or usage of trade in this respect as a protection against liability for the loss.

The testimony in the cause proves a uniform and well understood usage in the trade between New Orleans and New York that injuries received by goods from the sweating of the vessel should be borne by the goods alone. Chancellor Kent says, what is an excusable peril depends a great deal upon usage, and the course and practice of merchants, and it is a question of fact to be settled by the circumstances peculiar to the case. 3 Kent, 217; *Trott v. Wood*, 1 Gall., 443. And in the case of *Gordon v. Little*, 8 Serg. & R., 533, a general usage was admitted in evidence to lessen the responsibility of carriers.

§ 479. *As to stowage, the carrier may follow a well-known usage unless the shipper otherwise directs.*

In a case, then, hovering very closely upon the verge of the well settled doctrine which would exempt the master from liability because the loss was incurred by a peril of the seas, I think there is just propriety, if the particular instance merely fails to fall within that rule, in applying to it the principle that the usage of the trade shall determine the question of liability. There is no evidence that the loss was ever claimed, in such cases, of the owners of the ship. It was, for a period of time, attempted to charge these losses upon the underwriters of the ship, under a special clause then inserted in policies and supposed to cover this peril. Since that clause has been excluded it is in proof that the uniform usage has been to charge the loss upon the goods as a peril belonging to them, and not covered by the responsibility of the carrier. I shall adopt that as the principle governing the question as to part of the damages claimed in this case. That will discharge the libelants from the claim of damages for the injuries to sixty-nine of the barrels, there being no evidence of any injury to them beyond what would probably be sustained from the sweating or dampness usually occurring in ships on such voyages. If, as is contended, the flour was soured by the steam arising from the sugar, that fact could be shown by its smell or taste, as in such case the flavor of the sugar, it is proved, is imparted to the flour. There is no proof that this was so affected. So, also, in respect to this portion of the cargo, the small damage occurring might be, with much reason, ascribed either to causes inherent in the article, or to those engendered in its consecutive changes of climate, in the transportation from the mills where it was manufactured to this market, although it was apparently merchantable and sound when delivered to the ship. The evidence shows that cargoes of flour thus circumstanced are so frequently found slightly deteriorated when delivered here, as to establish that to be a probable, if not necessary, concomitant of such course of transportation.

§ 480. *Whether liability arises from stowing sugar and corn near the flour in question.*

The remaining inquiry relates to the six hundred and one barrels, and involves two considerations: 1. Whether the sugar and corn, or either, have been direct and active agents in producing the damage sustained by the flour. 2. Whether it was improper stowage to place the flour in proximity with those articles, in the manner in which this cargo was laden, so as to subject the master to answer for the consequences.

There is no evidence but that the sugar casks were sound and properly coopered, or that there was any actual leakage from them. I do not rehearse the proofs as to the effect of stowing flour in a close hold in connection with

sugar and corn. Very many witnesses were examined, and the result of the testimony on this point must be taken as establishing that such stowage as was made in the lower hold of this ship would account for the damage received by the flour, and that these consequences would most probably follow from it. The stowage itself was every way proper in securing the hogsheads, barrels and bags in their places; but the sugar and corn exposed the hold to an extraordinary heat and dampness by their exhalations, which would naturally be prejudicial to the flour exposed thereto. Five hundred and fifty-three barrels were taken from the lower hold, all in a very bad state. These had been placed on hogsheads of sugar, and sixty or eighty bags of corn thrown in among the barrels, or on them, and then the hatch between decks was battened down. The rest of the flour was placed between decks, where cotton and corn were also stowed. I do not find enough in the proof to satisfy my mind that any part of the flour between decks was injured by the evaporations or fumes from the sugar, and think whatever damage it sustained may be imputable to the ordinary sweating and dampness of a sound, tight ship on such voyage. But it appears to me that the evidence very satisfactorily establishes that a moving cause, if not the proximate one, of the damage to the flour in the lower hold, was the placing it in tiers over hogsheads of sugar, and stowing amongst and over the barrels, bags of Indian corn. The proof is direct and full from persons conversant with like shipments, and employed in receiving such cargoes from New Orleans and storing them here, that the common consequence of placing sugar near flour, even in open situations, is to impart a smell and flavor to the flour, diminishing its value, and that the manner in which this cargo was stowed, in the lower hold of the ship, would naturally tend to communicate a like damage.

The testimony of several ship-masters of large experience, and also of marine surveyors and stevedores, has been given, all concurring that for many years past it has been the familiar usage with general ships, freighted at New Orleans, to lade cargoes in the manner done in this case; that the great bulk of shipments at New Orleans for this port consists of cotton, sugar and provisions, including flour; and that there is no objection raised by shippers, or hesitation on the part of stevedores and masters, in stowing flour in barrels properly dunnaged, over hogsheads of sugar, in any part of the ship, and that without regard to the time the sugar has been manufactured; and that this mode of lading cargoes in general ships at that port is notorious here and at New Orleans, to persons concerned in forwarding or receiving produce; and these witnesses are of opinion that such stowage does not of itself necessarily cause injury to flour laden in that manner. The agents and shippers at New Orleans and the respondents are connected in business; and the book-keeper of the respondents testifies that he wrote for them to their agents in New Orleans not to ship flour with sugar and corn on board. Independent of the implied recognition of the course of business, this is direct evidence that the claimants were aware of the usage, and if they intended to have their goods carried in any other than the customary manner, it was incumbent on them to give the master specific directions.

A case involving a similar principle was decided in this court, in *Sabbich v. Prince*, MSS., 1840. The agents of the respondents shipped at Bordeaux, in France, a quantity of mulberry trees on board of the libellant's vessel. The agents knew the vessel was laden with wines, and that the trees would be stored in the hold with the wines. No notice was given the libellant that such

stowage would be hazardous to the trees. On delivery at this port they were all found to be dead; and it was contended by the respondents, on the proofs, that the destruction of the trees was occasioned by the effluvia and fumes generated in the hold by leakage or exhalation of the wines. The decision of the court upon that branch of the case was that the ship-master was not liable for the destruction of the trees by that cause, for want of notice or caution to him that the claimants would charge him with the risk, inasmuch as it appeared to be the usual and customary method of lading that description of cargo at the port of shipment.

The case of *Faber v. The Ship Newark*, decided in this court in February, 1844, turned, in some measure, upon the same doctrine, although in that case the additional particular was determined by the court that the loss was occasioned by *perils of the sea*. The action there was to recover damages to a lot of tobacco shipped with oil, grease and lard, and stained by the grease or oil which had leaked from the casks. The court intimated the opinion that the ship was discharged from liability by proving the casks to have been safely and properly stowed and secured by dunnage, and not so placed in relation to the tobacco as to expose the latter to be directly affected by the drainage or leakage of the casks, if such leakage had occurred as an ordinary incident of transportation.

So, also, I understand the rule to be laid down by Judge Story, in the case of *The Schooner Reeside*, 2 Sumn., 567. He rejects, to be sure, the proof of usage or custom in the trade, throwing, under like circumstances, the loss on the owners of the cargo, but only because it was offered in contradiction of and at variance with the express terms of the bill of lading. The libellant, in that case, shipped on board the schooner several bales of carpeting, which were greatly injured on the voyage by oil which leaked from casks stowed contiguously to the carpeting. The libel alleged that the carpeting was improperly stowed near the oil casks. The judge says, in his opinion, "It would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel." But he determines that "there was no bad stowage in the case." The decision against the vessel turned upon the fact that the master had taken the casks on board in very bad order, and very improperly coopered. *Id.*, 572. The manifest implication is that, but for the positive fault of neglecting to cooper the casks sufficiently, the ship would not have been liable for a damage which was occasioned by the improvident proximity of the carpeting to the oil casks, and not to perils of the sea. The question is one of great moment in relation to the mercantile navigation of this country, and, viewed in connection with the common law doctrine of the responsibility of common carriers, is not free from embarrassment and doubt.

§ 481. *Common law rule, as to liability of carriers by water, relaxed.*

The stringency of the common law, in respect to common carriers on land, is certainly relaxed in many particulars of importance, in its application to ships and ship-owners in the carriage of goods by water. Story on Bailm., §§ 509, 512, 513. If some of the English judges have recently indicated a disposition to fall back upon the rigor of the old doctrine, and enforce it against carriers by water (*Riley v. Horne*, 5 Bingh., 217), and some American authorities have echoed the sentiment (21 Wend., 190; 2 Story, 17; 3 *id.*, 349), and have pushed it to the extremity that the liability cannot be restricted or qualified by notice of usage (19 Wend., 234, 251; 21 *id.*, 153, 354; 26 *id.*, 591), yet I think it is manifest that the gradual though slow advance in the amelioration of the

ancient dogma in respect to common carriers tends to place their implied responsibility on a footing, in its essential features, in harmony with that of other parties performing undertakings of trust for a reward. 2 M'L., 157, 540; 2 Pet., 115; 13 id., 181; 2 Brev. S. C., 178; 16 Vt., 52. And, indeed, it is difficult to reconcile the anomalous severity of the liabilities imposed by law upon common carriers with the rational obligations of a hiring or trust, except upon the assumption that they undertake their employments with full assent to become insurers. If the rule and measure of their liability were now to be first introduced into our jurisprudence, it can scarcely be expected that it would be framed or sanctioned upon the implication that they were to be dealt with as common thieves and robbers; yet that seems the essential groundwork of the old rule. No reason, very palpable to the understanding, exists for discriminating between the responsibility of a person undertaking to transport goods from place to place, and that of another who is the depositary of them. In the ordinary course of things there is an equal opportunity to the depositary as to the carrier to convert the goods, if such be his disposition, to his own use; and the same risk of having them lost to the owner through accident or exposure, involuntarily on the part of the depositary, and without any means of proving fault or negligence against him. Yet warehousemen, wharfingers, etc., are relieved of the operation of the rule governing the carrier who brings goods to or takes them from his charge. 2 Kent, 591, 600, 601, and notes.

In the decision of this cause, however, I do not intend to trench upon the rules fixing the liability of carriers, further than those rules may be claimed to bind them as absolute insurers of the goods transported, irrespective of the custom or usage of the business or trade with which the transaction is connected, and regardless of deterioration or loss of the goods by inscrutable natural agencies, without fault of the carrier. I hold, in this case, that the flour was stowed conformably to the usage of the trade in freighting in general ships, known to the respondents; that the ship was sound and tight; that the shipment was delivered in apparently like condition to that in which it was received on board, except slight stains upon the barrels from mould or damp, which are not proved to have affected their contents; that the libelants are not responsible for injuries received by the flour in consequence of the mere sweating of the ship, or in consequence of exhalations or vapors arising from other parts of the cargo, which was well stowed and secured. I accordingly pronounce in favor of the libelants for the freight and primage demanded, and costs of suit to be taxed.

Decree accordingly. (a)

SPEYER v. THE MARY BELLE ROBERTS.

(District Court for California: 2 Sawyer, 1-7. 1871.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—The libels in the above cases, which by consent were tried together, were filed to recover damages for injuries to goods shipped on the above vessel to be transported from Hamburg to this port. The injury to the goods being proved, the carrier offered evidence tending to show that it was occasioned by perils of the sea.

The libelant then produced testimony tending to prove, as averred in the answer, that the damage was caused: I. By careless and negligent stowage of the cargo. II. By the reason of the insufficient and defective condition of the

(a) Affirmed in *Baxter v. Leland*,* 1 Blatch., 506.

scuppers when the vessel commenced her voyage. III. By sweat and moisture arising from insufficient ventilation, and the neglect of the master, while at Falmouth (a port of refuge he had sought to escape a gale during which the vessel had made a great deal of water), to remove the hatches or take any measures to dry the cargo, and, also, by his neglect during the voyage from Falmouth to take off his hatches in order to dry and ventilate the cargo.

The evidence shows, beyond controversy, that shortly after leaving Hamburg the vessel was exposed to sea perils of an unusual character. The severity of the gale, the ugly cross-sea, the straining and leaking of the ship, the long and ineffectual pumping by the crew, and their exhausted condition in consequence, their application to the master to seek a port of refuge, and his final determination to do so, after consultation with the mate, are established by the concurrent testimony of all on board. It is also, I think, evident that the vessel was well provided and in a seaworthy condition, when she left Hamburg, with the exception that there was a hole in one of her scuppers. It was strenuously urged at the hearing that, as the scupper, at the place where this hole was found, passed through solid timber, but little water could have reached the cargo, and that, therefore, no considerable part of the damage can be attributed to this defect. And such would seem to be the fact, if the statements of the witnesses, as to the precise position of the hole in the scupper, be accepted.

On the other hand, the master, in his protest, seems to ascribe the greater part of the damage to this very cause. His statement is, "On this day had an examination, found the port scupper had been broken off at some time in the severe weather encountered, and that the sea had free access to the vessel through this scupper." This statement contains two errors: First. The hole in the scupper was discovered, not after the arrival of the vessel at Falmouth, but some time previously, and during the gale; second, there is no reason to believe that it was made during the gale, or at any time after the departure of the vessel. Its origin was described by the master and officers, either to an injury inflicted while clearing the scupper of ice, or else made by a boat-hook in the hands of some lighterman along-side the vessel at Hamburg.

In the view I take of the case, it is not necessary to attempt to determine (if that were possible) how much of the injury to the cargo is to be attributed to this cause. That some of it was due to it cannot, I think, be denied; but probably no very considerable amount when compared with the total damage. Some attempt was made to show that the leak under the grub-beam was caused by defective caulking. I think, however, under the proofs, that the straining and working of the ship in the very severe storm she encountered may be accepted as the cause of this leak.

But the most important allegation of the libel with regard to the stowage of the cargo and the insufficiency of the dunnage appear to be clearly established by the proofs. A large number of witnesses, including the port warden and other experts, concur in the statement that the dunnage to the cargo, especially at the bilges, was wholly insufficient. The master himself seems to admit that the cargo was not stowed as he directed, nor, we may infer, as he considered properly. He states that when the stevedores were stowing the cargo he was down with them as often as he could be — perhaps one-third of the time. That he gave orders to break out cargo when he did not think it was stowed properly — "this happened at least a dozen times, probably many more; my orders were obeyed whilst I was there. I am satisfied from the breaking out of the cargo here that the cargo was stowed back as it originally was. I

mean that after I had left the hold they put things back as they were before." I do not deem it necessary to recapitulate the names of the numerous witnesses who confirm the conclusion which would naturally be drawn from these admissions of the master. Some of them do not hesitate to express the opinion that the greater part of the damage was caused by insufficiency of dunnage.

§ 482. *Effect of a want of proper dunnage where goods are injured.*

That the effect of a want of dunnage would be to expose the cargo to injury from water running down the sides, and also to increase the damage from water which might collect in the hold, was abundantly proved, and is obvious without proof. The very object for which dunnage is used is to protect the cargo from injury by being wetted. That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.

§ 483. *Under what circumstances the carrier is responsible where partly to blame; burden of proof.*

The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately? To exonerate a carrier, *prima facie*, from the liability assumed by him under his bill of lading, it will be sufficient to show that the immediate cause of the injury was a peril of the seas, or other cause for which he is not responsible. But after this proof has been given, it is competent for the shipper to show that the loss might have been avoided by reasonable skill and diligence; in other words, that the loss would not have occurred except for the carrier's negligence. *Clark v. Barnwell*, 12 How., 280 (§§ 416-423, *supra*). In such cases it has been held that the inquiry is, did the want of skill of the master and crew contribute in any degree to the loss? And that the carrier must show, not that the loss might have happened if the act complained of had not been done, but that it must have happened. Thus, when the immediate cause of the loss was the sudden and unexpected rising of a river to an unprecedented height, and it appeared that if the goods had been forwarded without unreasonable delay they would not have been exposed to the danger, it was held that this negligence of the carrier rendered him liable for a loss of which the immediate cause was a *vis major*. In *Williams v. Grant*, 1 Conn., 487, the court says: "And in cases of this description carriers may be liable for a loss arising from inevitable necessity existing at the time of the loss, if they have been guilty of a previous negligence or misconduct by which the loss may have been occasioned. . . . It is a condition precedent to the exoneration of carriers that they should have been in no default, or, in other words, that the goods of the shipper should not have been exposed to the peril, or accident, which occasioned the loss by their own misconduct, negligence or ignorance. For though the immediate or proximate cause of the loss may have been what is termed act of God, or inevitable accident, yet, if the carrier unnecessarily exposes the property to such accident, by any culpable act or omission of his own, he is not excused." Per Gould, J., 1 Conn., 487. It is evident, therefore, that in this case the carrier is liable for all injuries which, though immediately caused by a peril of the sea, would not have occurred had not his own negligence contributed to produce the injurious result. The bad stowage of the

cargo was, as to this damage, not the *causa causans*, but the *causa sine qua non*, and for the effect of this cause he is liable.

§ 484. *Extent of liability where some damage would have been sustained had the carrier been diligent. (a)*

The real difficulty in the case arises from the fact, which, however, is not conclusively established, that the cargo would have sustained some damage even if it had been properly stowed; but how much cannot be known. We are thus forced to choose between two alternatives, either to hold the carrier responsible for damages, a part of which he is not accountable for, or else to deny to the shipper any compensation for losses, which, in great part, were caused by the carrier's fault. The former alternative must, in my opinion, be adopted. By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself *in toto*, he should establish the degree and extent of the exoneration to which he is entitled. If he fails to do this, it seems to me that he must be held responsible for the whole damage.

If these views are correct, it is unnecessary to consider how far the master was in fault by neglecting to open his hatches, and attempt to dry and ventilate the cargo while the ship lay at Falmouth, or during his subsequent voyage. The master, during the voyage, is undoubtedly bound to take all possible care of the cargo, and "he is responsible," says Mr. Ch. Kent, "for every injury which might have been prevented by human foresight and prudence, and competent naval skill." 3 Kent's Comm., p. 213; 1 Pars. Ship. and Adm., 262; 12 How., 280 (§§ 416-423, *supra*); The Brig Gentleman, Olc., 118. Something must, however, be left to the master's discretion and sound judgment; and, in the present case, the evidence hardly justifies the conclusion that the practice of taking off hatches in fair weather on a voyage from Europe or the eastern ports is so universal, safe and proper a means of ventilating the cargo, as to make the ship responsible, when it is not done, for all the damage by sweat sustained by the cargo, especially when it is apparent that that damage could have been only partially prevented, and, perhaps, to a very inconsiderable degree, by any such precautions. With respect to the duty of taking off the hatches at Falmouth, the case is stronger, but the conclusion arrived at, in regard to the liability for the negligent stowage, renders the decision of the point unnecessary.

The damages proved by Morris Speyer are	\$14,682 56
By Eggers & Co.....	1,862 19
By Chauncey & Co.....	321 99

It is possible, however, that some of these amounts may be slightly erroneous. If so, I am ready to correct them if the error be pointed out.

(a) Tobacco and lard were shipped at New Orleans, on a bill of lading excepting "the dangers of the sea." The lard leaked and injured the tobacco. There was no very rough weather; lard was jumped from the vessel. Held, that the damage could not be attributed to subsequent rough weather, but arose from bad stowage and coo-perage, and that the vessel was liable. The Newark,* 1 Blatch, 308.

MERRIMAN v. THE BRIG MAY QUEEN.

(District Court for Louisiana: 1 Newberry, 464-474. 1854.)

Opinion by McCaleb, J.

STATEMENT OF FACTS.—The libelant has instituted this action *in rem* to recover the damages sustained by him in consequence of the failure on the part of the officers of the brig to deliver, in the like good order in which they were received on board, four glass counter cases, which were shipped by J. E. Caldwell & Co., in the port of Philadelphia, to be delivered to Wright, Williams & Co., at this port. The shipment was made on the 9th of August last, as appears by the bill of lading. There were five cases put on board the brig, and one, only, was delivered in good order. The other four were found, immediately after they were taken from the vessel and placed upon the levee, to be broken in pieces and utterly worthless. The libel alleges this breakage to have been caused by the careless, negligent and improper manner in which said cases were stowed and handled by the officers and crew of the brig.

The answer of the respondents denies the allegations of negligence and carelessness, and avers that the brig was not accountable for breakage, and that the contents of the boxes in which the cases were placed were unknown; that they have delivered to the consignees, Wright, Williams & Co., the boxes of cases in the same good order and condition in which they received them on board their vessel; that the outward appearance of the cases of packages was, in all respects, as clean, fresh and new as when they were put on board the May Queen, in the port of Philadelphia. The answer further avers that the vessel encountered heavy weather on her passage from Philadelphia to New Orleans. On the bill of lading annexed to the libel is stamped the following words: "Goods to be receipted for on the levee; not accountable for rust, breakage, leakage, cooperage; weight and contents unknown."

It is upon these words, thus stamped upon the bill of lading, that the proctor for respondents has relied to show such a limitation of responsibility on the part of the vessel as should exempt her from all responsibility for the loss sustained by the breaking of the cases in question. The issue raised by the pleadings must be determined by the evidence, and by the law applicable to such a case as that evidence presents. And let us first examine the evidence taken under a commission, in the city of Philadelphia, where the cases were shipped.

The witness Beal states that he is a member of the firm of Beal & Forman, who were employed by J. E. Caldwell & Co. to make the five show cases in question. They were made and finished in good order in every respect. The glass was from a quarter of an inch to three-eighths in thickness, and was of the best quality English plate glass. The cases were packed on Monday, the 8th of August, and shipped on Tuesday, the 9th. They were packed and shipped in five boxes, each case in a box by itself. The boxes were made by witness' firm, expressly for the cases. The witness himself assisted in packing them. He and three others were engaged in packing them, and they were employed until three or four o'clock in the afternoon. The wooden or bottom parts of the cases were respectively secured fast to the boxes. The glass was then covered with paper, to prevent the straw from scratching the glass and the German silver mounting, and the sides were then covered and filled in, the straw packed in closely, but not so tight as to cause any pressure. The straw was not packed so as to strain in any place, for the cases were screwed tight and could not move. The tops were screwed on. The top and bottom were of

inch stuff. The witness marked all the boxes himself. He believes they were marked "C. J. Merriman, care of Wright, Williams & Co., New Orleans." Also, in very large letters, on the lid of the boxes, respectively, was "glass case;" and he thinks, "with care." On the edge of the boxes was written "this side up," or "this edge up." The witness did not deliver the boxes, but his partner did. The cases were so packed that unless they had been jarred or banged in some manner they could not have been broken.

The witness Forman corroborates all that was stated by his partner, in reference to the packing the cases and directing the boxes, and further testifies that he aided in putting the boxes on board the brig. He declared that he engaged four men who were working for the brig, to assist him in placing them in the vessel, and he saw them swung up by a tackle and lowered down between decks. They were placed between the two masts. He went down himself to see that they were handled carefully. They were handled carefully, but they were not finally stowed away when he left them, for the man who was stowing said that he could not stow them away properly until he got other goods to stow with them. The clerk, the captain and the mate were there, and he told them of the contents of the boxes, and that if roughly handled they would be broken. The mate said that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods shifting in the vessel at sea. They (the captain and mate) replied there was not. The bill of lading was procured by Caldwell & Co., and the witness never saw it. The evidence of this witness is in many essential particulars sustained by the testimony of Jackson, and the whole taken together leaves no doubt whatever upon my mind that the cases were well made, properly packed and safely deposited on board the brig. The testimony of the men who aided in putting the boxes on board has also been taken under a commission and introduced in evidence by the respondents. It substantially agrees with that of Beal and Forman. The testimony of Pettit, who was engaged in receiving the cargo on board of the May Queen, does not contradict that of Beal and Forman, but proves another fact to which the witness Forman does not allude. It is, that he (Forman) was informed at the time cases were put on board, that the owners would not be responsible for breakage.

§ 485. *In case of breakage the burden is on the carrier to exempt himself from liability.*

The important question to be determined is, does the stamp on the bill of lading, to which reference has already been made, taken in connection with the declarations made by Pettit to Forman, so far limit the responsibility of the vessel as to exempt her from all liability for the loss? There is no direct evidence to show when or how the breakage was caused. I am, however, perfectly satisfied that it was not caused by any carelessness or want of skill on the part of the witness Forman, and those employed by him, in putting the cases on board and placing them between decks. Up to the time when they were left by Forman, I am satisfied they were safe and sound. The breakage then must have occurred after the shipment, and before the boxes were delivered to the consignees on the levee in this city. The testimony of the cartmen shows that the contents of the boxes were broken before they were received into the carts. They were therefore broken while the boxes were in the care and custody of the officers of the vessel, or those employed by them. Whether the breakage was the result of the straining of the vessel, caused by the violence of

the wind and waves, or of the carelessness or negligence with which the boxes were finally stowed, or in the handling them when they were delivered upon the wharf, are questions which can be settled by no direct evidence. And so far as the libellant is concerned, it would be difficult, if not impossible, to produce direct proof, if such should be required. The general rule of law is, that in all cases of loss the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie* the law imposes upon him the obligation of safety. Story on Bailm., § 529. In cases where notices are given by the common carrier for the purpose of qualifying or limiting his responsibility, the burden of proof of negligence is on the party who sends the goods, and not of due diligence on the part of the carrier; which is contrary to the general rule in cases of carriers, where there is no notice. Story on Bailm., § 573.

§ 486. *How far the carrier may qualify his liability by notice or express agreement.*

It is now well settled that a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice, to limit, restrict or avoid the liability devolved on him by the common law, on the most salutary grounds of public policy, has been denied in American courts, after the most elaborate consideration; and therefore a public notice by stage-coach proprietors, that "all baggage was at the risk of the owners," though the notice was brought home to the plaintiff, has been held not to release them from their liability as common carriers. 2 Greenl. on Ev., § 215. But it is contended, on behalf of the respondents, that the common law liability of the carrier has been in this case limited or qualified by an express agreement. The question has often been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of Gould v. Hill, 2 Hill, 623, and the conclusion arrived at that he could not. See, also, Hollister v. Nowlen, 19 Wend., 240; and Cole v. Goodwin, id., 272, 252. The supreme court of the United States, however, in the case of The New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How., 344 (§§ 220-242, *supra*), held that as the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, no well founded objection to the restriction could be perceived, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

The owner, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation is admitted in a large class of cases, founded on bills of lading and charter-parties, where the exception to the common law liability (other than that of inevitable accident) has been from time to time enlarged, and the risk diminished by the express

stipulation of the parties. The right of the carrier thus to limit his liability by the shipment of goods has never been doubted.

§ 437. — *his liability may be limited by express stipulations, but these should be specific and certain.*

But admitting the right thus to ~~restrict his obligation~~, it by no means follows that he can do so by any act of his own. He ~~is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned.~~ And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. The supreme court of the United States, having expressed these views fully in the opinion referred to, further declare that "the burden of proof lies on the carrier, and nothing short of an express stipulation by parol, or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, having no room for controversy between the parties."

§ 438. *Agreement held not sufficiently specific, nor assented to by one qualified to bind the shipper.*

The special agreement relied on in this case arises from the stamp on the bill of lading, and the declarations made by the witness who received the boxes on board that the vessel would not be responsible for breakage. In regard to the stamp referred to, I confess I cannot attach to it any importance. It seems to have been kept ready for a convenient resort, to limit or qualify the obligations of the ship-owner without any notice to the shippers. There is no evidence that the latter, in this instance, assented to the limitations of the liability of the former, which it has been attempted to create, by means of this stamp. I am by no means convinced from such evidence that there has been "such a certain and specific contract between the parties as leaves no room for controversy." The evidence in the cause shows, moreover, that the stamp is false in point of fact. It was not true that the contents of the boxes were unknown. The witness Forman, who put the boxes on board, states that "the clerk, the captain and the mate were there, and that he told them of the contents of the boxes, and that if roughly handled they would be broken. The mate replied that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods shifting in the vessel at sea. They, the captain and mate, replied there was not."

But it is urged on behalf of the respondents that the person who was engaged in receiving cargo on board the May Queen expressly stated to the witness Forman that the vessel would not be responsible for breakage. This witness, it will be remembered, was the maker of the cases which are the subject of litigation, and, from abundant caution, superintended their shipment; but in no just legal sense can he be regarded in the light of the shipper. The consignors and shippers acting for the owner of the cases residing in Memphis, Tennessee, were Caldwell & Co.; and I am aware of no principle of law which will hold them bound by the stipulations of a contract to which there is no

proof they ever assented. It is not shown that Forman had any authority to make on their behalf a special agreement of so important a character as would exempt the vessel from the usual and well established responsibilities of a common carrier. It does not appear that the witness assented at all to the declaration on the part of the person who was receiving the cargo; it is perfectly clear that he did not assume authority to make a contract binding upon the shippers; and the court is therefore bound to say that the exemption from liability claimed for this vessel has been made to depend upon implication or inference founded on doubtful or conflicting evidence; and that it is not of that specific and certain character which, according to the decision of the supreme court of the United States, already referred to, should leave no room for controversy between the parties.

§ 489. *An express agreement will not release a carrier from liability for gross negligence.*

But even if we admit that there was a special agreement in this case between the shippers and the owners, by which the liability of the vessel as a common carrier was limited, it has never been held that such a contract could be pleaded as an exemption from responsibility for any loss or damage resulting from gross negligence or misfeasance in the master or his servants. 2 Kent's Com., 607; Story on Bailments, § 558. It has been satisfactorily shown that these cases were put on board with great care under the superintendence of the witness Forman, and that they were left safe and in good order by him in the custody of the officers of the vessel. If they have not been delivered in like good order and condition, the conclusion is irresistible that the care and caution which were observed in putting them on board were wanting on the part of those employed in unlading and placing them on the levee. The officers of the vessel knew perfectly well the contents of the boxes, and a failure on their part to observe every precaution necessary to insure their safe delivery must be regarded as such gross negligence as subjects the vessel to the usual liability for the loss by breakage. The same conclusion must necessarily follow if, after they were left by Forman, they were finally stowed in such a manner as to render them liable to be jostled against other articles by the motion of the vessel.

The proctor for the respondents has relied upon a protest which was made by the second mate of the May Queen, and which was not afterwards extended in consequence of the death of the master, to show that the breakage may have been caused by the perils of the sea. Even if the protest could be received as conclusive evidence of all the facts it contains, there is no fact stated in it which would justify the court in saying that the damage complained of was caused by the winds and waves, or by any other cause absolutely beyond the control of the officers of the vessel. Such a conclusion would be a mere presumption or inference from a general statement, that at certain intervals of the voyage the vessel experienced hard rain squalls which caused the vessel to labor hard. But whether these squalls actually produced the damage alleged to have been sustained in this case must be left to conjecture only.

§ 490. *How far a protest is admissible in evidence against the shipper.*

But I am satisfied that this protest cannot be received as evidence to establish the facts for which it was introduced. As a general rule it is difficult to perceive upon what ground such *ex parte* statements as are contained in protests can be admitted to determine a controversy between the vessel and the

shippers. The latter having, as in this case, no opportunity of cross-examining the persons who make the statements, can rarely be prepared to counteract the effect which such statements, if admitted, would be calculated to produce. If such evidence could be permitted to prevail in a case like this, the shippers of cargo would be placed at the mercy of those who navigate the vessels upon the high seas, and who, by their usually extravagant descriptions of the storms and tempests they encounter, would have it in their power to cause every case of damage involving a doubt to be ascribed to the perils of the sea. "In a seaman's protest," says Judge Hopkinson in the case of *The Elvira*, Gilp., 61, "the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these compositions, and the writer may aim to exhibit his power and skill in describing dangers."

In the case of *The Betsy Caines*, 2 Hagg., 28, the protest by the master, attested by two of his seamen, was offered as evidence. It was objected to as quite inadmissible upon the ground that it was *res inter alios acta*; and Lord Stowell said: "I should be unwilling to allow a protest to be introduced that has been properly described as *res inter alios acta*. I therefore reject the protest and the article that pleads it." But I consider the authority of *Abbott on Shipp.*, 466, as conclusive on this point. "The protest," says that authority, "is a declaration or narrative by the master of the particulars of the voyage, of the storms or bad weather which the vessels may have encountered, the accidents which may have occurred, and the conduct in cases of emergency he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners; but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection and that of the mate, or trustworthy mariners, true and faithful instructions for its preparation."

After an attentive examination of the law and evidence in this case, I am satisfied that the libellant is entitled to recover the damage he has sustained in consequence of the breakage complained of; and it is therefore ordered that there be judgment in his favor against the brig *May Queen*, for the sum of \$560, with five per cent. interest from the 17th of October, 1853, and the costs of suit.

RICH v. LAMBERT.

(12 Howard, 847-360. 1851.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States held in and for the district of South Carolina in admiralty. The several libels were filed in the district court, against the ship *Martha*, by the owners of cargo brought in the same from Liverpool to Charleston, for damage done to the goods in the course of the voyage. Five of the separate owners of cargo joined in one of the libels, and each of the others filed separate libels, to each of which answers were put in by the respondents, and the parties proceeded in the usual way to take their proofs. Pending the proceedings, all the cases were consolidated by an order of the court on the motion of the proctors for the libellants.

The district court held the respondents liable, as carriers, for the damage done to the goods, and referred the cases to the clerk to take the necessary proofs, and ascertain the loss which each of the several parties had sustained,

and report the amount, which was done accordingly. And, in the coming in of the report, a decree was entered adjudging to each of the fifteen several owners the amount of the loss they had respectively sustained. On an appeal by the respondents to the circuit court this decree was affirmed. And the cases are now before us on an appeal to this court from that decree.

§ 491. *Statement of the right of appeal where separate libels were filed by shippers.*

With the exception of two of the cases, the sum decreed against the respondents in favor of the several owners of the cargo is below the amount that authorizes an appeal to this court. And it is insisted on the part of the appellees that the appeal should be dismissed for want of jurisdiction as to all parts of the decree, except the part relating to the two cases mentioned. On the part of the appellants it is contended that the objection to the jurisdiction is not available to the five separate owners joining in the libel, as the aggregate amount decreed to them exceeds \$2,000; nor to any of the parties, on the ground that all the cases were consolidated by the orders of the district court on the motion of the proctors for the libelants. We are of opinion that neither of these grounds is sufficient to maintain the jurisdiction, and that the appeal must be dismissed as to all the cases except the two in each of which the amount in the decree exceeds the \$2,000. The joining of several owners of cargo conveyed in the same ship in a libel *in rem* for damages done to the goods in the course of shipment, and the consolidation of libels filed separately by the respective owners for like damage, is allowed by the practice of the court for its convenience and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties. In cases where the several claims against the ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted. The defense will usually be the same in all the cases; but, if otherwise, the parties will not be prejudiced, as they may avail themselves in the answers of any defense existing against either of the several owners. For, although the proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits. We do not perceive, therefore, any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout. Clearly, a libelant could not have appeal unless his claim exceed \$2,000. Nor can the respondent, upon the same principle, unless the amount decreed against him in the particular case exceeds that sum. The principle, in effect, we think, has been already decided in this court. 6 Pet., 143; 8 id., 11; 11 How., 522.

§ 492. *Further evidence since appeal held admissible.*

There is another preliminary question which it is necessary to notice before proceeding to the merits. Further evidence has been taken on the part of the respondents, since the appeal to this court was entered, which is objected to by

the appellants. The act of 3d March, 1803 (2 Stats. at Large, 244), allows additional evidence to be furnished by either party before this court in cases of appeals in admiralty and prize causes. And by the twenty-seventh rule of the court the evidence is to be taken under a commission to be issued from this court, or from the circuit court, under the direction of any one of the judges thereof. The objection taken to the evidence is, that it does not appear from the record that any order was obtained from either court for the issuing of the commission. We have, however, before us the commission itself, issued in the usual form by the clerk of the circuit court, and in the execution of which both parties have joined. An order, therefore, must have been entered, or, if not, it was waived by the act of the parties in suing out the commission and joining in its execution. For these reasons we think the further evidence furnished to this court admissible.

§ 493. *Statement of facts as to damage of goods in the hold.*

This brings us to the merits of the case. The different libels filed in the several cases are in form and substance the same. And so are the several answers of the respondents. The libels charge that the ship *Martha* being at Liverpool on the 6th September, 1847, and bound on a voyage to Charleston, the libelants caused to be shipped on board the same divers goods, wares and merchandise, then in good order and condition, of great value, etc., to be taken care of and safely delivered in like good order and condition (the dangers and accidents of the seas and navigation excepted), they paying certain freight therefor as per bills of lading. That afterwards, on or about the 21st of the same month, the said ship, having on board the said goods, set sail from Liverpool, and on the 9th November following, arrived at Charleston, and soon thereafter delivered the same to the said libelants. That the said goods, wares and merchandise were not taken care of and safely carried and delivered according to the tenor and effect of the bills of lading; but, on the contrary, although no damage accrued from any dangers or accidents of the seas or navigation, the said goods were so badly taken care of by the said master, and the cargo of said ship, and particularly a quantity of salt on board thereof was stowed so improperly, that through the neglect and mismanagement of the master the said goods were greatly damaged, and great loss thereby sustained.

The answers of the respondents admit the taking on board of the vessel the goods as stated in the libels; and allege that she was loaded with an assorted cargo in the hold and with sundry sacks of Liverpool salt between decks; that the ship was sound, staunch and in every way well fitted and equipped for the voyage, and capable of carrying safely the cargo taken on board, the dangers of the seas only excepted. That the cargo was well and securely stowed and packed with proper dunnage, and according to the usage and custom of the trade, by the master and officers of the ship; that the hatches leading from the between-decks and the lower hold were well secured and calked, wholly separating the one from the other. That the ship encountered several violent gales and very boisterous weather during her voyage, causing her to labor heavily and straining her badly, the sea at times breaking over her, so that she shipped a great deal of water from leaks and stress of weather, requiring the constant use of the pumps, which were faithfully attended to, and every effort made to preserve the ship and save the cargo from damage. The respondents further allege that in consequence of the heavy seas, and the leaking of the vessel, and the change of latitude from a cold to a warm climate, the water shipped became heated, producing steam, and a wet and damp atmos-

phers in the lower hold, which no care or diligence on the part of the master and crew could have prevented; that this was the unavoidable result of the dangers of navigation, and proceeded from the storms, winds and waves, and not from any defect in the ship, or want of skill, care or diligence on the part of the master and hands, and caused the damage to the goods complained of. They further say that the salt stowed between decks was safely carried, and delivered dry and in good order at Charleston, without being wet, or any evidence of drainage from the same either upon the sacks, the dunnage, and matting upon which the sacks were stowed, or upon the lower deck, through the seams of which the drainage must have passed to the goods in the hold, if at all; and they deny that the damage to the goods in the hold proceeded from the salt thus stowed between decks.

The proofs in the case show that a mixed cargo, consisting of crates and boxes of dry goods and hardware, and a quantity of bars of railroad iron, was stowed in the hold of the vessel, the railroad iron placed at the bottom. And that some twelve hundred sacks of salt were stowed between decks fore and aft the main hatch of the lower deck. That she left Liverpool on the 21st of September, 1847, and arrived at Charleston on the 9th of November following, after a passage of forty-nine days; that during the voyage she encountered on the 1st and 2d of October, two very violent gales, the vessel on the wind at the time, causing her to roll heavily and the sea to break continually over her and to ship great quantities of water, so that it was necessary to keep the pumps going most of the time while the storm continued.

On opening the upper hatches a day or two after the arrival of the vessel, for the purpose of discharging the cargo, the salt between decks was found dry and in good condition; and after the discharge of the same, no unusual wet or dampness appeared upon the matting or dunnage upon which it was stowed, nor upon the flooring of the deck, nor any evidence of drainage from the sacks of salt in any part of the between-decks. All the witnesses concur on this point who had the best opportunity of becoming acquainted with the facts, and whose connection with the discharge of the salt precludes the possibility of mistake, including the port-warden present at the opening of the hatches, the purchasers of the salt, the consignee, the stevedores, the inspector of the customs and the mate of the vessel. Nor is there any evidence in the case to the contrary. On opening the hatches of the lower deck, leading to the hold of the ship, which was about the 15th November, five or six days after her arrival, great heat issued immediately therefrom, and much dampness and vapor were found to pervade this part of the vessel; and on breaking the cargo and commencing the discharge, the greater portion of it was found seriously damaged. The boxes of dry goods were found wet or damp and stained to a very considerable extent, and the hardware and bars of railroad iron, wet and badly rusted; and, indeed, the whole cargo throughout the hold more or less damaged. Drops of water or vapor, apparently formed from the heat and dampness of the hold, or by drainage from above, were found pendent from the seams of the under part of the lower deck, affording very satisfactory evidence of the immediate cause of damage to the cargo; but, leaving the question open to controversy as to the source whence these indications proceeded, some of the witnesses, and among them three of the port-wardens, testifying that these drops proceeded from the drainage of the salt that had been stowed between decks, and others, from the heat and dampness of the hold, aggravated by the quantity of sea-water shipped during the storm, and stress of the vessel.

We have already stated that the libelants charge in the several libels the damage to the goods to have been occasioned exclusively from the improper stowage of the cargo, and especially of the sacks of salt in the between-decks over the goods in the hold of the vessel. This is denied in the answers, and as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the part of the libelants to maintain this ground by the proofs, in order to charge the respondents. The real questions in the case, therefore, are, 1. Whether or not the respondents were guilty of neglect, and mismanagement in the stowage of the cargo, and especially of the stowage of the sacks of salt between decks? And, 2. If they were, whether the damage to the goods in the hold of the vessel was properly attributable to this cause?

§ 494. *Burden on carrier to bring loss within exception of bill of lading.*

The goods having been found to be damaged on the arrival of the ship, and which must necessarily have accrued in the course of the voyage, the burden devolved upon the respondents to show, in order to excuse themselves, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. That burden they have assumed, and have shown by nearly an unbroken current of testimony, that the conveyance of the salt between decks, in a mixed cargo, was according to the established custom and usage of the trade between Liverpool and this country, and that it was well stowed and packed and secured with proper and sufficient dunnage. This ground, therefore, for charging the respondents with the damage to the goods, entirely fails. They have shown further that the vessel encountered severe gales and boisterous weather in the course of her voyage, during which she labored heavily, the sea frequently breaking over her, and much water shipped by stress of weather, so that it was necessary to keep the pumps in constant operation to preserve the vessel, and protect the cargo. Thus presenting a state of facts in connection with the condition of the hold and appearance of the goods on the opening of the hatches, when the vessel arrived at her port of destination, that might well account for all the damage by reason of the perils of the navigation.

§ 495. *Damage by water shipped in bad weather, there being no fault apparent, is a peril of the seas.*

It is to be observed, also, that even assuming, according to the theory of the libelants, the damage was occasioned by the drainage of the salt coming in contact with sea water, if the water was shipped from the violence of the storm or stress of weather, as there was no fault chargeable to the master as to the place of stowage or as to the stowage itself, it is apparent that, even in that aspect of the case, the damage would still be attributable to the perils of the seas, and not to the fault of the master or ship. In order to avoid these necessary conclusions, the learned counsel for the libelants have sought to maintain upon the proofs that the seams of the lower deck were not properly calked, but were open, so that the drain from the salt readily dripped through upon the cargo in the hold, and that, conceding it to have been properly stowed between decks, if the seams of the deck had been tight, the damage would not have happened.

§ 496. — *so as to seams and leakage in bad weather.*

Assuming the facts to be true, as contended for in this proposition, the conclusion is admitted. But if the opening of the seams was occasioned by the straining of the vessel in the storms encountered during the voyage, and in favor of which view there is much evidence in the court below, the respondents

would still not be answerable. The further proof taken on this appeal would seem to remove all doubt on this point that may have previously existed.

§ 497. *That the ship was inspected before sailing is in favor of the carrier.*

That shows the ship, when about to sail from Liverpool, was inspected by a competent ship-builder, and repaired; and among other repairs, her lower deck was well calked and payed where any defects were discovered, and put in good order. The fact, therefore, that the seams were open on the arrival of the vessel, if admitted, must have happened in the course of the voyage, and may be fairly attributable to the storms she encountered. But it is not important to pursue this inquiry. For the proofs in the case show beyond all reasonable doubt that the damage could not have been occasioned by any drainage from the sacks of salt between decks. We have already referred to the witnesses on this point, and need not repeat the evidence. The salt was taken from the stores at Liverpool, and not from lighters, and was dry when put on board and also when discharged at Charleston; and there was not the slightest indication of unusual wetness or dampness upon the sacks or the matting and dunnage upon which it was stowed, or upon the flooring or any part of the between-decks. On this branch of the case there is no contrariety or discrepancy in the evidence.

§ 498. *Damage from drainage of salt in the cargo considered; no improper storage shown.*

And all the witnesses concur who speak on the subject, and common observation confirms their conclusion that, if the water came from drainage of the salt, so as to occasion the damage to the goods, some traces of its effects would have been found upon the sacks, and upon the mats and dunnage and deck of the vessel. The only ground urged for a contrary conclusion is an inference drawn from the fact that drops of water of a brackish taste, indicating, as supposed, the presence of salt in a degree beyond that of sea water was found along the seams on the under side of the lower deck; and of salt in the concrete found upon parts of the cargo in the hold. From these circumstances alone, three of the port-wardens out of four expressed the opinion that the damage must have been occasioned by the drainage of the salt above, notwithstanding the decisive facts as to the condition of the salt when put on board and when discharged, and the absence of any traces of it in the between-decks. It would be exceedingly difficult, if not impossible, to reconcile this opinion with the facts of the case, even if there was no other way to account for the circumstances stated on which the opinion of the port-wardens was founded. But when all of them may be accounted for as the natural, if not necessary, effect of the presence of the quantity of sea-water shipped by stress of weather in the course of the voyage, wetting the cargo as the vessel rolled and labored during the storms she encountered, producing great heat and dampness in the hold, we think the opinion altogether unsupported by the evidence.

As to the appearance of salt in the concrete upon parts of the goods, it is quite probable that the water in the hold thrown up the sides by the labor of the vessel in the gales may have brought it in contact with the salt between her timbers, and thus leaving traces of it upon the goods. Most of the vessels that have been built for many years, particularly eastern vessels, are filled with salt between their side timbers and outside and inside plank or ceiling, up to the air-streak, for the purpose of preserving the timbers, and preventing them and the planks from shrinking. When water comes in contact with this salt, either through the small openings below or air-streak above, or otherwise, the

tendency of it is to settle down in the space it occupies, by becoming more compact; and when the ship makes water in the hold, and rolls heavily by stress of weather, throwing the water up the sides, portions of the salt may escape from the small openings below and pass off along the water-way each side of the keelson to the well-pump. This, however, as is apparent, can happen rarely if at all, except when the ship labors heavily after having shipped much water in consequence of rough and boisterous weather. The effect of the salt, from its inherent tendency to attract and absorb moisture, is to tighten the seams of the ceiling, rather than open them, and thus prevent any escape of the particles of salt through them.

It has been suggested that, assuming the presence of salt in the hold may be properly accounted for in the way above stated, this should be considered as evidence of fault in the ship so as to charge the respondents. But in the first place, to permit the libelants to recover upon this ground would be a departure from that upon which they have chosen to place their right of action in the pleadings. That is founded exclusively upon their improper stowage of the salt between decks; and the proofs in the case have been taken with reference to the issue upon that allegation. In the next place, there is no evidence before us of any defect or fault in the vessel in respect to the ceiling or other parts of her connected with the process of thus salting the timbers. On the contrary, the port-wardens themselves speak of the seams of the ceiling as being tight and in good order. The truth is, that all the cases proceeded below, on the part of the libelants throughout, upon the allegation in the libels that the damage was occasioned by drainage from the sacks of salt between decks, where, as supposed, it was improperly stowed. And the evidence in the record in respect to the condition of the ceilings and other parts of the hold of the vessel was mere incidental and casual, no point having been made in the proofs on that subject. We have already expressed our views upon this, the main question involved in the case, and are satisfied that the damage could not have been occasioned for the cause set forth in the libels, but happened from the perils of the navigation. We will simply add, what was omitted in the proper place, that nearly all the witnesses concur, who speak on the subject, that the goods in the hold were most damaged by wet and dampness at the bottom or lower tier, and diminishing in the advance to the upper. And that in many instances the boxes of goods and crates of hardware were wet, or very damp, and stained at the bottom, and dry and sound on the top and sides, confirming the view that the damage proceeded from below.

Our conclusion is, that the decree of the court below is erroneous and must be reversed with costs, as to so much as awards damages to T. Lambert and Brother, and to the South Carolina Railroad Company, and that the proceedings be remitted to the court below with directions to enter a decree in favor of the appellants with costs; and as to the residue of the decree the appeal is dismissed for want of jurisdiction.

MR. JUSTICE DANIEL dissented, on the ground that the contract was entered into on land (in Liverpool), to be fulfilled chiefly on land (the delivery of the merchandise in Charleston), and that therefore the admiralty had no jurisdiction.

THE BARK COLONEL LEDYARD.

(District Court for Massachusetts: 1 Sprague, 530-533. 1860.)

Opinion by SPRAGUE, J.

STATEMENT OF FACTS.—This libel, *in rem*, seeks to recover for damage done to a quantity of flour by the effluvium of spirits of turpentine.

In June, 1859, this vessel was at New Orleans, taking freight for Boston, as a general ship. The libelants, on the 24th of that month, put on board of her three hundred and fifty-four barrels of sound flour, and took a bill of lading by which the carrier was bound to deliver the same to the libelants at Boston, in like good order as when received, "the dangers of navigation and fire only excepted." The flour was stowed between decks, aft. There were one hundred and ninety barrels of spirits of turpentine in the forward part of the lower hold. The cargo seems to have been, in other respects, properly stowed, and the hatches of the lower hold well secured; and during the passage, the hatches of the upper deck were taken off during the day-time, for ventilation. On arriving at Boston the flour was found to have been penetrated by the effluvium of the spirits of turpentine and its market value thereby diminished.

It is not contended, on behalf of the claimants, that this damage arose from the perils of navigation or of fire, so as to come within the exception in the bill of lading. But it is insisted that there is an established usage to take spirits of turpentine and breadstuffs together as portions of the cargo of a general ship, from New Orleans and elsewhere, and that, in this instance, the carrier took all proper care and performed his whole duty.

§ 499. *A shipper should see that his goods will bear the voyage if conducted in the usual manner.*

It is incumbent upon the shipper to see that his goods are of such a character and in such condition that they will bear the voyage upon which he sends them, if conducted in the usual and accustomed manner. If, therefore, his goods are deteriorated, because they will not bear the established mode of stowage or the companionship of other articles, which, from the known usage of trade, he may reasonably suppose may constitute a part of the cargo, the shipper must bear the loss and not the carrier.

§ 500. — *but the usage of carrying breadstuffs and turpentine as part of the same cargo not being shown, the carrier is liable.*

If, therefore, the claimants had succeeded in proving the usage which they set up, it would have been a good defense; but their proof has wholly failed. The evidence does not show that it has been usual on any voyages to take spirits of turpentine and breadstuffs as parts of the same cargo; and as to New Orleans, it is but recently that spirits of turpentine have been shipped from that port in any manner. The carrier has not shown any usage which would warrant him in putting spirits of turpentine on board of his vessel with the flour, if the former would be deleterious to the latter, and the evidence shows conclusively that it was. The numerous witnesses for the libelants testified positively that the flour was injured by the spirits of turpentine, and the scientific witness called for the claimant on that point rather confirmed than impaired their testimony. The flour having been damaged on the voyage, and it not appearing to have arisen from any inherent principle of decay, or from its character or condition being such as not to bear the voyage as usually conducted, nor from the danger of the seas, the carrier must be responsible.

§ 501. *Damages, how awarded, where flour is damaged by being stowed near turpentine.*

The only question remaining is the amount of damages to be awarded. This vessel arrived in Boston in the latter part of July, and soon after began unloading. This injury to the flour was discovered as it came out of the vessel. It was piled on the wharf, and the libelants informed the carrier that it would be sold at auction, and that he would be held responsible for the loss; it was sold at auction on the 29th of July. The libelants now claim the difference between the price thus obtained, and what would have been the fair market price of the flour if it had been delivered to them uninjured. This auction sale was in every way properly conducted. Due previous notice was given. There was a good company of dealers, and the ship's husband himself was present. The prices obtained were better than the previous appraisal by experts who had examined the flour for the purpose. The claimants have proved that the purchaser at this sale subsequently sold the flour for more than he gave; but it was by retailing it, one, two or three barrels at a time, and in one instance ten barrels, and to persons who were kept in ignorance of its damaged condition. Such a sale does not furnish a criterion by which the court can be guided. The claimants also introduced the testimony of Dr. Hayes, an eminent chemist. He testified that such was the volatile character of spirits of turpentine, and so pervading its effluvium, that it might injuriously affect this flour in the relative situation in which they were on board of this vessel, and with the hatches between decks well secured; that he had been making experiments for the last six weeks to ascertain, for his own instruction, the effect of spirits of turpentine on flour; that there was no chemical affinity between them, but that the flour absorbed the fumes; that this mixture was not injurious to health; that the effluvium might be removed by sifting the flour in the open air, or subjecting it to a dry heat of 150°, or sometimes at least in the process of making and baking it into bread. I did not understand him to say that this would always be successful; and it is in proof that bread made of this flour had the taste of turpentine. The scientific evidence undoubtedly shows that the effect of spirits of turpentine upon flour is less injurious than has generally been supposed, and that it may be removed by care and labor.

But if all this were, in fact, known at the time this flour arrived, still the necessity of bestowing this care and labor in order to relieve it from impurity and restore it to its sound condition would materially detract from its value. But it does not appear that the facts stated by Dr. Hayes were known even to him until demonstrated by his experiments within the last six weeks. The importer was entitled to have this flour delivered to him in as good condition, for his wholesale business, as it was when put on board of the vessel at New Orleans. It was not so delivered, and the carrier is responsible for the deterioration. The measure of damages must be the difference between its market value and the price it would have commanded if it had arrived in a sound condition. From all the evidence it appears that the auction sale is satisfactory proof of the market value. The testimony of experts has clearly shown what it would have been worth if it had arrived uninjured; and the difference is the amount of damages to be awarded.

Decree for \$567.42, damages and costs.

MAINWARING v. BARK CARRIE DELAP.

(District Court, Southern District of New York: 1 Federal Reporter, 874-880. 1880.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a suit to recover damages for injury done to bales of empty grain bags, shipped by the libellant at Liverpool for New York, under a bill of lading which stipulated in the usual form for their delivery in good order, "the perils of the sea" excepted. The bark was put up as a general ship. Her cargo consisted of three hundred and twenty-three tierces and forty casks of soda ash, three hundred drums of caustic soda, two hundred and sixty-five tierces of bleaching powder, one thousand eight hundred and fifty sacks of salt, ten thousand fire-brick, one thousand seven hundred and three empty petroleum barrels, eight hundred and forty boxes of cutch, and one hundred and ten bales of bags, of which sixty-seven were shipped by the libellant. There was some other miscellaneous cargo, of no great amount, which it is unnecessary to mention in detail. The bark is what is called an open-beam vessel, having two decks, the lower deck being laid only for a space about twenty-five feet long in the bow and about thirty feet long in the after-part of the vessel. Upon the beams between these two permanent decks were laid planks, and over the planks were laid mats. The planks were laid edge to edge, but rather loosely, together. The soda ash and the bleaching powders were stowed in the lower hold, two and three tiers high. Between two of the beams, amidships, the bricks were stowed, on top of the casks. This cargo filled the lower hold up to within a foot or a foot and a half of the beams. The empty barrels were stowed between decks, mostly in the fore peak. The salt was stowed between decks, partly aft and partly amidships. The cutch was stowed on the salt. The bags were stowed in two places between decks, part of them on this temporary deck of planks covered with mats, directly over the bleaching powders, and part of them aft on the permanent deck.

The vessel left Liverpool on the 3d day of November, 1877, and did not arrive at New York until the 18th day of January, 1878. She had a very tempestuous voyage, was obliged to put into Holyhead and remain there about three weeks, and on the 10th of January she encountered a gale of great violence, which lasted three days, during which she was, for a short time, on her beam ends and took in some water which the pumps could not reach. After this gale the vessel was somewhat listed to port. Some of the casks of bleaching powder and soda ash were broken. Upon arrival the bales of bags were delivered in good order, except some thirty-two which were corroded and eaten on the outside so that the fabric crumbled and became dust. This is the effect upon such fabrics of the fumes of bleaching powders, which consist largely of the chloride of lime. The evidence shows clearly that the bales of bags did not come in direct contact with the bleaching powders, but that the injury was done by the fumes arising from them. It is proved, also, that such fumes, dangerous to such fabrics as bags, arise from the bleaching powders wherever the powders are free—that is, not inclosed in casks—even without the powders being wet. It further appears that these bleaching powders have a destructive effect upon the hoops of the casks in which they are inclosed, having a tendency to cause the casks to fall apart. There is, I think, no doubt, upon the testimony, that the bleaching powders and soda ash were properly dunnaged and stowed in the lower hold, and that the breaking up of some of the casks was owing to the pressure and working of the cargo during the heavy weather

encountered, and the effect of the bleaching powders on the casks themselves during the long voyage, and that it could not have been prevented by any reasonable care and skill on the part of those in charge of the vessel. It was not shown, by any direct evidence, in what part of the ship the damaged bags were stowed; whether they were those stowed on the temporary deck above the bleaching powders, or aft on the permanent deck. It is the theory of the claimants that the fumes in the hold of a ship penetrate into all parts of the ship, and that they are especially strong in the after-part. In the absence of proof, however, which it would seem that the vessel could easily have produced, of the place from which the damaged bags came, I am unable to believe that these dangerous and corrosive fumes passed up, by and around these bales of bags on the temporary deck immediately above, without injuring them, to attack with accumulated destructive force other bales at a greater distance. I think, although the claimant's theory has some support in the opinions of some of the witnesses, the weight of evidence is that the danger of injury from bleaching powders depends in a great manner on the distance between them and the articles liable to be injured, and that it must be taken as proved that the damaged bags were those immediately above the bleaching powders on the temporary deck.

It is also clearly proved that the carrying of bleaching powders and soda ash in the same vessel with bales of bags, as parts of a general cargo, is a well-established usage of the trade between Liverpool and New York, and that the usage extends to the use of open-beamed vessels, like this bark, for the carriage of such general cargoes, including these articles. It is claimed, on the part of the libellant, that the injury was caused by the stowing of the bales of bags too near the bleaching powders, and upon this temporary and loosely laid deck, in such a way that they would be directly exposed to the fumes that would arise from the bleaching powders, if, as in fact happened, any of the casks should become broken during the voyage; that a proper and reasonable care, having regard to this particular danger, required that the bales of bags should have been stowed on the permanent deck, or further away from the bleaching powders. On the part of the claimants it is contended that the injury was caused by the perils of the sea, by which the casks were broken up, and that the stowage of the different parts of the cargo was proper, and with due and reasonable care for the protection of one part of it against injury from other parts, and that the stowage of part of the bales of bags on the temporary deck was necessary to the proper trim of the ship.

Both parties have undertaken to prove a usage; the libellant that the usage of the trade requires a greater separation between bleaching powders and bales of bags or similar fabrics; and the claimants that the usage of the trade is to stow the bales of bags as near to, or nearer to, the bleaching powders than in this case, and without interposing any more effective barrier between them. But after the examination of a very large number of witnesses, the result is that there is no usual mode of stowage in this respect, but that some masters and some stevedores take more, and some take less, precautions against this particular danger; that, in steamers which are built in compartments and afford much greater facilities for separating cargo, the bleaching powders are carried in separate compartments from bales of bags and similar goods liable to be injured by the fumes; that, in sailing ships, the bleaching powders are usually carried in the lower hold, and the bags generally, but not always, between decks, but that, on this particular point of stowing the bags on a tem-

porary deck, immediately above the bleaching powders, there is no settled usage. Although it appears that, in many cases, they have been stowed in positions of equal or greater exposure, yet many careful persons place them further away, or as far away as possible consistent with the proper stowage in other respects and the trim of the ship.

§ 502. *Rule of liability where goods of one shipper injure those of another in the course of the transit.*

The rule of law seems to be well settled that the ship is not responsible for injury necessarily resulting to the goods of one shipper, by a general ship, from their being carried in the same vessel with the goods of other shippers which, by usage, are a proper part of the same general cargo; but "if such injury, nevertheless, could have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty." This is the rule, even though the proximate cause of the injury is a peril of the sea, which brings the injurious force or quality of the dangerous article into operation upon the other. *Clark v. Barnwell*, 12 How., 280 (§§ 416-423, *supra*); *Lamb v. Parkman*, 1 Spr., 343. Where the carrier is innocently ignorant of the dangerous qualities of the article shipped — as, for instance, where the article is new in commerce, and its properties not known within commercial experience in the particular trade, and in fact unknown to those charged with its carriage, or where there is nothing to indicate or create a suspicion of its being dangerous — it is not negligence in the carrier to omit such precautions as the exercise of reasonable prudence would require, if the dangerous qualities of the article were known. *The Nitro-Glycerine Case*, 15 Wall., 524 (§§ 169-176, *supra*); *Pierce v. Winsor*, 2 Cliff., 18 (§§ 177-179, *supra*); *Brass v. Maitland*, 6 Ell. & Bl., 485.

§ 503. *Reasonable care is required to guard against injury to other goods where bleaching powders are carried.*

In this case, however, it is shown that bleaching powders have long been an article of commerce in the Liverpool trade, as parts of the general cargoes, and that the dangerous and corrosive qualities of their fumes are well known, a matter of common knowledge in the trade, and so, also, of the effect of the breaking of the casks in liberating the fumes, and the liability of the casks to come apart from the action of the powders. The reasonable care that must be exercised to exonerate the carrier must, therefore, be measured by the known danger and his means of guarding against it. In discussing a similar question, where paper stock was injured by oil and coal dust, Judge Blatchford says: "The vessel being up as a general ship, the libelants may *not* be at liberty to say that it was negligence to carry oil in the same vessel with paper stock; but yet the proposition set forth in the answer, that, as the shippers of the paper stock knew that the oil was to be taken by the vessel, such shippers assumed all risk of damage to the paper stock from the oil, is not a sound one. The true rule is that the peculiar character of the coal oil, its pungent odor, its volatile character, the damage certain to result to other cargo from contact with it, the liability of the casks containing it to break by pressure from the working of the vessel and let out the oil, demanded especial care in stowing the paper stock and the oil with reference to each other." *The Ship Sabioncello*, 7 Ben., 360. The same principle is clearly applicable here, and the question is whether the danger to which the bales of bags were exposed from the bleaching pow-

ders and from which they suffered injury was so far likely to happen that, in the exercise of that care which a prudent man would exercise in the conduct of his own affairs, it should have been anticipated and guarded against, and then whether there were means to guard against it. The ship is not responsible for the unusual prolongation of the voyage nor for the violence of the wind and waves; yet I think a reasonable prudence and care would, upon the evidence, have anticipated that, in the course of the voyage, some of this bleaching powder would be likely to get out of the casks and to injure the bales of bags stowed with reference to the bleaching powders as these were stowed. If this had been anticipated the precaution to guard against the danger was obvious enough to stow the bags further away, or on the permanent deck, or to place other cargo not liable to injury beneath them on the temporary deck, if it was of a nature to obstruct the passage of the fumes.

It is suggested that the stowage that was made was necessary to the trim of the ship, but this is not proved. There is no testimony on the subject. It is, doubtless, true that in a general ship no particular shipper can demand that his goods be put in a particular place or in the very safest place for them. The stowage must necessarily have reference to the trim of the ship. The safety of the ship is of greater concern to all than the safety of any particular part of the cargo. And this consideration may modify what would otherwise be the duty of the ship-master in separating articles dangerous one to the other. But in the absence of evidence it cannot be assumed that the cargo could not have been, in this respect, with safety to the ship, stowed otherwise than it was stowed. The proof shows clearly that the other bales of bags were stowed more safely as against this particular peril, and it is not shown that these bales could not equally have been protected from the natural effects of the bleaching powders. If there was any difficulty in doing so, growing out of the necessity of trimming the ship properly, the claimants could easily have shown it. Therefore they cannot now make this answer to the libelant's claim. Decree for libelant, with costs, and a reference to compute damages.

HUNT v. THE CLEVELAND.

(Circuit Court for Illinois: 6 McLean, 76-79; 1 Newberry, 221. 1853.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—On the 8th of October, 1851, were shipped on the propeller Cleveland, at Ogdensburg, New York, several casks of hardware, for Chicago, belonging to the libelant. On the arrival of the propeller at Chicago, on the 1st of November, when the casks were opened and examined, it was ascertained that the hardware had been wet and damaged to an amount varying from three to five per cent., according to the kind of goods. The libel alleges that this damage was sustained in consequence of the carelessness and unskillfulness of the carrier. The claimants, in their answer, insist that the injury was the result of the dangers of the sea, and was unavoidable. The bill of lading states that the merchandise was shipped in good order and condition, and was to be delivered in like good order and condition — *the dangers of navigation only excepted*. The sole question in the case is whether the damage was within the exception in the bill of lading.

§ 504. *Burden of proof as to injury caused by "dangers of navigation;" how shifted from carrier to shipper.*

The proof is that the vessel was tight, staunch, well manned and equipped in every respect. The injury being established, it is incumbent on the car-

rier to show that it was caused by the dangers of navigation, and if it appear it was the consequence of such dangers, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill on the part of the carrier. *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *supra*). Apply these principles to the facts in this case. The casks were stowed in the after part of the forward hold, which was a proper and safe place for that kind of merchandise. The propeller had a cargo of various goods, for Cleveland, Sheboygan, Port Washington, Milwaukee, Racine, Southport and Chicago. Nothing of importance occurred till the 16th of October, when, being off Saginaw Bay, the cylinder of one of the engines broke, and other damage was done, which compelled the vessel to return to St. Clair to repair. The engine was repaired, and they left St. Clair on the 21st. After leaving St. Clair, and passing Point of Barques, about midnight of that day, they were met with a very severe gale from the west. The sea made a clean breach over the vessel, washed things from the promenade deck, stove in the larboard gangway, which caused her to ship a considerable quantity of water which went through the hatchway into the fire-hold, and to leak. All hands were immediately called and set to pumping. The propeller was put head to the wind, and worked up under the lee of the land. At the end of about four hours' labor, they succeeded in freeing her from the water, and she did not afterwards leak more than usual. The gangway had been well and securely fastened. They had heavy weather the remainder of the voyage, but nothing further occurred of any moment. The witnesses who testify to these facts are the captain, the engineer, the clerk and the mate. There is no contradictory testimony. They all concur in the belief that whatever damage was done to the hardware was in this gale of wind, and that no human skill or prudence could have prevented it.

It seems fairly to be inferred from the proofs that the damage was caused by the gale of wind, which resulted in wetting the merchandise, either by leakage of the vessel, or by shipping water. The damage is thus shown to be caused by the dangers of navigation. It follows that the shipper must establish negligence or want of skill in the carrier. It must not be matter of doubt merely, but it shall clearly appear there was a want of proper care, skill or diligence. Now, in this case, the court must be satisfied, notwithstanding the statements of the witnesses that there was proper care and skill, that there was not. It is certainly true that the court is not bound by the mere statements of the witnesses on this point; but facts must appear from which the court is able to infer there was a want of due care on the part of those who had the management of the propeller. There is nothing in the facts shown to warrant such a conclusion. The testimony comes from those on board of the vessel, and this should lead to great caution in receiving it. Any considerable experience in this class of cases teaches us to scrutinize closely everything that may be said. But the testimony cannot, obviously, come from any other source. We must endeavor to draw just conclusions from it, making all due allowance for the influences which may be supposed to affect the minds and memory of the witnesses.

§ 505. *Master's duty to note a protest after an accident; effect of an omission to do so.*

Some stress was laid on the circumstance of there having been no protest noted until the arrival of the vessel in Chicago, notwithstanding she stopped at various places before her arrival at that port. It is a useful and proper pre-

caution for a master of a vessel to note a protest on his arrival at the first port—when it is in his power to do so—in all cases where any accident has occurred, or any injury been sustained, or any possibility thereof; but it is not an indispensable duty, without which the carrier cannot be relieved from liability. It is always highly desirable that a statement should be made of all the circumstances attending any casualty or accident on shipboard while the facts are fresh in the mind and before controversy has sprung up in relation to them. Still, if it be omitted, it operates against the carrier only by throwing a cloud over the transaction—at most, by casting something of suspicion on the affair. It cannot be said that the omission of the carrier shall throw upon him all the consequences of negligence in a clear case of none in fact. It may well have its effect in a doubtful case, but not in one where there is nothing to cause the mind to hesitate in its conclusion. Abbott on Shipp., 497 (side paging 380); 9 Leigh's R., 54; Conkling Adm., 684, etc.; Senat v. Porter, 7 Term R., 158; Arnould on Ins., 1337; The Emma, 2 W. Rob., 315. There was a protest noted and properly extended on the arrival of the propeller at Chicago, but it has not been introduced. No objection has been taken on that point by the libellant. It is said to be lost or mislaid. I think it is reasonable to conclude, under the circumstances of this case, if it were here it would shed no new light upon the subject of this controversy. The libel must be dismissed, with costs.

THE MOHLER.

(21 Wallace, 230-235. 1874.)

APPEAL from U. S. Circuit Court, Eastern District of Wisconsin.

STATEMENT OF FACTS.—A cargo of wheat was shipped on a barge (in charge of the Mohler) from Mankato, Minnesota, to St. Paul. The bill of lading accepted the "dangers of navigation." The barge was totally lost by collision with a bridge pier. The Home Insurance Company, the insurer of the cargo, paid the loss, and filed a libel to recover the amount. The defense was that the loss was caused by a sudden and unexpected gust of wind at the time the boat was passing the piers. The evidence on this point is reviewed by the court. The steamer was condemned and the owners appeal.

§ 506. *Burden of proof is on carrier to show loss by excepted peril.*

Opinion by MR. JUSTICE DAVIS.

It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that therefore the carrier was excused from a delivery of the wheat. The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment. This burden has been assumed by the carrier, and the case was heard on the testimony introduced by the respondents, the libellant having called no witnesses.

§ 507. *Loss of goods by tempest not excused where carrier carelessly exposed the vessel to the peril.*

It may be true, as the answer implies, that the boat would have safely made the passage if the wind had not driven her against the pier, but this does not solve the difficulty. The inquiry is whether the passage should have been undertaken at all in the general bent of the weather on that day. If the carrier had sufficient warning to put him on his guard, and chose to neglect it and take the chances of a venture when common prudence told him there was

danger in it, he cannot escape on the ground that the particular peril which finally overcame him was a sudden gust of wind. The general doctrine that a carrier is not answerable for goods lost by tempest has no application to such a case.

FACTS STATED BY THE COURT.—It is undeniable that the weather was boisterous during the after-part of the day on which the loss occurred, and that the boat laid up at Mendota on account of the wind. It had at best only “abated” or “calmed down” when she left Mendota and proceeded on her voyage. There is a singular discrepancy in the testimony of the master and the mate as to the condition of the wind after the departure from Mendota, and as to where it was that the wind began to blow hard; the master swearing that there was no great wind until the boat met the Julia, and that this was but a quarter of a mile above the piers; the mate giving a very different account as to both facts. Both these officers had equal opportunities of judging, and there is nothing in the record affecting the credibility of either. In such a case the defense fails, for the respondents have no right to ask the court to prefer the testimony of one witness over the other when there is nothing in the record to show that one is more reliable than the other. Apart from this there is enough in the evidence to establish satisfactorily that the weather had not cleared, nor the direction of the wind changed, and that the boat should either not have left her moorings at Mendota, or have landed at some proper point before the piers were reached. It won’t do to say that the wind had moderated, and that the officers of the boat thought they could get through without trouble. They had no right to think so, for on such a day squalls were likely to arise at any moment, and it was bad seamanship, being forewarned, to attempt to go through such a dangerous place in the river. It is difficult at all times to make the passage of these piers, and especially so in sudden gusts of wind blowing from the south, which was the case on that day. And this difficulty is enhanced in the night-time, and when the current, by reason of high water, is increased. Any prudent officer would have stopped until the weather became calm. At any rate it was the duty of the master of the boat in question to have done so, and, failing in this duty, he is chargeable with the consequences of his negligence, which in this case were lamentable, for not only was the property in his charge destroyed, but a human life lost.

§ 508. *Common carriers upon inland waters should be careful correspondingly in attempting to pass under bridges.*

The officers of steamers plying the western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them. These bridges, supported by piers, of necessity increase the dangers of navigation, and river-men, instead of recognizing them as lawful structures built in the interests of commerce, seem to regard them as obstructions to it, and apparently act on the belief that frequent accidents will cause their removal. There is no foundation for this belief. Instead of the present bridges being abandoned, more will be constructed. The changed condition of the country, produced by the building of railroads, has caused the great inland waters to be spanned by bridges. These bridges are, to a certain extent, impediments in the way of navigation, but railways are highways of commerce as well as rivers, and would fail of accomplishing one of the main objects for which they were created — the rapid transit of persons and property — if rivers could not be bridged. It is the interest as well as the duty of all persons engaged in business on the water routes of transportation to conform to this

necessity of commerce. If they do this and recognize railroad bridges as an accomplished fact in the history of the country, there will be less loss of life and property, and fewer complaints of the difficulties of navigation at the places where these bridges are built. If they pursue a different and contrary course, it rests with the courts of the country, in every proper case, to remind them of their legal responsibility.

Decree affirmed. (a)

TRANSPORTATION COMPANY v. DOWNER.

(11 Wallace, 129-135. 1870.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—A lot of coffee shipped by water from New York to Chicago was so injured as to be rendered worthless by the fact that the lake steamer got aground and leaked in consequence to such an extent as to ruin the coffee. The bill of lading expressly excepted the dangers of lake navigation, of which the grounding of vessels is claimed to be one. There was a verdict for the plaintiff.

§ 509. *Rule stated as to burden of proof of negligence where carrier shows loss by an excepted peril.*

Opinion by MR. JUSTICE FIELD.

On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the court refused an instruction to the jury, to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred.

§ 510. *No presumption, from fact of loss under excepted peril, that there was negligence.*

In *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *supra*), the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company.

(a) *The Mollie Mohler*, * 2 Biss., 505, affirmed.

§ 511. — *though presumption may arise if accident is itself inconsistent with the exercise of due care.*

A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in *Scott v. London & St. Catharine Dock Co.*, 3 Hurlst. & C., 596, the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." So in *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y., 543, the court of appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off a switch was not of itself, without proof of the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible, but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

§ 512. *Application of rule of presumption to present case.*

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff.

For the error in the refusal of the instruction prayed and in the instruction given, the judgment must be reversed and the cause remanded for a new trial.

THE OCEAN WAVE.

(District Court, Eastern District of Wisconsin: 3 Bissell, 317-320. 1872.)

Libel by the Home Insurance Company to recover amounts paid on policies issued on a cargo of wheat shipped from St. Paul to Prairie Du Chien.

Opinion by MILLER, J.

STATEMENT OF FACTS.—The usual exceptions of unavoidable dangers of the river and fire were contained in the bill of lading. It is alleged in the answer

of claimants "that, at a point on the Mississippi river, between Nebesha, in the state of Minnesota, and Alma, in the state of Wisconsin, and while passing in the usual channel of the river, and proceeding with due caution and care, the barge Bill Fleming struck a bar in the river and stuck fast, and the steamer and the other barge in tow, by their own impetus and the current of the river, were carried against the barge Fleming with great force, and caused the guards of the steamer to break down a fender part of the barge Fleming, tearing away the fastenings of the same below the water line of the barge, and crushing in the side of the barge. And an examination being made then and there, the barge was discovered to have sprung a leak and to make water freely." The barge was new, well built, staunch and strong. The timber head of the barge was broken in, the bolts that her timber head were bolted with were driven through her side. The timber head was broken in, so that the top bolt of the timber head was driven through the sides, and the second bolt from the top nearly through, and the third bolt driven through the outside plank. The timber head is fixed in and fastened to the barge in its construction in this wise: "The bottom of the timber head is bolted to the bilge keelson and top timber, also two screw bolts run through the outside and the top timber, through the side clamps inside and the timber head, being one-inch bolts, having a big flat head on the outside, fastened on the inside with a nut and a washer." The effect of the drawing of the bolts in the manner described was to make the barge leak through the bolt holes on to the wheat. Water did not show in the pump well until it had wetted the wheat and run down through the dunnage boards. The upper bolt was in a line with the water.

The barge ran on the bar at Beef slough in the forenoon of the day, in the month of May, and was taken off about six o'clock that evening, and towed down to Alma, about three miles, that night, when it was discovered that she had water in her, and pumping then commenced. The usual way of getting barges off was not successful—that is, to have lines from the barge to the boat, the boat backing and going ahead, sometimes one way and sometimes the other way. The engineer of the steamboat testified that they pulled at the barge until the guards were torn off the steamboat. The captain then ordered us to drive her off the bar by running the boat against her and butting her off. In doing so we drove in one of the timber heads of the barge. The barge was got off in that way and landed at Alma. One hundred and fifty pounds of steam to the square inch was used in butting the barge off. We made a line fast to the barge and steamboat, giving the line twenty feet slack. The boat drifted back that twenty feet with the current and then came ahead with both engines strong and butted the barge off. The barge was struck right against her timber head. The pilot of the steamboat corroborated in substance the testimony of the engineer. The captain saw the injury to the barge and he had two carpenters on board. The leak could have been discovered by going into the hatch, or by looking into either of the scuttle hatches, or by use of the pumps, which would take water at two inches depth. The answer does not state truthfully the cause of the injury to the barge. Not one particle of evidence supports the answer in this respect.

§ 513. *The burden of proving that the loss was through an excepted peril lies upon the carrier.*

In my opinion the answer does not bring the respondent within the exception of unavoidable dangers of the river. The answer merely alleges that while passing in the usual channel of the river, and proceeding with due care

and caution, the barge Fleming struck a bar in the river and stuck fast. It is not alleged that the bar was unknown, or that it could not have been avoided. The barge struck a bar in broad daylight which was well known to the pilots. The case of *Transportation Co. v. Downer*, 11 Wall., 129 (§§ 509-512, *supra*), is referred to as ruling this case. If the record of that trial had contained the facts proven by the master of the steamer, in which the plaintiff's coffee was stored, that he, the master, had not entered the harbor at Chicago for two years, and that he refused a tug, with the additional fact that the channel of the harbor was a shifting channel by means of sand, it is not probable that the supreme court would have decided that that harbor was a peril of navigation. The master was a comparative stranger to that harbor, and was incompetent to navigate his vessel in. With proper knowledge and due care, with the aid of a tug, he could have avoided the accident. With these facts proven, the circuit court, in my opinion, could not consider the defendant as within the exception. The master must be competent to the discharge of his duties before the exception should be allowed. If that case, as reported, is adhered to as law, all that the owners of steamboats are required, in order to bring themselves within the exception, is to show that they encountered shallow water and stuck. Before a shipper should be put to prove negligence on the part of the carrier, the carrier should furnish evidence tending to show that the accident was unavoidable. The allegation in the answer, that they were passing down the usual channel and proceeding with due caution and care, may be seen in substance in almost every answer. The boat may have been in the channel, but the barge not. The respondent must show that the boat and barge were in the usual channel, and that the injury was caused by an excepted cause.

§ 514. *After discovering injury to vessel, carrier should protect the cargo against its effects.*

The holes knocked in the barge should have been sought for and plugged without delay. The upper hole was visible, and the lower holes might have been discovered by feeling down in the water, and by going into the hatches the leakage no doubt would have been detected. The flowage of water on the wheat was not discovered for several hours after the barge had been towed to Alma. It was the first duty of the captain to use all means in his power for the security of the cargo. For his neglect there is no possible excuse. He is clearly in fault for the damage to the wheat, and a decree must be made for libelants.

HOSTETTER v. GRAY

(District Court, Western District of Pennsylvania: 11 Federal Reporter, 179-183. 1882.)

Opinion by ACHESON, D. J.

STATEMENT OF FACTS.—On December 6, 1874, the steam tow-boat Iron Mountain, having in tow several barges (one called Ironsides No. 3) partly loaded with a miscellaneous cargo, left Pittsburgh, bound for New Orleans. The libelants shipped by the barges two thousand boxes of bitters and eighteen boxes of show-cards, which were placed on the Ironsides No. 3, the bill of lading stipulating that the goods were "to be delivered without delay, in like good order, at the port of New Orleans, Louisiana, the dangers of navigation, fire and unavoidable accidents excepted." At the argument it was claimed, in behalf of the libelants, that there was a verbal agreement touching the course of transportation additional to the bill of lading, but the libel itself asserts that "in confirmation of said agreement" the bill of lading was signed, and the evi-

dence fails to establish such alleged verbal contract. The case stands upon the bill of lading.

The tow-boat and her barges, after taking an additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, eight hundred and nineteen miles below Pittsburgh, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge Ironsides No. 3, which was but partly loaded, and proceeded with it up stream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York landing, about three miles above the wharf-boat, and Whitmon's landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while rounding out to the river the barge suddenly took water and soon sunk, becoming a total wreck, the cargo, including the libelants' goods, sustaining great damage. This occurred late in the evening of December 18, 1874. The protest, signed by the officers and some of the crew, and executed December 23, 1874, assigns as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libelants.

The libelants brought no suit until March 4, 1880, when they filed the libel in this case against the surviving owner and the executors of a deceased owner of the tow-boat and barges *in personam*. The original libel set forth that the barge "struck some unseen obstruction, as the libelants are informed and believe," and the only ground of liability therein alleged is that of wrongful deviation in returning up stream to New York landing, after safe arrival at Mt. Vernon. In their answer the respondents denied that their course of action complained of was a deviation, and averred that it was lawful, customary and right, and in accordance with the established usage of the trade in which they were plying. After this answer was filed, the libelants, on March 31, 1880, filed an amended libel, in which they allege that since the filing of their original libel they had been informed and believe that the sinking of the barge was not the result of an obstruction in the river, but was caused by reason of the barge being overloaded on the port side with sacks of corn, the undue haste with which the barge was loaded, and the negligent and improper stowage of the corn thereon. The case, therefore, as it now stands, presents for solution two main questions: *First*, was there a deviation? *Second*, if not, was the sinking of the barge the result of one of "the dangers of navigation," and an "unavoidable accident," within the exception in the bill of lading, or was it caused by reason of the negligence charged in the amended libel?

§ 515. *What is a deviation; and how far a contract of affreightment is controlled by usage as to deviation.*

1. A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage. *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass., 447. It is, however, no deviation to touch and stay at a port out of the course of the voyage, if such departure is within the usage of the trade. *Bentaloe v. Pratt*, Wall. C. C., 58; *Bulkley v. Protection Ins. Co.*, 2 Paine, 82; *Thatcher v. McCulloh, Olc.*, 365 (§§ 986-989, *infra*); *Oliver v. Maryland Ins. Co.*, 7 Cranch, 489, 491. Where a bill of lading provides that the goods are to be carried from one port to another, a direct voyage

is *prima facie* intended; but this may be controlled by usage. Thus, where the bill of lading stipulated that the goods were to be transported from New York to Georgetown, in the District of Columbia, it was held that the vessel was justified by the usage of the trade in going to Norfolk to discharge freight, although it was thirty miles out of the direct course to Georgetown. *Lowry v. Russell*, 8 Pick., 360. So it was held in *Columbian Ins. Co. v. Catlett*, 12 Wheat., 383, 387, 388, that the true meaning of the policy there in suit was to be sought in an exposition of the words, with reference to the known course and usage of the West India trade, and that what delay at St. Thomas would constitute a deviation depended on the nature of the voyage and the usage of the trade. After the explicit provisions of the contract, usage is the predominating test as to deviation. *Phillips, Ins.*, § 980. And usage is the test of what belongs to the voyage, and the proper course in prosecuting it. *Id.*, § 1003. Established usages relating to a voyage are impliedly made part of the contract if nothing is expressed to the contrary. *Gracie v. Marine Ins. Co.*, 8 Cranch, 75; *Columbian Ins. Co. v. Catlett*, *supra*; *Robinson v. United States*, 13 Wall., 366; *Phillips, Ins.*, § 997.

§ 516. *Usage as to barge trade on the western rivers considered.*

These being recognized legal principles, our next inquiry is, how far are they applicable to this case? Numerous witnesses variously connected with the river trade, and having large experience, testify of their own personal knowledge that it has been the general usage since the commencement of the business of transporting merchandise on the western rivers in barges towed by steam-vessels, and constantly practiced, for such barges to take on additional cargo along the rivers *en route* to the port of destination, and in so doing for the owners or agents of such vessels and barges to land and tie up their tows at the more public or larger and safer landings, and detach from the fleets a barge or barges and tow the same to the places in the vicinity, whether up, across or down the stream, where cargo is awaiting shipment; and it is testified that such usage has thus prevailed at Mt. Vernon, Indiana, in respect to goods awaiting shipment at New York landing and other neighboring points.

For example: Arthur J. Branch, the superintendent of the Evansville & New Orleans Barge Company, having testified to his connection with the Ohio river trade for twenty years, and his acquaintance with its usages, was asked this question: *Question*. "Suppose a steamboat with several barges in tow were to land at a port on the Ohio river, and there find or ascertain that there was freight for her at three or four different landings within four or five miles above said port which she passed in coming down, what has been the custom with respect to taking such freight?" To which he replied: *Answer*. "It has been to leave the tow in the safest and most convenient landing, and take one or two barges, as might be necessary, and go back. If we know when we pass the freight that we are to take it, we go below to the nearest and safest harbor for our tow, and to save time and expense. It would not be good navigation to land with our whole tow at each landing for freight, and in many cases it would be impossible to do so." Printed Ev., 81.

William A. Page testifies: "Where there are several landings to make in the same neighborhood it is almost the invariable custom to tie up the tow, and then go back with one barge for the freight. Wherever I have been, and all along the Ohio, as far as my knowledge goes, this is the custom, and it is good, sound steamboat sense everywhere. This is the custom in the neighborhood of Mt. Vernon." *Id.*, 92.

Henry H. Sholes says: "I have known that custom to exist twenty years — ever since I have been tow-boating. It has existed, to my knowledge, in the trade between Pittsburgh and New Orleans." *Id.*, 152.

John B. Hall, a wharf-boatman at Evansville, Indiana, speaking of the practice there, says: "A tow-boat coming down the river with four or five model barges, and having several landings to make close together above, would leave the bulk of the tow and go back up the river with the barge which was to receive the freight. This custom has prevailed all along the lower Ohio ever since I had anything to do with the river, and before I went into business. The custom at Mt. Vernon has been the same as here." *Id.*, 89.

George G. Grammer, the superintendent of the Evansville, Cairo & Memphis Packet Company, testifies that at Evansville, Mt. Vernon and Shawneetown there are wharf-boats, and that it is an old custom for the farmers in the vicinity thereof to make contracts there for shipping their corn from their farm landings, and that it has been the common practice for tow-boats descending the Ohio to land at these wharf-boats and make fast the tow, and take one of the barges out of the fleet and to the corn freight piles. And he adds: "I regard it as the safest for all interests concerned to select some good landing in the vicinity of these freight piles, either above or below, or at them, for that matter, and detach the particular barge they desire to load, and move it separately to the freight piles. That would be safer, because a steamboat can handle one barge better than she can handle more than one. And very often the freight is in a shoal or ragged landing, and she can get there with one barge when she could not get there with more. That would be a much more speedy way of loading, and more convenient. This is the custom at Mt. Vernon and other points on the Ohio river for loading barges." *Id.*, 66, 67.

Enoch E. Thomas, who has been one of the proprietors of the Mt. Vernon wharf-boat for twenty-five years, testifies: "The boats generally come here with their barges, and when told of corn above here to be shipped they go back for the corn. This has been the general custom here. The corn above Mt. Vernon is, as a rule, owned by parties living here, who make their shipping contracts with the boats on their arrival at this port. This custom has been observed by boats with barges partly loaded, bound from Pittsburgh to New Orleans. This has been the custom ever since I have been on the river. Our shipments cover the river from Long's landing to the mouth of the Wabash. Long's landing is six miles above Mt. Vernon." *Id.*, 80.

Similar quotations from the testimony of the respondents' other witnesses might be greatly multiplied, were it deemed necessary. The witnesses assign several reasons for the usage. The barges, they testify, can be more conveniently and economically handled and loaded singly than when together in the tow. A saving of time is also effected, as several barges can be loaded at different points simultaneously,—a matter of much importance in a river like the Ohio, which is subject to sudden rises and rapidly falls. But the main reason is that the usage conduces to the safety of the whole fleet, and thus operates to the advantage of every party in interest. Upon this point the witnesses are very emphatic. Where freight is to be taken on at several points in the vicinity of such a good landing as that at Mt. Vernon, they testify that it is much the safer course to land and leave the tow there, and go back with a single barge, than to land the entire fleet at the different points. To appreciate how heavy, and hard to handle, a tow of three or more barges is, we need but to recur to the official survey of the barge Ironsides No. 3. *Id.*, 121. Her

custom-house tonnage was three hundred and sixty-nine, her carrying capacity seven hundred tons, length one hundred and eighty feet, breadth thirty-one feet, depth seven feet. It is shown that there is a further and special reason for the usage at Mt. Vernon. Ninety per cent. of the shipments in that vicinity consists of corn in sacks at different farm landings, which can be reached by a single barge, when it is often impossible to land the whole tow. The only reasonably practicable way the farmers have to get their corn to market is by barges brought to their private landings. To haul the grain to the wharf-boat at Mt. Vernon would cost as much as the freight charges to New Orleans. *Id.*, 70, 73, 85.

To disprove the alleged usage the libelants examined a large number of witnesses. Their testimony, however, is principally of a negative character. They say they do not know of any such usage, but with rare exceptions they expressly disclaim familiarity with the usages of the trade. They are simply ignorant upon the subject and confess their ignorance. Thus, the following is found in the cross-examination of Charles A. Ault, a witness for the libelants: *Question*: "Do you pretend to be at all familiar with the customs of navigation with respect to steamboats or barges receiving and discharging freight between their terminal points?" *Answer*: "I do not." *Question*: "Such a custom, then, as you have been asked about might exist without your knowing anything about it, might it not?" *Answer*: "Yes, sir; it might exist without my knowing anything about it." *Id.*, 219. And so F. A. Bacon, being cross-examined as to the alleged usage at Evansville and Mt. Vernon in respect to corn shipments, answered: "I know nothing about that matter. . . . That may have been the universal custom without my knowledge." *Id.*, 329. Upon a careful scrutiny of the evidence it will be found that the admitted want of knowledge touching the barge trade on the part of the libelants' witnesses generally is such as to deprive their testimony of force. Several of the libelants' witnesses, however, state that they have knowledge or information that the usage in question is pursued by barges towed by steam-vessels. The evidence submitted by the respondents in proof of the usage is positive, clear and convincing, and, in my judgment, is not weakened, nor is any doubt respecting it created, by the testimony on the part of the libelants.

The court, therefore, finds: (1) That it has been the general usage in the Pittsburgh and New Orleans barge trade, coeval with the commencement of the business, and constantly practiced, where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river. (2) That at the time of the sinking of the barge Ironsides No. 3 it was the general and established usage for barges towed by steam-vessels in the Pittsburgh and New Orleans trade, having cargo to receive at New York landing, and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place, and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of the trade. (3) That the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business, and conduces to the safety of the whole tow, and is, therefore, a reasonable usage.

Applying, then, to these facts, the legal principles already discussed, I am of the opinion that there was no deviation. When the barge Ironsides No. 3 was detached from the tow and taken to the several landings on the Indiana and Kentucky shores it was to get cargo—a purpose connected with the voyage. The Iron Mountain was never beyond sight of her tow, and, commercially considered, kept within the port of Mt. Vernon, according to the testimony of George W. Thomas. Id., 82. The expert testimony clearly shows that, in landing at Mt. Vernon, and there leaving the bulk of her tow and taking back a single barge for cargo, her course was prudent and proper.

§ 517. *Whether the barge in this case sunk by reason of improper loading and stowage.*

2. The contemporaneous declaration in the protest as to the cause of the sinking of the barge remained unchallenged for a period of five years and three months, and the original libel, verified by affidavit, ascribed the loss to the same cause. That it was not filed without an investigation of the facts may be well assumed. Indeed, the statements of the libel plainly imply that the libelants were then possessed of information as to “all the particulars of the sinking of the barge.” Death had removed S. L. Summers, the mate under whose immediate supervision the corn was loaded and stowed on the barge, and whose testimony was of the last importance. These things are to be borne in mind when we enter upon the inquiry as to the truth of the specific charge of negligence first made in the amended libel, that the barge sunk by reason of improper loading and stowage. To sustain this charge the libelants examined eight deck hands, viz., Krumm, Riley, John and James H. Dunn, Martin, Leonard, Starke, and Tolen, and Anderson, a stevedore. Anderson says the barge listed at New York landing, and, indeed, was not trim when she went up. Herein, however, he is contradicted by Martin, who testifies the barge was all right at New York landing, and when she left there. The opinion Anderson undertakes to express as to the cause of the sinking I regard as entirely worthless. He did not see her sink, and left her at New York landing. I do not understand him to have been at Whitmon’s at all. He admits he has had no experience with barges.

Nothing in the testimony of Krumm or Tolen tends to show that the barge was overloaded on the larboard side or the corn improperly stowed. On the contrary, the testimony of both these witnesses, I think, strongly disproves the allegations of the amended libel. Krumm says: “When we carried the corn on the barge we carried the corn as much on the one side as the other.” He also states it was when the barge got out into the river “she capsized a little on one side,” and not when she commenced to back out, and that she did not careen enough to take water over her deck. The testimony of this witness, throughout, in my judgment, tends to show that the cause of the sinking was as claimed by the respondents. Tolen testifies: “We stowed the corn in piles along the sides of the boat and amidships at both places. We put as much on one side as the other as far as my knowledge goes.” He further states—in this contradicting other of the libelants’ witnesses—that all the corn was stowed away except “a few sacks, probably a hundred.” In his examination in chief he says: “As she was backing out she hit a snag or sprung a leak, I could not say which. We put a syphon in her and started to put another syphon in, and before we got it done she was sunk.” He says she was a good barge, and there was nothing wrong with her so far as he knew. On cross-examination he was asked: “Could she have sunk in so short a time by reason of any ordinary

leak not caused by striking some object?" To which he replied, "Not to the best of my knowledge; she would not have sunk without having struck a snag or having sprung more than an ordinary leak." And he significantly added: "There was nothing to cause her to spring more than an ordinary leak unless she struck something. She must have had a very big hole in her bottom to have sunk in that short time." This, be it remembered, comes from the libelants' own witness. His testimony has peculiar value as that of one who has had a steamboat experience of fifteen years, and is by occupation a sailor. I think no one, after reading this man's testimony, can accept the theory of the loss upon which the libelants now insist.

At least two of the other six deck hands who testified in behalf of the libelants were without experience on the river. The individual stories of several of these witnesses are confused and lack coherency. They differ among themselves as to important particulars, and in some very essential matters their testimony is conflicting. For example: Stark and James H. Dunn say the corn taken on at New York landing and Whitmon's was not stowed at all. On the other hand, Martin says the corn taken on at both places was stowed as received, and he describes minutely in what manner. Again: James H. Dunn testifies: "The water that sunk the barge came over her side, and from there run into her hold." On the contrary, Leonard testifies: "I rather think the water that sunk her came in from the bottom, as there was water on the dunnage when we went down to move the freight. There was half an inch or so of water on the dunnage at that time. . . . She took water very rapidly after I got out of the hold, as she sunk in three minutes after." Five of these witnesses express the opinion that the barge sunk on account of improper loading, but they hardly agree as to what the precise negligence was. This accident, it must be observed, happened after night-fall and suddenly. It is quite plain these witnesses at the time were greatly excited. Called upon to testify nearly six years after the occurrence, their opinions are to be received with allowance. They are probably honest in their opinions, but, after a very careful consideration of the whole evidence, I am persuaded they are mistaken.

It clearly appears the barge was not overloaded. Indeed, she was not nearly loaded up to her full capacity. She was well built, strong, staunch, and in perfect order. The mate who superintended her loading on this occasion, now, unfortunately, dead, is spoken of by the witnesses as a competent and trustworthy officer. The respondents examined William C. Gray, the captain of the tow-boat, Henry H. Sholes, the receiving clerk, and Joseph H. Dunlap, the agent of the "Iron Mountain" barge line. These witnesses have had long experience on the river, are intelligent and disinterested, and I have no reason to doubt the truth of their statements of fact. They severally testify that the barge was loaded in the usual manner and properly, and that the corn, save a few sacks, not exceeding a hundred, was regularly stowed away before they left Whitmon's, and the barge was then trim. Sholes and Dunlap testify that they went into the cabin of the tow-boat and sat down at a table to figure up the quantity of corn taken aboard. While thus engaged they felt a jar or shock, as though the boat had struck something. Capt. Gray, who was then on the deck of the tow-boat, says, "the barge made a sudden, crushing lurch;" and again he describes the shock as a "concussion, blow or crush." Dunlap and Sholes hastened out, and heard some of the men say the barge had struck something, and was taking water. Both went on the barge, and Dunlap in the hold. They found she was taking water in her hold rapidly. No water was

coming over the deck. Sholes said he heard the water "rushing into the hold." A syphon pump was put in the hold and set to work. Capt. Gray states that after the concussion the barge righted temporarily, and for probably five or six minutes there was nothing unusual in her shape. He went into the hold and heard the water coming in below the dunnage and back of the wing tiers of the stowage. He says he "heard it rush behind the cargo." Efforts were made to get at the break by removing the cargo, but before this could be accomplished the water came over her dunnage and caused the barge to list badly, and the men were ordered out of the hold, the peril becoming so great. It is needless to prolong this opinion by further citations from the proofs. Suffice it to say, I am satisfied, from the whole evidence, the sinking of the barge occurred by reason of the cause alleged by the respondents.

The court finds (4) that while the steam tow-boat Iron Mountain, with the barge Ironsides No. 3 in tow, was backing out from Whitmon's landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this without negligence on the part of the owners of the tow-boat and barge, their agents or servants, and that it was an unavoidable accident. That a loss so occurring is within the exception in the bill of lading is quite clear. *Transportation Co. v. Downer*, 11 Wall., 129 (§§ 509-512, *supra*); *The Favorite*, 2 Biss., 502; *Williams v. Grant*, 1 Conn., 487. Let a decree be drawn dismissing the libel, with costs.

DEDEKAM v. VOSE.

(Circuit Court for New York: 3 Blatchford, 44-47. 1853.)

STATEMENT OF FACTS.—Libel to recover freight on iron, the bill of lading containing an exception, "not accountable for rust." The defense was that the iron was seriously damaged by rust, this being caused by bad stowage and negligence of the carrier. Further facts appear in the opinion of the court.

§ 518. *A stated exception in a bill of lading cannot exempt from liability for negligence.*

Opinion by NELSON, J.

It is urged, on this appeal, that the exception in the bill of lading exempts the owner from responsibility for the damage, although the rust be attributed to the defective stowage. But I cannot agree to this doctrine. Even in the case of the usual exception of "the dangers of the sea," if it can be shown that the goods might have been saved by the due and proper care and diligence of the master and crew, notwithstanding the peril, the vessel is answerable for the loss. These exceptions in bills of lading do not cover negligence or want of care on the part of the carrier. Whether carriers or other employees can stipulate for exemption from liability for negligence or unskilfulness in the fulfilment of their undertakings, within sound principles of public policy, is, perhaps, not exactly judicially settled; but it may, at least, be safely said that, if any such exemption can be set up, it must be in pursuance of an express and positive agreement to that effect, or, what may be the same thing, necessary and unavoidable implication. Nothing of the kind appears in the bill of lading in this case. It is conceded that the rust was occasioned by negligence or unskilfulness in the stowage. The bundles of iron stowed upon the top of the coal were discharged in good order, while those under it, at the bottom of the vessel, were more or less damaged by the rust. The carrier, therefore, was clearly liable for this damage.

§ 519. *What is a sufficient tender in admiralty to avoid payment of costs.*

There is a little difficulty upon the question of the tender, on account of the confusion and want of precision in the evidence relied on to establish it. There is no doubt that the respondents are entitled to an abatement of the freight claimed, to the extent of the damage to the iron. But, in order to avoid being charged with costs, or, at least, to entitle themselves to costs, they must show that they made a tender, or what, in the admiralty, will be regarded as an equivalent, before the suit was brought. It is in proof that an offer was repeatedly made, before suit, to pay the balance of the freight, deducting this loss, to be ascertained by arbitration, or by a sale of the damaged iron at auction, but that this was refused, and that the whole amount of the freight was demanded; also, that, after this, a sale of the damaged iron at auction took place, with notice to the agents of the vessel, and that the amount of the loss was in this way ascertained. But there seems to have been no offer actually made to pay the balance, after thus ascertaining it, till the offer that was made on the filing of the answer. It is quite clear, however, that a tender again would have been a mere matter of form, as the agents had refused repeatedly to accept the offer shortly before the auction sale took place; and for aught that appears, they neglected to attend the sale, or take any notice of it, thereby leaving the implication that they still refused to adjust the dispute in that way. If this conclusion can be properly maintained, the tender on the coming in of the answer was all that could be essential to support this branch of the defense. If a tender had been in fact made after the balance was ascertained by the sale, the case would be free from difficulty; and if the conduct of the agents fairly authorizes the conclusion that the repetition of the tender would have been but an idle ceremony, because of the offers and refusals that previously took place, then the case must be regarded as standing upon the same footing as if a tender had been made after the sale.

I admit that this tender could not be maintained, according to the strict principles of the common law. Indeed, as the sum in controversy sounds in damages, it could not have been the subject of a set-off at all in an action at law. It might have been given in evidence in abatement of the amount of freight claimed. The doctrine, however, of courts of admiralty on this subject is less stringent. A tender may be made in salvage cases, where the amount in controversy is quite as uncertain and indefinite as it is here; and it will be upheld even where there has been less formality in making it than is required at law. The court looks to the substance and good faith of the transaction, rather than to technical forms of proceeding. *The True Blue*, 2 W. Rob., 176, 180; *The Lady Flora Hastings*, 3 id., 120; *Crosby v. Grinnell*, MS., South. Dist. N. Y., before Betts, J., March, 1851 (9 N. Y. Leg. Obs., 281); *The Frederick*, 1 Hagg., 211, 218; 2 Chitty's Gen. Pr., 523. Upon the whole, therefore, I think that the decree below is right and should be affirmed.

THE SVEND.

(Circuit Court for Massachusetts: 1 Federal Reporter, 54-68. 1879.)

§ 520. *General doctrine of carrier's responsibility stated.*

Opinion by CLIFFORD, J.

Carriers of goods, if common carriers, contract for the safe custody, due transport and right delivery of the same, and, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods, and are liable

at all events for every loss or damage, unless it happened by the act of God, or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without any fault or negligence on the part of the carrier. The *Propeller Niagara v. Cordes*, 21 How., 23 (§§ 438–450, *supra*). Ship-owners and masters of ships employed as general ships in the coasting or foreign trade, or in general freighting business, are deemed common carriers by water, and as such are as much insurers of the goods they transport as common carriers by land, unless it is otherwise provided in the bill of lading. Story on Bailm. (7th ed.), 501. Such a carrier's first duty, and one implied by law, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails or other motive power, as the case may be, and furniture necessary for the voyage. Vessels so employed must also be provided with a crew adequate in number, and sufficient and competent to perform the required duty, and with a competent and skilful master of sound judgment and discretion. Owners in such cases must see to it that the master is well qualified for his situation, as they are directly responsible for his negligences and unskilfulness in the performance of his duty. In the absence of any special agreement to the contrary, the duty of the master extends to all that relates to the lading and stowage of the cargo, as well as to the transportation and delivery of the goods, and for the performance of all those duties the ship is liable, as well as the master and owners. *Elliott v. Rossell*, 10 John., 7; *King v. Shepherd*, 3 Story, 349 (§§ 532–537, *infra*); *Abbott on Shipp.* (8th ed.), 478.

STATEMENT OF FACTS.—Goods of great value, consisting of sheet iron in bundles, were shipped by the libelants in the steamer *Svend*, bound on a voyage from the port of Liverpool to the port of Boston. By the manifest it appears that the steamer was an iron propeller, carrying general cargo for freight, and that the shipments belonged to various persons, which, of itself, is sufficient to show that the master and owners were common carriers in the strictest sense. Sufficient also appears to show that the goods, when shipped, were in good order and condition, and that the covenant of the bill of lading is that they shall be delivered in like good order and condition. One thousand bundles of the shipment, stowed in the forward part of the aft lower hold, were badly wet with salt water to such an extent that, when the bundles were hoisted out to be delivered, the water dripped out of the same and appeared muddy with rust. Damages are claimed by the libelants, in the libel as amended, for breach of the contract to deliver the goods in the condition specified in the bill of lading, in the sum of \$4,000, and the evidence shows that the goods shipped were injured in the manner charged to an amount even greater than that alleged in the libel. Compensation for the injury is claimed by the libelants upon the following grounds:

First. Because the evidence proves to a demonstration that the goods were shipped in good order and condition, and that the respondents have failed to show that the injuries to the goods resulted from the excepted perils, or any of them, or from the fault of the shipper. *Second.* Because the steamer was unseaworthy in that she was not of a construction suitable to carry such a cargo on such a voyage at that season of the year. *Third.* Because the ceiling of the steamer was not of a suitable character, nor fit to protect such cargo from salt water on the described voyage. *Fourth.* That the goods injured were not properly stowed or dunnaged for their protection against injuries of the kind on such a voyage.

Two points are not controverted in argument by the respondents: *First.* That the goods were in good order and condition when shipped. *Second.* That the quantity mentioned in the libel was injured in the course of the voyage, and that it was not in good order and condition when delivered.

Conceded or not, the evidence to that effect is satisfactory and conclusive, but the respondents explicitly deny every other proposition submitted by the libelants, and insist as follows: *First.* That the burden of proof is upon the libelants to prove that the injury to the goods did not result from the excepted perils. *Second.* That the steamer was in all respects seaworthy, and of suitable construction and equipment to transport such a cargo on such a voyage at that season of the year. *Third.* That the ceiling of the ship was sufficient, and that the goods were properly stowed and dunnaged.

Hearing was had in the district court, and the district court entered a decree dismissing the libel, from which decree the libelants appealed to this court. Since the appeal was entered here more than sixty witnesses have been examined by the parties, which renders it necessary to review all the findings of the court below, as well as the legal principles applied in disposing of the case. Due shipment of the goods is not denied, nor is it controverted that the steamer sailed from Liverpool March 24, 1873, and that she arrived at Boston, her port of destination, April 14, in the same year. Certain exceptions are contained in the bill of lading. At the time of the voyage the steamer was comparatively a new vessel, it appearing that she was built in October of the previous year. Competent expert witnesses in great numbers describe the construction of the steamer under deck as low-waisted forward of the poop, and express the opinion that she was unfit to make such a voyage during the winter months. They were asked to give the reasons for that conclusion, and answered to the effect that in such a construction as that described the tendency in rough weather would be to fill the waist with water, and to cause the vessel to strain and roll deep and heavy. When asked what effect the straining of the vessel would have upon her ceiling in the lower hold, the answer was that if the vessel labored heavily it would cause her to blow; that the deeper the ship rolls the higher she will blow the water in her bilge, particularly if her ceiling is not water-tight. Sheet iron, all agree, is quite susceptible to damage from being wet, and some of the expert witnesses testify that a drop of sea water will damage a sheet of the iron, and that it would take very little water to go through a whole package of such merchandise. Apart from the construction of the steamer, including her ceiling, no attempt is made to show that she was unseaworthy. Beyond doubt, she was comparatively new and was staunch and strong. Nor is it pretended that the damage to the cargo resulted from any defects in the hull of the vessel or in her equipment, beyond what is embraced in the charge that her construction in the particulars mentioned exposed the vessel to unusual strain in bad weather, and tended to make her roll unusually deep and heavy.

Argument to show that the vessel, when she rolls deep and heavy, is more likely to blow and expose cargo stowed in her aft lower hold to wet, is quite unnecessary, as the conclusion accords with all experience, and is fully established in this case by the evidence, unless the ceiling of the ship is water-tight.

§ 521. *Vessels should not only be seaworthy in the general sense, but have appliances fitting them to carry the cargo.*

Owners of vessels of such a construction, even though they are seaworthy in the general sense, are bound to furnish such appliances for the protection of

the cargo so stowed as will protect it from injury arising from the ordinary perils of navigation. Damage to cargo, occasioned by salt water, does not come within the excepted perils when, by reason of the place in which it is stowed, it is exceptionably liable to such injury in severe weather. The *Oguendo*, 38 Law T. (N. S.), 151. Ship-owners, by such a bill of lading, contract for safe custody, due transport and right delivery of the goods, in like good order and condition as when they were shipped; and it is universally admitted that the contract implies that the ship is reasonably fit and suitable for the service which the owner engages to perform; that she is and shall continue to be, in a condition to encounter whatever perils of the sea a ship of the kind, laden in that way, may be fairly expected to encounter in the contemplated voyage. Safe custody is a part of the contract, and if, in consequence of the peculiar construction of the ship, further appliances are necessary to protect the cargo from injury by ordinary perils, not excepted in the bill of lading, the duty of the owner is to furnish all such; and if he fails to do so he is responsible for the consequences. The *Marathon*, 40 Law T. (N. S.), 163. Explicit exceptions may excuse imperfections of construction or repairs, but in the absence of express words to the contrary, a bill of lading, in the usual form, implies a warranty of seaworthiness when the voyage begins, and all the exceptions in it must, unless otherwise expressed, be taken to refer to a period subsequent to the sailing of the ship with the cargo on board. As for example: Wheat was shipped at New York for Scotland, under a bill of lading excepting perils of the seas, however caused. During the voyage the wheat was damaged by sea water. In an action by the holders of the bill of lading against the owners of the ship, the jury having found that the water obtained access to the cargo in consequence of one of the ports being insufficiently fastened, the subordinate court entered a verdict for the ship-owners, upon the ground that the loss was covered by the exception in the bill of lading. But the house of lords, on appeal, reversed the judgment, and held that as in order to bring the loss within the exceptions it must be found that the ship sailed with the port in a seaworthy state, a new trial must be had, it not appearing that that fact had been found by the jury. *Steel v. State Line Steamship Co.*, 37 Law T. (N. S.), 333; *Lyon v. Mells*, 5 East, 428.

§ 522. *Defects in the peculiar construction of the present vessel stated.*

Two defects are suggested in the steamer, both of which, if they be defects, existed at the time the ship sailed: *First*. That the construction of the ship, as already explained, rendered her unfit to transport such a cargo on such a voyage at that season of the year. *Second*. That the ceiling of the ship, in view of her peculiar construction, was not sufficient to protect such cargo from damage by salt water in such a voyage during the winter months of the year, when rough weather may reasonably be expected.

Rough weather, as all experience shows, may be expected on such a voyage in the winter and early spring months of the year, but the respondents deny that the construction of the steamer rendered her unfit to transport such goods on such a voyage, and insist that her ceiling was properly constructed and sufficient to protect such cargo, in the place where it was stowed, from damage by salt water, and from every peril within the contract of the bill of lading. When built the steamer was ceiled with a permanent ceiling up to her deck. It is claimed by the respondents that she had during the voyage, in addition to that, a temporary ceiling up to the turn of the bilge, but the evidence, taken as a whole, does not sustain that theory of fact. Even the master testifies that

"she was ceiled all the way up to the deck," but he says nothing about any such additional temporary ceiling as that supposed by the respondents. Surveyors examined the steamer in New York, and one of them speaks of the vessel as ceiled to the deck, but makes no mention of any temporary ceiling of any kind. Proof that the steamer had no such ceiling is also derived from the statements of the consignee, who testifies that he went down into her hold after she was discharged, and he states that she was ceiled from the keelson entirely up to the deck. Nor does he say a word about any additional ceiling. Ships carrying grain frequently have what is called a grain ceiling, in addition to the ordinary permanent ceiling, which usually extends only to the upper turn of the bilge. Unlike that, a grain ceiling is a temporary appliance built up as dunnage to keep the grain removed from the permanent ceiling. Support to the theory of the respondents, that the steamer had such temporary ceiling for the protection of the cargo in question, is derived chiefly from the testimony of the head stevedore, who superintended the discharge of the cargo, and the fact that the steamer, on her former voyage from Odessa to Falmouth, for orders, carried a cargo of wheat, which was delivered without injury.

Beyond all doubt, the evidence shows that the damage was caused by salt water, which came in contact with the bundles of sheet iron as they lay stowed in the aft lower hold; and it is equally clear that the water must have reached the iron in large quantities to have caused such extensive damage to one thousand bundles of the iron, estimated to weigh fifty-five tons. Cargo stowed in the same hold, above the bundles of sheet iron, came out in good condition; and the witnesses for the respondents agree that there had been no leakage through the hatches, from which it would seem to follow that the water must have come from below. Confirmation of that view, of a persuasive character, is derived from the testimony of the master, who in direct terms attributes the damage to the blowing of bilge-water through the seams of the ceiling in the after hold when the steamer rolled. Cogent support to that theory is also derived from the testimony of the mate, who expresses the opinion that it was caused by the ship laboring so heavily and rolling. Convincing confirmation of that theory, if more be needed, is also found in the testimony of Port Warden Paine, who testified that when he went down into the after hold he did not see anything that denoted a leak, and he expressed the opinion that it must have been done by what is called blowing—that is, that the bilge-water swashes up when the ship rolls; and he added that it is a common thing for bilge-water to blow up when the ship labors, as explained, and that it does not take much water to damage sheet iron. Few steamers have their ceiling caulked so as to be water-tight, and in all cases where they do not it seems that the blowing of bilge-water through the seams of the ceiling is a common occurrence when the vessel rolls. Steamers, as well as sail ships, roll more or less on every such voyage, varying in degree with the state of the wind, the construction of the vessel, the manner in which she is loaded, and the means by which she is propelled. Even suppose that cases may arise where it would properly be held that blowing is a peril of navigation, within such an exception in a bill of lading, it is clear such a rule cannot be applied in this case, as it appears that the goods might have been protected from such damage by a reasonable foresight, care and prudence, the rule being that the carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence which might and ought to have been foreseen. *Bearse v. Ropes*, 1 Spr., 332.

Dangers of the seas, said Judge Story, whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still in either case be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. The *Reeside*, 2 Sumn., 571. Hence it is that, if the loss occurs by a peril of the sea that might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability. Story on Bailm. (7th ed.), § 512a; *Nugent v. Smith*, Law Rep., 1 C. P. D., 437; 3 Kent's Com. (12th ed.), 217. Both parties agree that the steamer was well built, and that in the general sense she was seaworthy when the voyage began and when it ended at the port of destination, the only defect alleged by the libelants being that in consequence of her peculiar construction and the insufficiency of her ceiling and dunnage, she was unfit to carry sheet iron stowed in her aft lower hold on such a voyage during the winter and early spring months of the year; and the court is of the opinion that the great weight of the evidence fully sustains that proposition. It may be that the steamer would have been a fit and proper vessel to carry such cargo on such a voyage in a milder season of the year, or that she would have been a fit and proper vessel for the voyage in question if her ceiling had been water-tight, or if the sheet iron had been stowed between decks; but it is very clear, in the judgment of the court, that the construction and defective ceiling of the steamer, taken in connection with the place and manner of stowage, rendered her unfit to transport such goods on such a voyage at that season of the year. By the terms of the bill of lading safe custody is as much a part of the contract of the carrier as due transport and right delivery. When shipped the sheet iron was in good order and condition, and when delivered it was badly damaged by salt water, the evidence showing to the satisfaction of the court that the water obtained access to the goods through the seams or crevices in the ceiling of the steamer.

Evidence of leakage is not exhibited in the record, and inasmuch as it is proved that the cargo stowed above the iron in the same hold came out dry, it seems clear, almost to a demonstration, that if the ceiling had been water-tight no such damage would have been occasioned, and that the swashing of the bilge-water between the sides of the vessel and the ceiling would not have caused it to reach the sheet iron, though stowed in the aft lower hold. Where goods are shipped and the usual bill of lading given, promising to deliver the same in good order, the dangers of the seas excepted, without more, and they are found to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the excepted perils. *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *supra*); Story on Bailm. (7th ed.), § 529; *Nelson v. Woodruff*, 1 Black, 156 (§§ 408-412, *supra*). Reported cases, however, may be found where it is held that if an excepted peril is shown which is adequate to have occasioned the loss, the burden of proof shifts, and that the shipper, in such a case, is required to show that it was not occasioned by that peril, but by some negligence of the carrier, which rendered that peril efficient, or co-operated with it, or brought it about without any connection with the sea peril. *The Invincible*, 1 Low., 226; *The Lexington*, 6 How., 384. Such ship-owners, carrying goods under a bill of lading by which they contract to deliver

the goods in good order and condition, certain perils excepted, are bound to deliver the same in that condition unless prevented by those perils, and are responsible for any damage to the goods occasioned otherwise than by those perils. The *Chasca*, 32 Law T. (N. S.), 838. Three marine surveyors examined the steamer after her return, and concur in the opinion that she was not fit for such a voyage at that season, in view of her construction and consequent tendency to roll and produce blowing in a heavy sea, and many other witnesses are of the same opinion. Her internal construction was such that bilge-water could blow into the hold through the seams of her ceiling when she rolled, it appearing that her ceiling was built upon the ribs of the ship, beginning at the keelson, only fourteen inches above her iron bottom, and that it continued all the way up to her main deck, being only about four inches away from her iron sides, which shows that bilge-water might rush up between the ceiling and her iron sides whenever the ship rolled, as there is no evidence to show that the seams of the ceiling were caulked or pitched before she sailed or at any time during the voyage. Defects of the kind might easily have been remedied before the voyage began, or at any time during its progress; but it does not appear that any attempt was made to apply any of the known remedies for such defects. Stowage in the lower hold may be a fit place even for such a cargo in a steamer of a different construction, and doubtless might have been in the steamer of the libelants if the ceiling had been water-tight, or if proper means had been devised and applied to prevent the bilge-water, when the vessel rolled, from blowing or escaping through the seams of the ceiling, and finding access to the sheet iron as stowed in the hold. Suitable appliances, it is not doubted, would have prevented such consequences, and protected the cargo from damage. Nothing of the kind was done or attempted, and, in view of the exposed condition of the cargo from the causes shown, the conclusion must be that the place where the same was stowed was an unfit place, in that steamer, for stowing such cargo on such a voyage at that season of the year.

Defenses of various kinds are set up in argument, of which the two principal ones deserve to be specially examined: *First*. That the bill of lading excepts leakage, breakage and rust; the language of the instrument being, "not answerable for leakage, breakage or rust." *Second*. That the damage was caused by the perils of the seas, within the meaning of the bill of lading.

§ 523. *Exceptions in a bill of lading of "leakage, breakage or rust," and of "peril of the sea," held inapplicable to present case.*

1. Two or more answers may be made to the defense, arising from the said exception: *First*. It is not adequate to have occasioned the loss. Rust may be caused by sweat or mere moisture of the air in the place where goods are stowed, and it may be that the exception is adequate to cover such a loss, and in such a case to shift the burden of proof from the carrier to the shipper, to show that the loss was not occasioned by that peril. *Second*. Concede that, but it by no means follows that such an exception is adequate to cover the damage in this case, which arose from the profusely wetting and soaking the sheet iron in salt bilge-water, blown through the seams and crevices of the ceiling on the sides of the place where the iron was stowed. Viewed in the light of the actual circumstances, it is clear that the exception is neither adequate nor sufficiently comprehensive to cover the damages occasioned by the means proved in this case. *Third*. Suppose, however, it may have the effect to shift the burden of proof, still it does not follow that the defense is a valid one, as it fully appears that the evidence introduced by the libelants is sufficient to overcome every pre-

sumption in favor of the carrier, and to show that the damage was occasioned by mere want of foresight, care and diligence.

2. Nor is there any better ground to support the second defense. Evidence to support the defense was introduced in the court below, consisting of the depositions of the master, mate and engineer of the steamer, and the protest filed in the case; and those documents are exhibited in the record, together with the depositions of nineteen other witnesses taken since the appeal, of which sixteen were introduced by the libelants. Ships carrying cargoes as common carriers must be fitted to encounter ordinary sea perils on the voyage described in the contract of shipment. Injuries to cargo resulting from such perils give the shipper a right of action against the carrier, but the court below, on the evidence then exhibited, found that the gales were proved to be of extraordinary violence, and such as would have been likely to damage a seaworthy ship, and to come within the usual definition of such perils. Responsive to that, the first observation to be made is, that the gales referred to did not damage the steamer of the respondents in the slightest degree worth mentioning, as appears from all the testimony exhibited as to her condition after she arrived at her port of destination. Except that the muzzle around the end of the pipe under the ceiling broke loose, there is no proof of actual damage to the steamer, and it is not claimed that the expenses of repairing that injury would amount to more than a nominal sum. Witnesses called by the respondents, especially the officers of the steamer, sustain the theory of the respondents that the gales which the steamer encountered were extraordinary, but in view of the very slight damage to the vessel, and the contradictory testimony introduced by the libelants since the appeal, the court is of the opinion that the violence of the gales was much exaggerated in the testimony of the officers as introduced in the court below. *The Oguendo*, 38 Law T. (N. S.), 151. Opposed to the theory of the respondents that the damage was occasioned by the extraordinary perils of the seas is the united testimony of the sixteen witnesses since introduced by the respondents. Suffice it to say, without reproducing their testimony, that they are witnesses of great nautical experience, and that they all testify in substance and effect that the weather, even as described by the master, was not more boisterous than is usually found on that voyage at that season of the year. Eight steamers coming westward over the same route as the steamer of the respondents, starting at different times later, overtook and passed her at various points on her course, and encountered only moderate weather, and made very good passages as to time. On the other hand, steamers which left a week earlier than the steamer of the respondents encountered severe and heavy weather, such as is to be expected and is usually experienced during the winter and early spring months. Inquiry was made of the master whether or not there was any unusual wind or weather during the voyage, and his answer was: "We had very heavy gales, sir, but I could not say it was an unusual thing to have, except at that season, being so far advanced."

Examined in the light of the whole evidence, the court is of the opinion that the respondents have failed to show that the damage was occasioned by the perils of the seas within the meaning of the bill of lading. Much testimony was introduced by the respective parties in regard to the dunnage of the sheet iron stowed in the lower hold. Dunnage usually consists of pieces of wood placed against the sides and bottom of the hold of the ship to protect the cargo from injury by contact with the vessel or other cargo, or by leakage.

Confined to that purpose, the court is of the opinion that the weight of the evidence shows that it was sufficient, but, if its purpose be extended as a means to protect the cargo stowed in the hold from being wet by bilge-water blown through the seams and crevices of a defective ceiling, the court is of the opinion that it was clearly insufficient to afford any such sufficient protection. Conclusive proof is exhibited that the ceiling was not water-tight, and all the witnesses examined upon the subject, except the head stevedore and one of his assistants, have given evidence tending to convince the court that the salt water obtained access to the sheet iron through the ceiling. Testimony to the contrary comes chiefly from the stevedore, but his statements are so indefinite, contradictory, rash and inconsiderate that they fail to secure the concurrence of the court in their accuracy. Beyond controversy, the damage to the sheet iron was occasioned by blowing, by which is meant that the salt bilge-water found access to the iron, as stowed in the forward part of the after hold, through the seams and crevices of the ceiling, when the vessel rolled; from which it follows that the libelants are entitled to recover, and that the decree must be reversed. Separate findings of fact and law are required in an admiralty suit in the circuit court in all cases where the amount in controversy, on appeal, is sufficient to give the supreme court jurisdiction to re-examine the decree rendered in the circuit court; but where the sum or value in dispute does not exceed the sum or value of \$5,000, a more general finding of those matters in the opinion of the circuit court will be sufficient. 18 St. at Large, 315, § 1; 316, § 3; One Thousand Two Hundred and Sixty-five Vitrified Pipes, 14 Blatch., 274 (§§ 981-983, *infra*).

Prior to the filing of the answer the libelants filed an amendment to the libel, increasing the *ad damnum* to \$4,000, and inasmuch as the respondents made no objection to the amendment, it is deemed proper to regard it as having been duly allowed, as otherwise it would be allowed by this court. On June 16, 1876, the libelants asked leave to file a second count as an amendment to the libel, and the court ordered it placed on file, reserving the question of its allowance or disallowance to be decided at the final hearing. Pursuant to that order, the amendment, as proposed, is allowed, but the additional amendment proposed at the argument, further increasing the *ad damnum*, is disallowed. Evidence as to the extent of the damage is contained in the record, and, in view of that fact, it is not necessary to refer the cause to a commissioner to ascertain the amount, the court being satisfied that the loss exceeds even the amended *ad damnum* of the libel, which is all the court can allow under the pleadings, except for costs which have arisen through the fault of the respondents in not paying the just claim of the libelants. The *Wanata*, 5 Otto, 600, 612.

Decree of the district court is reversed, and a decree for the libelants entered for the sum of \$4,000, with costs.

WERTHEIMER v. PENNSYLVANIA RAILROAD COMPANY.

(Circuit Court for New York: 17 Blatchford, 421-423. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—On or about July 17, 1877, the defendant received from the plaintiffs, at the city of New York, for transportation to Pittsburgh, Penn., goods of the value of \$1,710. At the time of receiving the goods the defendant delivered to the plaintiffs a bill of lading, whereby it agreed to transport the goods, subject to several conditions, among which was one that the

company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company. On the 17th of July the car containing the goods was dispatched by the defendant from Jersey City for Pittsburgh, reaching Pittsburgh about one o'clock A. M., July 20th, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22d, when troops, ordered by the governor of the state to aid the sheriff in retaking the property, came in conflict with the mob, failed to dispossess the mob, and the mob fired the property and thereby destroyed it.

§ 524. *Acceptance of a bill of lading by a shipper binds him by the terms therein expressed.*

The delivery of the bill of lading by the defendant, and its acceptance by the plaintiffs at the time of the delivery of the goods, must be deemed to constitute a contract between the parties, with the conditions contained in the bill of lading. *York Co. v. Central R. Co.*, 3 Wall., 107 (§§ 243-248, *supra*); *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 174 (§§ 1492-98, *infra*); *Grace v. Adams*, 100 Mass., 505; *McMillan v. Michigan Southern & N. I. R. Co.*, 16 Mich., 79; *Hopkins v. Westcott*, 6 Blatch., 64; *Kirkland v. Dinsmore*, 62 N. Y., 171. These cases all hold that the shipper who accepts the bill of lading cannot be heard to allege ignorance of its terms. It is unnecessary to refer to the cases where, from the peculiar circumstances attending the acceptance of the receipt, assent to its terms was held not to be implied, as the present case is the ordinary one, where no peculiar circumstances are shown. Neither are the cases in point which decide that assent on the part of the shipper will not be implied to any conditions which do not appear on the face of the bill of lading. Such was the case in *Ayres v. Western R. Corp.*, 14 Blatch., 9 (§§ 1294-96, *infra*), which was decided upon the authority of *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *infra*).

§ 525. *Where the carrier brings himself within an excepted loss, the burden of showing negligence is on the shipper.*

The effect of the contract made between the parties was to impose upon the plaintiffs the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark v. Barnwell*, 12 How., 272 (§§ 416-423, *supra*), Mr. Justice Nelson says that, although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury "might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods." But the *onus probandi* then becomes shifted upon the shipper, to show the negligence. In *Transportation Co. v. Downer*, 11 Wall., 129 (§§ 509-512, *supra*), the judgment of the court below was reversed, because the jury were instructed that it was incumbent upon the defendant, the carrier, to bring itself within the exception, by showing that it had not been guilty of negligence. Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this court.

§ 526. *An incendiary fire by a mob, causing loss of goods, is within the exception of loss by fire in bill of lading. (a)*

The plaintiffs have not shown negligence on the part of the defendant, and therefore cannot recover. But irrespective of any considerations concerning the

(a) The same ruling was made on the same state of facts by McKennan, J., in *Hall v. Pennsylvania R. Co.*,* 1 Fed. R., 226.

burden of proof, where it appeared, as it did here, that the fire by which the plaintiff's goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the state, without anything to show that the defendants were bound, from the circumstances, to anticipate such a result, the defense was affirmatively established.

The motion for a new trial is denied.

THE GOLD HUNTER.

(District Court for New York: Blatchford & Howland, 300-308. 1832.)

STATEMENT OF FACTS.—The owner of wines shipped from Havre to New York libeled the vessel *in rem* for non-delivery of part of the consignment. It appeared that during the voyage it became necessary to put the passengers on short allowance, and that in consequence the master and crew could not restrain them from committing depredations upon the baskets of wine. Other matters of defense appear from the opinion of the court.

§ 527. *Admiralty jurisdiction over matters pertaining to the sea defined and stated.*

Opinion by BETTS, J.

The point raised, in this case, as to the jurisdiction of the court, is to be determined by the consideration whether the subject-matter of the suit is of a maritime character. Subjects of a maritime nature, which pertain to the cognizance of courts of admiralty, are those touching things done upon, or in relation to, the sea; in other words, all transactions and proceedings relative to commerce and navigation, and to damages and injuries done upon the sea. Charter-parties and contracts of affreightment are appropriately considered as within the scope of those powers, and jurisdiction is exercised by admiralty courts over those classes of cases. Policies of insurance and bills of lading are regarded as included within the same principle. *De Lovio v. Boit*, 2 Gall., 398; *Drinkwater v. The Spartan*, Am. Jur. No. 5, p. 26, Jan., 1830 [1 Ware, 149].

It is not denied that subjects of the character of the one involved in this action were, at an early period, within the ordinary jurisdiction of the English admiralty. It is supposed, however, that the jurisdiction has, to that extent, been abrogated or restrained by the adjudications of courts of common law, from a period anterior to our revolution. *Johnson, J., in Ramsay v. Allegre*, 12 Wheat., 621. Although the common law decisions in England, and the prohibitions which followed them, may have suspended or abolished the ancient powers of the admiralty, that fact does not necessarily determine the limits of the jurisdiction under the jurisprudence of the United States. The signification of the phraseology employed in our constitution is not determined by the sense in which the same expressions were used in the English jurisprudence, except as to those terms which had a notorious common law meaning. Those terms which are derived from the civil law, or are expressive of the functions of courts acting under that system, are expounded upon the general principles which govern the interpretation of language, or by historical evidence of the mode in which the same terms were ordinarily employed in the administration of that system. In view of the American authorities on this subject, it cannot be an open question with this court whether admiralty jurisdiction is to be ascertained by consulting the expositions given by the common law courts of England, or by allowing fair force to the provisions of the constitution and laws of the United States, in connection with the doctrines and administration

of the courts of other civil and maritime powers. The admiralty jurisdiction, in respect to contracts, depends upon their subject-matter. *De Lovio v. Boit*, 2 Gall., 398; 2 Browne's Civ. and Adm. Law, ed. 1799, 150, 169.

§ 528. *A bill of lading for sea transportation is a maritime contract, whether entered into on land or on the water.*

A bill of lading clearly possesses the characteristics of a maritime contract. It concerns transportation by sea, and the whole service and consideration contemplated by the parties to it relate to navigation and to maritime employment. The transaction covered by it is one of navigation and commerce on navigable waters—in this case upon the high seas. The contract is, then, in its essence and nature, maritime, and is subject to the cognizance of this court, whether entered into on land or on water. *The Rebecca*, Am. Jur. No. 11, p. 1, July, 1831 [1 Ware, 188]. The exception to the jurisdiction is, therefore, overruled.

§ 529. *The vessel is responsible to the shipper on the undertaking of the bill of lading as to goods received.*

The questions which remain relate to the measure and mode of relief applicable to the facts, and to the competency of a court of admiralty to administer it. Two principles have an important bearing on the subject, one of which principles rests in the doctrine of the common law, and the other is drawn from the commercial and maritime codes. The first is not open to contestation, and is, that the owner of a general ship is chargeable with the responsibility of a common carrier for goods transported at sea. 2 Kent's Comm., 608, 609; Story on Bailm., §§ 496, 501; *Allen v. Sewall*, 2 Wend., 327. The other proposition—that the ship is responsible to the shipper, on the undertaking of the master in the bill of lading, for cargo laden on board—is less familiar in the adjudications of the courts, but may now be affirmed to be solidly imbedded in the elements of commercial law. Cons. del Mare, chs. 104, 105, 106; Molloy, b. 2, ch. 3, § 9; Abbott on Shipp., ed. 1829, 94, 170; *The Ship Packet*, 3 Mason, 261; 2 Browne's Civ. and Adm. Law, ed. 1799, 156; 3 Kent's Comm., 220. It is becoming an equally familiar principle in this country, that a contract of affreightment is within the admiralty jurisdiction, and that a remedy *in rem*, against the ship, will be afforded in that court for a default of the master in performing the contract. *The Ship Rainbow*, Bee, 116; *De Lovio v. Boit*, 2 Gall., 398; *The Jerusalem*, id., 348; *Zane v. The Brig President*, 4 Wash., 453; *Drinkwater v. The Spartan*, Am. Jur. No. 5, p. 26, Jan., 1830 [1 Ware, 149]; *The Rebecca*, id., No. 11, p. 1, July, 1831 [1 Ware, 188]. The subject-matter of the contract concerns the navigation of the seas, and affects the ship, her freight and cargo. The lading, transportation and unlading are sea services, and the engagement in the bill of lading, for the performance of those services, is of a maritime character, and imparts a lien, and binds the ship to the performance. *The General Smith*, 4 Wheat., 443; *The Jerusalem*, 2 Gall., 349; Molloy, b. 2, ch. 3, § 9; Cons. del Mare, chs. 105, 106; 2 Browne's Civ. and Adm. Law, ed. 1799, ch. 5. The lien thus secured is appropriately enforced by process *in rem* in admiralty.

§ 530. *Ship held liable for wines plundered and consumed by passengers while on short allowance.*

Satisfaction is sought, in this action, for the loss of cargo, occasioned by the plunder and consumption of some of the wines on the passage from Havre to Halifax, the port of distress, and also for the portion disposed of by the master at Halifax, to obtain funds for the necessary refitment of the ship. The

necessity for the repairs is not questioned, nor is it contended that the master had any resources for their supply in that port other than the cargo. Under such circumstances the law justifies the master in appropriating so much of the cargo as may be required for the necessities of the voyage. Cons. del Mare, chs. 105, 106; Laws of Oleron, art. 22; Laws of Wisbuy, arts. 35, 45; The Gratitude, 3 Rob., 240. Our maritime courts hold that, in such case, the ship is responsible to the owner of the goods, and that a lien for their value arises, which can be enforced *in rem* against the ship. The cases of *The Rainbow*, Bee, 116, and of *The Ship Packet*, 3 Mason, 261, support this proposition. See, also, 3 Kent's Comm., 220. A distinction may be attempted to be drawn between an appropriation of the cargo, in aid of the ship, by the voluntary act of the master, after her arrival in a port of safety, and a mere failure or neglect to deliver it to the consignee; as the former is an incident of the perils of the sea and might, perhaps, fall within the exceptions in the bill of lading against responsibility for losses by those perils. I am inclined, however, to follow the American authorities on this subject; because, although a peril of the sea produced the necessity for the repairs which were made, and thus indirectly led to the use of the libellant's property for the benefit of the ship, yet such peril was not the proximate cause of the loss of the goods. They were disposed of at the option and selection of the master, to raise funds in aid of the voyage, which was interrupted or delayed by such peril. In that view, I think, the broad principle would aptly apply that the ship is answerable for the safe carriage of the goods, and for their delivery to the consignee, even without the aid of the further principle that the act of the master, in so appropriating the goods for the service of the ship, creates a charge on the ship for their value. The equity of the first mentioned rule is manifest; for the foreign shipper trusts to the ship, as an open letter of credit from her owners, and furnishes supplies on that authority alone, since, ordinarily, he can know nothing of the personal responsibility of the owners.

The same principle covers equally the wines sold by the master in Halifax, and those consumed on the passage by the passengers and crew. Those depredations constitute no excuse to the owners for the non-fulfilment of their contract of carriage (*Abbott on Shipp.*, 222; 2 Kent's Comm., 609; *Morse v. Slue*, 1 Vent., 190, 238; *Schieffelin v. Harvey*, 6 Johns., 170), and the value of the property so lost is a charge on the vessel. Cons. del Mare, chs. 209, 212; 2 Molloy, b. 2, ch. 3; *American Ins. Co. v. Coster*, 3 Paige, 323; *Ross v. The Ship Active*, 2 Wash., 226. I shall, accordingly, decree to the libellant the value of the deficiency in his shipment, with costs.

§ 531. *Rule of damages stated.*

The goods having been deliverable here, and only a part of them having been brought to their port of destination, the libellant is entitled, in reimbursement of the deficiency, to recover the market value, at this port, of the goods lost, with interest. That seems to be the measure of damages for deficiency of cargo, except, perhaps, in cases of average adjustment (*Watkinson v. Laugh-ton*, 8 Johns., 164); and interest is an equitable remuneration to the owner for being deprived of the use of his capital, after the ship was bound to put it in his possession. Neither the price brought by the wines sold at Halifax, nor their invoice cost, nor their value at the place of shipment, furnish the rate of compensation under the contract of affreightment.

An order must be entered, referring it to the clerk to ascertain the value of the goods, under these directions, and also to ascertain the freight, primage

and other necessary charges due from the libelant to the ship; and, if a balance is found due to the libelant, process for its recovery may be awarded at his instance.

KING v. SHEPHERD.

(Circuit Court for Massachusetts: 8 Story, 349-364. 1844.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This cause has been elaborately argued on both sides, and in its actual presentation it embraces questions of some novelty and of no inconsiderable importance. The suit is an admiralty suit *in personam*, founded upon a maritime contract and shipment under a bill of lading of a box of gold sovereigns of the value of \$10,000 — shipped on the 1st of November, 1842, on board of the ship *North America*, of which one George S. Hall was master and part owner, at the port of New York, on a voyage from thence to Mobile. The bill of lading was in the usual form, and contained a description of the box as containing \$10,000 in gold, and the usual exception of “dangers of the seas.” In the course of the voyage the ship got ashore on the Bahama Banks, by which her rudder was knocked off, and a temporary rudder having been made, she was got off and sailed on her voyage, and she was afterwards, apparently from the difficulty of steering the ship with the temporary rudder, and from the strength of the winds, wrecked on the Florida Reef about the 22d of November, 1842, and lost. While on the reef (the Honda Reefs) the ship bilged, and the master sent for and employed several wrecking vessels, commonly called wreckers, to assist in saving the cargo and the materials of the ship. There was, besides the box of gold, another box containing \$1,000 in silver on board. The box of silver was found and saved. The box of gold was not found, and the loss of it has not been in any manner satisfactorily accounted for. That it was on board and safe at the time when the ship was wrecked on the Honda Reefs is admitted. That it was not lost by the stranding and wreck of the ship or submerged in the ocean seems to me entirely clear. The loss can be accounted for only by supposing that it was embezzled by the master of the ship, or by his officers and crew, or by the persons employed as salvors — amounting to some thirty or forty persons.

It appears that when the ship sailed from New York she had but a small cargo on board, consisting of materials of and for carriages, coal in casks and goods in casks, and some other merchandise. She had a large number of passengers on board. When she struck on the Bahama Banks the passengers left the ship and went on board of a schooner, called the *Ellen*, which was near them, and the master of which contracted to carry the passengers to Mobile. Captain Hall concluded (at first) to send the specie to Mobile by one of the passengers going there in the schooner *Ellen*, and accordingly he caused the specie to be removed on board of the schooner. He afterwards changed his mind, and it was brought back again and taken on board of the ship. Up to this period the specie had always been kept in one of the state-rooms in the lower cabin, under lock and key. It was returned there; and a day or two afterwards the captain caused it to be removed into the run, deeming it, as he said, a place of more safety, especially while the crew were fixing the temporary rudder and constantly passing through the cabin. It is fully established by the whole current of the evidence that the run was not separated by any bulkhead from the hold, and that it was easily accessible therefrom by the crew and the salvors.

The cargo and materials saved were carried to Key West, where regular pro-

ceedings were instituted for salvage by the salvors in the admiralty court there, and in one of the allegations the libel expressly charged that they (the salvors) believed the missing box of gold was either in the possession of Captain Hall, or that he was aware of the place where it was secreted. To this allegation Captain Hall in his answer excepted "as being impertinent and improper, and prayed the same to be stricken out by the court." But in answer to one of the interrogatories propounded in the libel, he said "that he does not know where it (the box of gold) is." No allegation was set up by Captain Hall, in his answer, of any embezzlement of the box of gold by the salvors—nor was any mode suggested as to its loss. The court of admiralty decreed a salvage of forty-five per cent. to the salvors; but refused to decree that the residue be paid over to Captain Hall for the use of the owners thereof, upon the avowed ground that the circumstances of the case affected him with such apparent fraudulent or improper conduct that he could not be safely intrusted with it. From this decree an appeal was taken to the court of appeals of Florida, so far as the decree refused to restore the residue of proceeds, after deducting the salvage, to Captain Hall—leaving the decree as to salvage to the salvors to stand without question; and upon this appeal the appellate court reversed the decree of the superior court, and ordered the residue to be restored to Captain Hall, stating, however, in their opinion, "that though the facts proved may well raise a suspicion, yet they are not of a character sufficiently conclusive to justify the withholding of the residue of the proceeds in question, and they must, therefore, be restored to him" (the captain). Under all the circumstances of the case, the general question presented is, whether the present loss is to be borne by the shippers, or whether the owners of the ship are, as common carriers, responsible therefor. It is not denied, and indeed it is beyond all doubt, that the owners of the ship were in this case common carriers, and, of course, they are responsible for all losses not caused by "the dangers of the seas"—which is the common exception and the only exception in the present bill of lading.

§ 532. *The common carrier should show that the loss resulted from a cause excepted in the bill of lading.*

Now, the burden of proof is on the respondents to show that the loss arose from this cause; and if they fail to establish it, they are responsible for the loss, however otherwise it may have arisen, whether from theft or embezzlement, or negligence or inadvertence. Lord Tenterden, in his work on Shipping (Pt. 3, ch. 3, § 9, p. 244, 5th ed.), lays down the rule in explicit terms, and says that the master and owners of a ship "are responsible for goods stolen or embezzled on board the ship by the crew or other persons;" and the same rule is laid down by Roccus (De Nav. et Naut., n. 40); Trent & Mersey Nav. Co. v. Wood, 4 Doug., 287; Dale v. Hall, 1 Wils., 281; and Smith v. Shepherd, Abbott on Shipp., p. 3, ch. 4, § 1, p. 252, 5th ed., inculcate the same doctrine. See also Story on Bailm., §§ 516–526. In this last case it was expressly held that the act of God, which would excuse a common carrier, must be immediate and not the remote cause of the loss. The American cases fully recognize the like doctrine. Schieffelin v. Harvey, 6 Johns., 169; Elliott v. Rossell, 10 Johns., 1; Williams v. Branson, 1 Murph., 417; Jones v. Pitcher, 3 Stew. & P., 171–180; Sprowl v. Killar, 4 Stew. & P., 382; Campbell v. Morse, 1 Harp., 468.

§ 533. *Robbery by pirates is a peril of the seas; but not robbery or theft while in port.*

A loss by the robbery of pirates on the high seas has indeed been held to be

a peril of the seas; but not a loss by robbery of any persons coming from the shore, while the ship is lying in port in a river within the body of a country. Lord Tenterden upon this subject says: "As soon as the goods are put on board, the master must provide a sufficient number of persons to protect them, for even if the crew be overpowered by superior force, and the goods stolen while the ship is in a port or river within the body of a country, the master and the owners will be answerable for the loss, although they have been guilty of neither fraud nor fault, the law holding them responsible from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves." Abbott on Shipp., Pt. 3, § 3, p. 223, 5th ed.; Story on Bailm., §§ 528, 529. In this language he is fully borne out by the case of *Morse v. Slue*, 1 Vent., 190, 238; *Barclay v. Cuculla y Gana*, 3 Doug., 389; and *Trent & Mersey Nav. Co. v. Wood*, 4 Doug., 287. The cases of *Schieffelin v. Harvey*, 6 John., 169, and *Watkinson v. Laughton*, 8 John., 213, are to the same effect. The court have applied the same rule in cases of mere theft, but distinguished between mere theft (*furtum*) and robbery with violence (*latrocinium*), holding the latter to be a loss by *vis major* or inevitable accident, but not the former. The Digest says: *Nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt coeundi cum ne nunc quidem absteneant hujus modi fraudibus* (Dig., lib. 14, tit. 1, c. 1, § 1), thus giving the very reason which our law sustains and applies as well in respect to mere robbery on land as to theft. But the civil law treated (as has been already stated) robbery as being governed by a different rule, and as *damnum fatale*. Gothofred, in his Commentary, observes: "*Adversus latrones parum protest custodia; adversus fures prodesse potest, si quis advigilet—latrocinium fatale damnum, seu casus fortuitus est; at non furtum.*" Goth. ad Dig., lib. 17, tit. 2, c. 52, § 3, n. 24, cited; Abbott on Shipp., P. 3, ch. 3, § 3, p. 223, n. (l), 5th edit.; Boulay Paty. Droit. Commerce, term 4, tit. 10, § 15, p. 35.

It is upon this distinction, thus recognized by the Roman law, but not by our law, between a loss by theft and a loss by robbery, that the French ordinance on Insurance (Valin, tome I, p. 74, sur L'Ordin. of 1672, liv. 3, tit. 6, art. 26) proceeds, and declares that the insurers shall be liable for all losses by "pillage" on the high seas, the word "pillage" being equivalent to *latrocinium*, or theft with violence, in the sense of the French law. And so, accordingly, it is interpreted and the point ruled by Emerigon, who says that, under this article of the ordinance, the insurers are not liable for losses by simple theft (*vol simple*) in the ship, but only for theft by violence (*vol fait avec violence*). This at once explains the citation at the bar from Pothier (*d'Assurance*), n. 55, and demonstrates that it proceeds upon a ground not recognized in our law, which does not treat theft or robbery upon the high sea as a peril of the seas, unless it be an act of piracy, perpetrated by pirates, and not an act of theft or plunder or embezzlement, perpetrated by the officers or crew of the ship, or by other persons lawfully on board. Now, in no just sense can either the officers or the crew of the ship *North America*, nor the salvors, coming on board with the consent and at the request of Capt. Hall, be treated as pirates, even although they may have been guilty of embezzlement.

§ 534. *That the vessel was wrecked does not relieve from responsibility for robbery.*

The answer of the respondents does not attempt to put the loss as one caused immediately by any peril of the seas or by piracy. The law, on this point, agrees: "That by reason of the wrecking of the said vessel, and by the peril of

the seas, and without the fault or negligence of the said master, the said gold coin was totally lost, though in what particular manner the said loss occurred, and whether the same was sunk in the sea, or stolen by certain persons, who assisted in saving the residue of the cargo, these respondents knew not." This allegation is far too loose and general for the court to act upon it; and if the respondents cannot assert how the loss took place, in what manner is the court to discover it? If the gold coin was stolen by the officers, or crew, or salvors, it is plain, from what has been said, that it is not a loss by the perils of the seas in the sense of the common law. And, as has been already suggested, there is not a tittle of evidence to show that it was submerged by the stranding or shipwreck, and, on the contrary, every presumption in the case leads in the opposite direction.

The argument of the respondents seems to suppose that by the stranding and wreck of the ship, although the gold coin did not perish or sink in the ocean thereby, that the duties of the owners and master, as common carriers, were varied, and that they were thereafter exempted from all liabilities, except for reasonable diligence and care in their endeavors to save the property. But I do not so understand the law. On the contrary, I understand that their obligations and liabilities and duties, as common carriers, still continued, and that they are bound to show that no human diligence or skill or care could save the property from being lost by the stranding or shipwreck (*Elliott v. Rossell*, 10 John., 1); but that it perished with the wreck, and then the maxim might apply, *Res perit domino*; but certainly it could not apply where the loss was by theft or embezzlement, by persons in the employ of the owners and master, and not acting piratically and with hostile force or irresistible violence. If, in the present case, upon the stranding and wreck, the property had, before it was delivered from the peril, been plundered by pirates, or any assailing thieves from the shore, acting in adversion and with violence and force *animo furandi*, there might have been ground to say upon a policy of insurance that the subsequent loss was properly attributable to the first peril — the stranding or wreck. See 1 Phillips on Ins., ch. 13, § 9, p. 649, 2d ed.; *Bondrett v. Hentigg*, 1 Holt, 149; *Peters v. Warren Ins. Co.*, 14 Pet., 99, 110, 111; *Hahn v. Corbett*, 2 Bing., 205. But I do not know that even in such a case the same rule has been applied, or ought to be applied, to the liability of a common carrier; and certainly *Barclay v. Cuculla y Gana*, 3 Doug., 389; *Morse v. Slue*, 1 Vent., 190, 338, and *Trent & Mersey Nav. Co.*, 4 Doug., 287, are strongly the other way. It is suggested that here the contract was for the carriage of the goods in the ship North America, and not in any other ship; and that when she was lost the duties of carrier were ended, and the contract prevented from being performed by the perils of the seas. But this is not a true view of the law upon this subject. The gold coin was to be transported in that ship if she was in a condition to carry it. But when she became disabled it was the duty of the carrier master to carry it on or send it in another ship, if practicable; and his duties as carrier were not ended until the property was delivered at the port of destination, or returned to the possession of the owner, or kept safely until the owner could resume, or it was otherwise carefully disposed of. This doctrine is very clearly stated by Lord Tenterden, in his work on shipping (*Abbott on Shipp.* p. 3, ch. 3, § 8, c. p. 242, 5th ed.). And we all know that it is familiarly applied in cases of insurance. See 1 Phillips on Ins., ch. 12, § 1, pp. 485, 486, 2d ed.; *Plantamour v. Staples*, 1 Marsh on Ins., B. 1, ch. 5, § 2, p. 169; S. C., 1 Term R., 611, n.; S. C., 3 Doug., 1. Whether, under such circumstances, the

master and owners would be liable as common carriers for any losses which might arise after their charge of the ship, or other vehicle of transportation and use, not occasioned by the perils of the seas, or by the want of proper diligence and care on the part of the master and owners themselves, is a point not necessary to be here decided, because the coin was not so sent on, but remained in the custody and care of the original carriers until the time of the loss. There is no difference, in point of law, between common carriers by water and common carriers by land. Each incurs the same obligations and liabilities, and is subject to the same duties. *Elliott v. Rossell*, 10 John., 1. Now, let us suppose that the wagon in which the goods are on the course of transportation should break down and become incapable of performing the journeys, would the duties of the carrier cease; would he not be liable for any subsequent theft or robbery of the goods while under his care and control and custody, or those of his servants and persons employed by him. I apprehend that as in the case of a ship when wrecked, he would be obliged to send on the goods by another conveyance to their proper place of destination, if any can be obtained; if not, to keep them as a common carrier should, until they can be delivered up to the owner, or otherwise disposed of accordingly to law.

§ 535. *Rules regulating liability under insurance policies differ from those applied to common carrier.*

The rules which regulate losses under policies of insurance are by no means the same as those which either necessarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of interpretation; and it is not safe, in many instances, to reason from one to the other. In cases of collision of ships, for example, the loss is treated as a peril of the seas, whether caused by accident, or by the fault of one party or of both parties. See *Hale v. Washington Ins. Co.*, 5 Law Rep., 360, and the cases there cited; *Peters v. Warren Ins. Co.*, 14 Pet., 99. But who ever heard that a carrier was exempted from any loss caused or occasioned by the negligence of himself or of his servants? Here, it appears to me, that the dangers of the seas is not shown to be the direct or immediate cause of the loss, *causa proxima*—as the case of *Smith v. Shepherd* affirms it should be to exempt the carrier from liability. My own opinion is, that the loss of this coin was occasioned solely by embezzlement or theft; and it matters not whether it was by the officers or crew of the ship, or by the salvors employed by the master.

§ 536. *Negligence of the master shown upon the facts of the case.*

But even if the present case turned upon the question of due care and diligence on the part of Capt. Hall, I should say that he was, upon the evidence, guilty of the grossest negligence and want of care. I do not impute to him personally any fraud or embezzlement, for it is unnecessary so to do—although there are circumstances in the case which may well leave the mind in some doubt upon this point. His conduct throughout appears to me wholly unaccountable, and just such as no reasonable, prudent or thoughtful master in such exigencies could or ought to have adopted. He removed the coin, after the stranding, from the state-room into the run. Why was this done? Was it less secure in the state-room, after the passengers, some fifty in number, had left the ship, than before? It is said that he thought it a more safe place of deposit. Why was it? The state-room had a lock and key. If broken open, the fact would be easily shown, and an immediate examination and search had. How was it with the run? There was no bulkhead there; it was easily accessible to the crew, as all the evidence shows, and equally as accessible to the

salvors. What additional safety, then, could there be against the coin by removing the box from a locked state-room, inaccessible except by breaking the lock or forcing the door, and placing the box in the run, where, without breaking or forcing, the crew could readily have access to it?

But this is not all. The box of coin was of great value — \$10,000,— and all the other property on board as cargo of comparatively small value — bulky, and not easily concealed or embezzled. Capt. Hall selected his own time for receiving the salvors on board. Why, knowing full well the value of the box, did he not, before they came on board, secure it, relock it in his state-room, or place it under lock in his trunk? How did it happen that, with a full knowledge that the salvors were to remove the cargo, that he never once examined the run; that he took no personal precautions to insure the safety of the box; that he never once made any search where it was; and never, as he ought to have, retained it in his own personal custody, or that of one of his mates, during the whole of the day and evening when the wreckers came on board. If the wreckers had been as lawless, barbarous and unprincipled as it is now suggested they were, this called for double vigilance on his part, and how did it happen that the box of silver was not embezzled by the wreckers, if the box of gold was? Instead of attending to this paramount duty, under the circumstances, of saving this large shipment of specie, Capt. Hall seems to have busied himself about everything else, however unimportant or trivial. He could take great care of his own trunk and apparatus, of some of the rigging and sail, and casks of coal and goods. But he seems to have thought no vigilance necessary to preserve the specie. It is suggested that he had no command over the wreckers. That does not appear; but on the contrary, as I think, they acted under his orders. It is suggested that he surrendered all to the care and custody of the wreckers. That he had no right to do. They were to act under him and not over him. And I see not the least reason to suppose, from the evidence, that they ever renounced his authority or disobeyed his directions.

If we turn to the proceedings for salvage in the admiralty, not a single difficulty is removed, and, indeed, every doubt is strengthened. We have seen that the libel of the salvors expressly charged the box of gold to be in the master's possession or under his control. Instead of meeting the allegation by a direct denial, and an allegation that it was lost by the perils of the seas, or embezzled by the crew or salvors, he evades the inquiry as "impertinent and improper," and thereby leads to the conclusion that he adopted that course to escape salvage on the gold, which the opinion of the court shows to have been suggested at the argument, or leaves the case naked of any pretense on his own part that there was any loss thereof by the perils of the seas, or by embezzlement, or any other manner, which he chose to avow or to support by evidence. If the box had been embezzled by the wreckers, that would have amounted to a complete forfeiture of all their right to salvage. Yet Capt. Hall makes no objection to the salvage, and a very large amount, viz., forty-five per cent., is made, and acquiesced in by him, without objection or appeal. How has it happened that not a human being ever saw the box of coin after it was first put into the run — or ever was called upon by Captain Hall to attend to its safety — until the very hour when the wreckers came on board? I am sorry to be obliged to come to the conclusion that a more aggravated case of gross negligence, under circumstances of so little urgency and peril, never came before this court.

I do not dwell upon other considerations of a more intricate character, nor

upon some portions of the evidence which might lead to a more harsh conclusion. My judgment is, that the owners are responsible for the loss of the box of gold, and that no facts have been shown that establish the loss to have been by the perils of the seas.

§ 537. *Measure of damages where gold coin is not delivered.*

Under such circumstances the libelants ask to have the value of the gold coin (the sovereigns) allowed them as if they had arrived at Mobile. I do not know that there is any difference between the value there and at Key West. But as they were not carried to Mobile, and might never have arrived there, the true test is the value at Key West, with interest upon the value from the time when proceedings for salvage were instituted at Key West. I adopt that date as allowing full time for Capt. Hall, if he had exercised reasonable diligence, to have ascertained all the facts, or at least all which were within the reach of an interested and vigilant master and owner.

The decree of the district court is, therefore, reversed, and a decree for damages and interest, according to the rule above suggested, is to be entered for the libelants, with costs.

THE SHIP SHAND.

(District Court, Southern District of New York: 10 Benedict, 294-315. 1879.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a libel by The Donner & De Castro Sugar Refining Company, the owners of part of the cargo of the ship Shand, against the ship and her owners, to recover damages on account of her failure to deliver her cargo in good order and condition, pursuant to the stipulations of her bills of lading. She shipped at Manila, among other goods, thirty-four thousand seven hundred and forty-two mats of sugar, weighing about two million four hundred and thirty thousand nine hundred and forty pounds, and sailed from that port for New York on the 1st day of August, 1876. The sugar was stowed in the lower hold and properly stowed and dunnaged. It was shipped under bills of lading which acknowledged its receipt in good order and condition, and stipulated for its delivery in New York in like good order and condition, "all and every the dangers and accidents of the seas and navigation of whatsoever kind excepted." The ship delivered in New York only thirty-one thousand six hundred and sixty-three mats, weighing about one million eight thousand eight hundred and sixty-five pounds. As to the three thousand and seventy-nine mats not delivered, it appeared that they were jettisoned at sea; and the loss of weight in the mats that were delivered was about one million two hundred and six thousand five hundred and forty-five pounds. And for this failure to deliver and this loss of weight the suit is brought. The libel charges "that the said ship and her owners have failed to keep and perform the contracts in said bills of lading contained, or to deliver the said sugars in conformity therewith; but, on the contrary, by reason of carelessness and negligence on the part of said ship and her owners, and their servants or agents, a large part of said sugars were totally lost and a large portion of the remainder delivered in a damaged condition." The answer alleges that part of the sugar was necessarily jettisoned to save the ship and cargo and the lives of those on board, and that all the sugar which was lost or destroyed, or jettisoned, or which was not delivered, was lost, destroyed or not delivered solely from the causes excepted in the bills of lading, and not from any fault, negligence or carelessness on the part of the ship and her owners, or their servants

or agents. The answer further alleges in excuse of the damage to the cargo that the ship sprung a leak on the voyage, by reason of violent storms and stress of weather, and that the damage was the result of this leak.

The proofs are sufficient to show that when the ship left Manilla she was tight, staunch and strong. It is true that no evidence is given of any survey or examination made before her sailing, nor of any survey or examination of her hull after her discharge in New York, to account for or to show the nature and position of the leak which she undoubtedly had in her upon her arrival; but the uncontradicted testimony of her master and mate as to her condition, and the fact that she was several months at sea and encountered considerable rough weather before a leak of any importance appeared, and that the leak did appear only after she met with very tempestuous weather, sufficient to account for the injury to a good ship, are clearly proof enough that she was seaworthy at the time of her sailing. The proofs also are sufficient to show that the circumstances of danger under which part of the cargo was jettisoned were such as justified the act, and that it was done under reasonable apprehension on the part of the master that the ship might founder, and for the purpose of checking the leak and for the safety of all concerned. As to that part of the loss, therefore, the defense is clearly made out and the libelants have no claim.

From the time the ship was off Cape Hatteras she encountered very heavy weather, and the crew were kept constantly at the pumps, and even after the jettison of part of the cargo the leak continued. On the night of the 25th of December, 1876, she took the pilot, being then about sixty miles S. S. E. of Sandy Hook. She came to anchor at quarantine about midnight of the 26th. Her crew were exhausted with constant working at the pumps. The captain and the pilot had thought it necessary to call to their assistance two tugs to bring her in, and they had done so. From quarantine the master telegraphed to the consignees of the ship, Grinnell, Minturn & Co., of New York, for a fresh gang of men to work the pumps. At 5 o'clock on the morning of the 27th and again at 8½ o'clock the pumps were sounded. At the first sounding they found nearly nine feet of water, and at the second sounding within an inch of ten feet. The depth of the hold from the platform on which the sugar was stowed to the deck beams was eleven feet and seven inches, and from the bottom to the platform three feet and four inches. The ship left quarantine about noon on the 27th, and soon after leaving took on board a fresh gang of men to work the pumps, and from the time they arrived they were able to control the leak with the ship's pumps. She arrived at Martin's stores shortly after noon of the 27th of December with ten feet of water in her hold. There is considerable conflict of testimony as to the amount of water in the ship before her arrival at quarantine. The pilot, testifying from his recollection as to the behavior of the ship and from his apprehensions lest she should founder, and also from his recollection as to the reports of the soundings, makes the depth of water eleven feet on the afternoon of the 26th, and six feet at five in the morning of that day; but he is evidently mistaken as to the amount, as appears by the log and the testimony of the master and mate. The captain testified to the correctness of the entry in his log, which shows that on Wednesday, the 27th of December, they sounded and found six feet four inches. He says this was very early in the morning, and that there was no time before that when they had so much water in her as that. The evidence shows that the water had been gaining in consequence of the exhaustion of the crew, till

it reached a maximum of about ten feet, and that the leak was such that fresh men at the ship's pumps were able to hold it in check.

That a very considerable damage to the cargo of sugar had been done by sea water at the time of the ship's arrival at the pier is very evident. A large part of the sugar had been submerged in the water for nearly twenty-four hours, and this must have resulted in great wastage of the sugar. It is claimed by the libelants that the evidence does not warrant the conclusion that before Wednesday the water ever rose higher than the bottom of the cargo. But even that quantity of water, with the ship rolling and tossing in a heavy sea, must have very seriously wet and washed the sugar in the lower part of the ship. As soon as possible after her arrival at the pier, the consignees of the ship, upon the master's report and application for aid, engaged the Coast Wrecking Co. to send a steam pump, with sufficient men to work it, to the ship. This was done, and about eight or nine in the evening, the steam pump was got to work and worked continuously till three o'clock the next morning, when the pump sucked, having reduced the water to three feet and four inches, which was as low as its suction pipe reached. After the steam pump was got working the ship's pumps were stopped.

For all the loss and damage to the cargo by the salt water up to the time that the ship was thus pumped out by the steam pump, the libelants have no claim against the ship and her owners. The cause of the injury was a peril of the sea, and upon the most rigorous rule of diligence which has ever been enforced against the ship or the master in the effort to resist and overcome the effect of the threatened danger, this ship and her master and crew had up to that time discharged their entire duty to the cargo. They had used their utmost endeavors to protect the cargo from the threatened peril.

The discharge of the cargo was commenced on Wednesday. Manilla hemp and indigo and canes from between decks, shipped to other parties, were first discharged. The stevedores worked all Wednesday night. On Thursday the steam pump was kept going at intervals, pumping till it sucked, and then pumping again as the water rose. On Thursday a considerable quantity of sugar was discharged. They worked till five or six o'clock in the evening. A special permit had been obtained from the custom-house, allowing the discharge of this cargo more rapidly than is usual, on account of its condition. The custom-house interposed no restriction whatever on the rapidity of the discharge or its continuing day and night, week days and Sundays. When the men quit work on Thursday evening, there were on board, of the ship's company, the captain, the mate, the second mate, carpenter, cook, steward, one able seaman and three boys. The evidence shows, I think, that the mate afterwards left the ship to sleep on shore and did not return before four o'clock Friday morning. A night watchman came on board during the evening, but whether he remained on board all night did not appear. The steam pump was in charge of an engineer named Johnson, and other men — how many does not appear. The captain turned in between eight and nine o'clock and none of the ship's company remained on deck. During the night the steam pump stopped. It failed to keep the ship clear. The cause of the failure does not appear. The weather was very cold, but there is no evidence which justifies the conclusion that it was the cold that disabled the pump, or indeed that anything disabled it. There is proof of a conversation in the morning between the engineer and the mate, in which the engineer complained that it was out of order. The evidence is that it was a good and suitable pump, and that the men who were

manning it were men who had experience in that work. In the morning it was found that it had failed to keep the ship clear. The lower hold where the sugar was stowed was flooded. The water had risen higher among the mats of sugar than it had ever been before. See *The Ship Shand*, 4 Fed. R., 925. Neither the engineer nor the men in charge of the pump, nor the watchman, were called as witnesses, and no attempt has been made to explain why or how the accident happened. No alarm was given during the night. The captain was not called nor notified that the pumping had stopped. After the discovery was made in the morning, the steam pump was started again and the ship was pumped out, and thereafter kept pumped out as before. For the loss caused by this flooding on the night of the 28th of December, the libelants claim damages. That there was a very large wastage of the sugar from this cause, which is not to be attributed to the effect of the water in her before she was first pumped out, is very evident. The claimants, however, insist that this loss and damage as well as the other is to be attributed to the same peril of the sea; that it was caused by the leak in the ship, which was a continuing peril of the sea; and they claim as to this particular part of the loss, that the same having been caused by a peril of the sea, the burden is on the libelants to show that the ship has been guilty of negligence in not guarding against the peril; that such negligence has not been shown; on the contrary, that it is affirmatively shown that the master did all that could have been reasonably required of him under the circumstances of the case; that he employed proper and efficient means to keep the ship clear of water; that having done that, he was not chargeable with negligence if those means became ineffectual through the fault or negligence of those in charge of the steam pump. It is further claimed, on the part of the owners of the ship, that the master in employing the steam pump was not acting merely as the agent of the ship, but in a case of necessity and distress as agent for all concerned, cargo as well as ship, and that being the agent of the libelants in thus employing the pump and those in charge of it, they cannot recover of the ship for a loss resulting from the negligence of the libelants' own agents. It is further claimed that the Coast Wrecking Company in this service acted as salvors; that ship and cargo were in imminent peril, and that the service rendered by the Coast Wrecking Company was in fact a salvage service, and if through the negligence of the salvors a loss happens to the cargo, its owners have no remedy against the ship.

§ 538. *Duty of the ship as to protecting cargo against effects of a peril of the sea considered.*

Assuming that the leak in this ship was caused by a peril of the sea, and that this loss now in question resulted from the same leak, the question is, what is the duty of the ship in protecting the cargo against a peril of the sea which threatens its safety, or, which is the same thing, against damage, which threatens to result from an injury to the ship caused by a peril of the sea? The duty of the ship to the owner of the cargo, in this respect, has been so conclusively determined in this country that it is necessary only to quote the language of the supreme court in the case of *the Propeller Niagara v. Cordes*, 21 How., 7 (§§ 438-450, *supra*). In that case the court say, p. 26: "Carriers by water are liable at common law, and independent of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land—that is to say, they are in the nature of insurers, and are liable, as before remarked, in all events and for any loss, however sustained, unless it happen from the act of God or the public enemy, or by

the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. Duties remain to be performed by the owner or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel, in *King v. Shepherd*, 3 Story, 358 (§§ 532-537, *supra*), to maintain the proposition assumed by the respondents in this case, that the duties of a carrier, after the ship was wrecked or stranded, were varied, and, therefore, that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities and duties as a common carrier still continued, and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that where there is no provision in the contract of affreightment, varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care except by proving that it was the result of some natural and inevitable necessity, superior to all human agency, or of a force exerted by a public enemy." The contract of carriage in the present case, by the bill of lading, is an absolute promise to carry and deliver in good order and condition, the perils of the seas only excepted, and no distinction can be made, nor do the learned counsel for the claimants attempt any, between this case and the case of a common carrier, as respects the duty of the ship or master to protect and preserve the cargo. And indeed the evidence shows that the *Shand* was on this voyage a general ship. And clearly if the duty of the ship in this respect is not varied nor lessened in case the vessel is wrecked or stranded, it cannot be varied or lessened because she has sprung a leak which threatens the cargo with damage.

§ 539. *Where loss or damage is shown it is incumbent upon the carrier to bring it within the excepted peril.*

And on this subject the supreme court further says, p. 28: "His duties as carrier are not ended until the goods are delivered at their place of destination or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. *King v. Shepherd*, 3 Story, 349; *Abbott on Shipp.* (8th ed.), 478.

These authorities are sufficient, it is believed, to demonstrate the proposition that where a loss or damage is shown it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in the case. Had the goods perished with the wreck it would be clear that the loss was the immediate consequence of the stranding of the vessel, and assuming that the disaster to the vessel was the result of the excepted peril or of some natural and inevitable accident, then the carrier would be discharged. All the evidence in this case, however, shows the facts to be otherwise — that the goods did not perish at the time the steamer was stranded, and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions, so that the difference in the rule contended for and the one here laid down is much less than at first appears. Nevertheless there is a difference, and in a question of so much practical importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertion, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril the ultimate damage and loss, in judgment of law, results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences the excepted peril may be regarded as continuing its operation." And in that case, by the application of the principles thus declared, the ship was held liable for the negligence of the master in not availing himself of the means shown to have been within his reach at a short distance from the ship on the shore for the storage and preservation of the goods, although they ultimately perished from being left in the stranded vessel. In the case of *King v. Shepherd*, 3 Story, 349, the owners of the ship were held liable to the shipper of specie embezzled by salvors employed by the master to save the cargo after the wreck of the ship, such a loss being held not within the exception of perils of the sea. Judge Story says: "My own opinion is that the loss of this coin was occasioned solely by embezzlement or theft, and it matters not whether it was by the officers or crew of the ship or by the salvors employed by the master."

§ 540. *Where the ship springs a leak the cargo should be protected by the carrier against threatened dangers.*

These cases, as it seems to me, are singularly applicable to the present case, and are conclusive to the point that the master was bound by the contract of affreightment, upon the happening of the disaster which befel his ship, the springing of the leak, to employ all possible means within his reach to protect the goods against the danger which the leak threatened them with; that he was bound under his original agreement for the safe carriage and delivery of the goods, not only to employ all the resources of his ship's company to this end, but on his arrival in port, where other and more efficient aid could be procured, to employ such other means for the effectual preservation of the cargo against the conse-

quences that might be expected to result to it from the leak; that though that leak was caused by a peril of the sea, this employment of extraordinary means to resist and control it was a duty of the master as agent and representative of the owners of the ship, under their contract with the owners of the cargo, and not a duty thrust upon the master *ex necessitate*, as agent for the owners of the cargo. In the case of *The Niagara* the stranded condition of the vessel was a continuing peril to the cargo and was itself caused by a peril of the sea, yet the loss of the goods was not caused by the peril of sea within the meaning of the exception, because the master could, by means at his command, extraordinary in their character, that is, means independent of, and outside of, the resources of his ship and his ship's company, have saved the goods from this threatened peril. So here the leak threatened damage to the goods. The master had means at hand, by the employment of men and machinery, to control that leak. He was bound to employ those men and that machinery, and the fact, if it be a fact, that the peril of the ship and cargo was so great that the service rendered will, on grounds of public policy, be rewarded at salvage rates of compensation, does not make the employment of these means any the less an act done by the master in the performance of the contract of the ship with the owners of the cargo. I think these authorities are sufficient to show that there is no ground for the claim that the men working the steam pump were not in the employ of the ship, or that the possible claim of the Coast Wrecking Company for salvage compensation can make any difference in the liability of the ship for the negligence of the men employed in working the pump, as well as for the immediate negligence of the master, officers or crew. A ship is liable for the result of negligence, though the negligence be that of one of the crew, as in case the fault is that of the lookout. If there may be cases where the overpowering necessity for assistance is such that the master may surrender to salvors the entire control of ship and cargo, that certainly was not this case. His duty was plain. The vessel was leaking. Salt water would damage the cargo. It was his duty to keep her pumped out. The means at hand were ample. He employed men and machinery for this purpose. There is nothing in the evidence which warrants the conclusion that he in fact surrendered the care or control of the ship to the Coast Wrecking Company, or understood that he did; nor were the circumstances such as would have justified him in doing so, if he so intended. On the contrary, all that is proved is that the ship's agents hired of that company a pump and men to run it, and sent it to the ship. The pump and the men were subject to the master's orders. He could at any time have sent them away and employed other persons and other machinery to do the pumping. I see no principle upon which the ship can be relieved from responsibility for the negligence of the persons thus employed.

§ 541. *Various authorities considered on this subject.*

As Judge Story says, in *King v. Shepherd*, 3 Story, 360: "The rules which regulate losses under policies of insurance are by no means the same as those which either necessarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of interpretation; and it is not safe, in many instances, to reason from one to the other." So it may be said that although, by the principles of general average or of salvage, extraordinary expenses incurred by the master are, under certain circumstances, a charge in part upon the cargo, it cannot be safely concluded from that circumstance that, as between the master and the owner of the cargo, the incurring of the

expense was not the duty of the master by force of the bill of lading. General average and salvage contribution rest not on contract, but on reasons of public policy, adopted and enforced for the furtherance of the interests of commerce. The foregoing remarks dispose of the point made for the claimants that an extraordinary exigency had arisen which threw on the master *ex necessitate* the character of agent of the shipper, and that in the employment of the steam pump he was acting as such agent, in support of which the learned counsel cite the case of *The Gratitude* and other cases. The cases cited refer to the agency of the master thus created to do something with the cargo outside of that which he is already authorized to do with it by the contract of affreightment, as, for instance, to sell or hypothecate it. Those authorities are not in point to show that the master is ever made the agent of the owner of the cargo to preserve and protect it. Such preservation and protection are of the very substance of the ship's contract with the cargo owner, and therefore what the master does in that regard is done for the ship, and there is no necessity for creating by a legal fiction any new agency to authorize or require him to do this duty towards the cargo. It is obvious, therefore, that these authorities have no application to the present case.

The English cases cited show that the courts in England do not hold the ship to so strict a liability as our courts for preventing damage to the cargo from the effect of a threatened peril of the sea. In the recent case of *Nugent v. Smith*, L. R., 1 C. B. Div., 423, it was held that the loss or damage is caused by a peril of the sea if "by no reasonable precaution under the circumstances could it have been prevented." And singularly enough the court cites the authority of Judge Story, in support of this milder rule of liability and in opposition to the stricter rule, which, as appears above, has been adopted by our own supreme court, partly, at least, on Judge Story's authority. They quote Story on Bailm., p. 512, as follows: "Hence it is, if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." And the court go on to say: "Story here speaks only of 'ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence.' In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of 'acts of God.' In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity to the effects of such *vis major*, as the act of God." The language here cited from Judge Story is almost identical with that used by him in his decision of the case of *The Reeside*, 2 Sumn., 571 (§§ 451-454, *supra*). And the court seems not to have observed his more full and exact exposition of what he understood to be the law in this respect contained in the later case of *King v. Shepherd*, 3 Story, 358, cited above.

But even under the English rule, it was clearly the duty of the master to keep this ship pumped out, for the preservation of the cargo, and no case is referred to which will relieve the owners of the ship from the consequences of

not keeping her pumped out, if the failure to do so was the result of the negligence of those employed by the ship for that purpose. And to hold otherwise would virtually allow the master of the ship in any exigency or condition of distress, however slight, to delegate to other parties those duties which, under the contract, the ship has assumed towards the owner of the cargo, holding him only to due diligence in the choice of the agency so employed. This would be fatal to that security which the law merchant has thrown around the goods intrusted entirely to the care and custody of the ship, and to that rule of vigilance which the law, for wise reasons of public policy, has imposed upon the master and crew as the chief support of that security. It would, as it seems to me, be not only without sanction from authority, but most disastrous to the interests of commerce.

§ 542. *Application of the rule concerning burden of proof to the present case.*

The questions raised as to the burden of proof, and as to whether the libelants have sustained the burden which is upon them, are very easily disposed of, so far as this case is concerned. Where goods are carried under a bill of lading which stipulates for their delivery in good order and condition, excepting certain perils, as the perils of the sea or the act of God, proof of the failure to deliver the goods in good order throws the burden on the ship-owner to show that the damage resulted from the excepted peril. *Clark v. Burnwell*, 12 How., 280 (§§ 416-423, *supra*). If, then, it appears by the proofs offered that the damage resulted from a sea peril, this is *prima facie* sufficient to bring the case within the exception. *Id.*; *Transportation Co. v. Downer*, 11 Wall., 134 (§§ 509-512, *supra*). Therefore, where the evidence which shows that the damage resulted from a sea peril does not also show that there were available to the master means of avoiding the damage which threatened the goods, then the libellant must go further and show that though the goods perished as the result of the excepted peril, yet that there were means within reach of the master by which he could have averted the peril. Negligence is not presumed from the mere occurrence of an accident, "except where the accident proceeds from an act of such a character, that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, or [except] where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management and construction of which he is responsible." *Transportation Co. v. Downer*, 11 Wall., 134. But there is no case which goes so far as to hold that because the goods were damaged in consequence of a sea peril any greater burden is thrown on the libellant than to show that the master had at his command the means to have averted the threatened danger. The proof of that, and the further admitted or proved circumstance, that the danger was not averted, is evidence from which the presumption of negligence in the use of those means at once arises. It is, unexplained, sufficient proof of negligence. The presumption is of the same general character as that presumption of negligence which arises in the first instance upon proof of the failure to deliver the goods in an undamaged condition. The cases relied on by claimants to sustain their position that the libelants should have gone further and affirmatively proved that the pump failed through the negligence of the engineer or those in charge of it are not in point. They are cases where the loss was shown to be ultimately traceable to a peril of the sea and where the evidence disclosed no available means on the part of the ship to have averted the danger to the goods. Now in the present case it appears that the means at the master's command were ample. The ship's pumps were suffi-

cient for that purpose, if properly manned. He undoubtedly had a right to use the steam pump in place of the ship's pumps if he chose to do so, but having employed this new agency, he was bound by the same rule of vigilance that governed his whole conduct toward the cargo, to see to it that the pump was efficient and properly used. There certainly is no presumption that the stoppage of the steam pump was caused by an inevitable accident. And the failure to call the engineer or others in charge of it, to explain the fact, is fatal to the supposition. It must be assumed that their testimony would not aid the claimants. But if the steam pump did break down, the duty of the master was equally plain to put the ship's pumps at work at once. His ship's company, reduced as it was, consisted of ten men and boys, and the men in charge of the steam pump were at his service. The danger could thus have been wholly or partially averted until further help could be obtained. Thus the libelants have clearly made out a case of negligence in the failure to keep the ship pumped out, and for all damage to the cargo resulting from the ship being flooded on the night of the 28th of December they are entitled to recover.

§ 543. *Further claims of resulting damage considered.*

A further claim is made by the libelants for damage to the cargo by the exposure of the bottom of the sugar to the water, in consequence of the suction pipe of the steam pump not reaching lower than the platform. All the time that the ship was discharging and while the steam pump was at work the water was necessarily allowed to rise somewhat above the point reached by this pump to enable the pump to work. Upon the proofs, I think it appears that some small part of the lower portion of the sugar was thus constantly being alternately submerged and drained of water. This process necessarily carried off more or less of the sugar, and for this damage the ship is clearly responsible. No excuse or reason is shown or suggested why the pipe was not lengthened or why the ship's pumps, which reached this water, were not employed to pump it out, if there was any difficulty or necessary delay in properly adjusting the steam pump. The claimants insist that the loss attributable to this cause is too trifling to be charged against the ship, but the negligence being entirely clear the amount of the damage is not material. Whatever loss ensued from this cause the ship is liable for.

A further claim of damage is made in consequence of delay in delivering the cargo. The delivery stopped at some time on Saturday, December 30, and was not resumed until Wednesday, January 3. The cause of the stoppage was that the ship became crank, and the ballast which the consignees of the ship had intended to put on board for the outward voyage was not at hand on Saturday, and owing to the intervention of Sunday and New Year's day and the severity of the weather, the ballast was not got to the ship till Tuesday afternoon, although when it was discovered that the ship was getting crank some efforts were made to hurry it up. The effect of the delay was to increase to some extent the necessary loss by drainage of this mass of wet sugar. That the ship-owner owes some duty to the owner of the cargo in the preservation from further loss of goods already damaged by a sea peril is unquestionable. *Notara v. Henderson*, L. R., 7 Q. B., 225. There is nothing unlawful or in the view of the maritime law improper in the delivery of cargo on Sunday or festival days, especially where such delivery is necessary to avert loss. *Richardson v. Goddard*, 23 How., 23 (§§ 786-796, *infra*). And although a carrier seems not to be held generally to more than reasonable diligence as respects *the time of delivery* (*Briddon v. Great Northern Ry Co.*, 23 L. J., N. S., Com. L., p. 51),

yet it seems but reasonable that the delivery should be continued on Sundays and holidays if thereby any considerable damage to the goods would be averted. But where the owner of the goods is at hand and knows the circumstances, and no request to do this is made, it may be doubted if the ship is chargeable with negligence from this cause. It seems, however, unnecessary at this stage of the case to determine these questions, or the further question whether there was fault in not having the ballast at the ship on Saturday, because, so far as the loss which resulted from the flooding of the ship on Thursday night was aggravated by any delay in delivery, the ship is liable for that additional loss as a part of the loss caused by the flooding, and it does not distinctly appear that the loss necessarily resulting from the original wetting of the cargo was appreciably enhanced by the slowness of the delivery. Therefore, any such question of liability may well be left till the report of the commissioner as to the amount of the damage shall disclose the fact that the question really arises.

Decree for libelants and reference to compute damages.

THE SCHOONER EMMA JOHNSON.

(District Court for Massachusetts: 1 Sprague, 527-529. 1860.)

Opinion by SPRAGUE, J.

STATEMENT OF FACTS.—For ten years last past this schooner has been regularly plying between Boston and Chatham, in this state, as a packet, for the transportation of merchandise for all customers. She was, therefore, a common carrier. In July, 1859, Doctor Carpenter, the libelant, by his agents, put on board of her at Boston, a piano forte, to be conveyed to Chatham, and took the following receipt: "Boston, June 28, 1859, received from Hallett & Cumston, on board schooner Emma Johnson, one boxed piano forte, marked E. W. Carpenter, Chatham." Such receipts are common on these short coasting voyages, and it is contended by the claimants that the undertaking in this case is to be deemed the same as if a common bill of lading had been signed, and for this case I shall so consider it. On the arrival of the vessel at Chatham, the piano forte was found to have been much damaged by sea water, and compensation for that injury is now sought by this suit.

§ 544. *Where goods are delivered in an injured state, the burden is upon the carrier to exonerate himself.*

The goods not having been delivered by the carrier in like good order and condition as when received, the burden is upon him to exonerate himself from liability. This he has attempted to do, insisting that the loss was occasioned by perils of the sea. This vessel sailed from Boston on the evening of the first of July, and had a pleasant run, with a fair leading breeze, and arrived off Chatham in about ten hours, and was then found to have water in her hold, by which much damage was done to this piano and other parts of the cargo. Upon subsequent examination it was found that from one of the seams, being the third or fourth from the garboard, the oakum was entirely gone, to the length of eight or ten inches, and that other seams in her bottom were defective, being found, as expressed by the caulker, to be *soft*.

§ 545. — *to show that a leak was caused by some inscrutable agency, he must negative all other causes.*

What perils of the sea caused this defective condition of the seams, and particularly the aperture through which the water was admitted? To this ques-

tion the respondent has given no answer, except by introducing evidence that ships not unfrequently spring a leak at sea. But no witness has stated that such an occurrence as a seam in the bottom of a vessel being without oakum for eight or ten inches occurs at sea, without previous violence of wind or wave, or stress of weather, or accident, even on long voyages; much less that such a phenomenon occurs in a pleasant and easy run of only ten hours from port. The respondents are compelled to ascribe the accident to some inexplicable action of a treacherous element; in other words, to say that it is one of the mysteries of the sea. The burden of proof is upon the respondents; and before they can expect the court to listen to the suggestion that the loss arose from inscrutable agency of the elements, they must, at least, by proof, negative all other causes; and in particular, they must show, by full and satisfactory evidence, that the vessel was in good condition and suitable for the voyage at its inception. It is always the duty of the owners to provide such a vessel. It is a part of their contract, that the vessel, when she enters upon the voyage, is seaworthy, so as to be suitable for the undertaking. It is not sufficient that they honestly believe her to be so; she must be so in fact.

This vessel has been running between Boston and Chatham for ten years, and yet the owners have introduced no evidence to show when, in what manner, or by whom, her bottom had been caulked. They have, indeed, shown that on the 12th of May, 1859, she was hauled out at East Boston, and her wales and upper works caulked, and her bottom, after being cleaned, was examined by the caulker. But this examination was a mere inspection, with the exception of trying some of the butts; and it was further in evidence, from the seamen, that the vessel had performed well and carried her cargo safely on previous trips. All this may be true, and yet the very defective condition in which the seams were found may have been, and probably was, owing to the caulking being too old or improperly done; and if from either of these causes the vessel was defective, the owners must be responsible. In my opinion, the owners have not shown that this loss was occasioned by a peril of the sea, and the libelant is entitled to recover.

The view which I have taken precludes the necessity of considering the questions as to stowage and due attention to the pumps, which were much contested at the hearing.

HUSSEY v. THE SARAGOSSA.

(Circuit Court for Georgia: 8 Woods, 880-882. 1876.)

STATEMENT OF FACTS.—A horse was shipped from Baltimore to Savannah on the steamer Saragossa. He was delivered without external evidence of injury and next day he died.

Opinion by WOODS, J.

It is claimed by proctor for libelant that the horse having been delivered to the ship in apparent good health and condition, and the ship having delivered him to the libelant on the termination of the voyage in a dying condition, the burden of proof is upon the respondent to show that the illness and death of the horse did not result from the act or neglect of the respondent, but from causes beyond its control.

§ 546. *Failure to deliver, or delivery in damaged condition, puts burden of exemption on the carrier.*

The rule of law is, that when the carrier fails to deliver goods, or when he delivers goods in a damaged condition, the *onus* is cast upon him to show that

he is not in fault. In other words, loss or injury is sufficient proof of negligence or misconduct, or of the intervention of human agency, and when shown, the burden is on the carrier to exempt himself. Angell on Carriers, sec. 202; Story on Bailm., sec. 329; Code of Georgia, sec. 2066.

§ 547. *Where an animal is delivered, sick, but uninjured, the presumption is that the sickness was due to natural causes.*

But the shipper must show an injury to the article shipped before the burden is cast upon the carrier to exonerate himself. Is an injury shown when the article shipped is a horse or other live stock, which is proved to have been delivered to the carrier in good health and condition, and to have been redelivered to the shipper in a sick and debilitated condition, but without any fractures, wounds, abrasions or other external or visible injury? I think not. As well might a passenger who embarks in good health claim to support an action for damages against the common carrier by simply showing that when he disembarked at the end of his voyage he was in a sick and debilitated condition. The liability of a common carrier of animals is not in all respects the same as that of a carrier of inanimate property. For instance, he is not an insurer against injuries arising from the nature and propensities of the animals and which diligent care could not prevent. He is not liable for injuries by disease contracted without his fault after the stock is delivered to him. On the same principle, proof of the decay of perishable fruit committed to a common carrier would not of itself be sufficient to charge him. *Boyce v. Anderson*, 2 Pet., 150; *Clarke v. Rochester & Syracuse R. Co.*, 14 N. Y., 570; *Smith v. New Haven & Northampton R. Co.*, 12 Allen, 531; *Hall v. Renfro*, 3 Metc., 51; Story on Bailm., sec. 492, *a*. When the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain. He must show some injury to the thing shipped which cannot be the result of its inherent nature or defects before the burden is cast upon the carrier to show that he is not in fault.

But without applying this rule in this case, we are satisfied from the weight of evidence that the horse of libellant was not injured by the careless handling of the respondents, but that he died from natural causes, and that he would have died if he had never been put on board the *Saragossa*. Libel dismissed.

THE POWHATTAN.

(Circuit Court for New York: 12 Federal Reporter, 876-881. 1882.)

STATEMENT OF FACTS.—The following are the material facts in this case, as found by the court: The Powhattan was an ocean steamer, built of iron. She had permanent ventilators to ventilate her hold, and four unusually large hatches. On June 17, 1878, her agents entered into a contract for the transportation of a cargo of cattle from New York to Bristol, part of the cattle to be carried on deck, and part between decks. Subsequently the owner of the cattle received notice to ship the cattle on the morning of July 7th, and that the ship would sail at nine o'clock on that morning. The cattle were all on board by ten o'clock, but as the steamer had lost the slack tide, she did not sail till three o'clock. The cattle were in good condition. The recorded observations of the thermometer were from 77°, at seven A. M., to 83°, at four P. M. There was a light breeze on the river. While the steamer lay at the pier the ventilators were open and in good working order, but no wind-sails were

up. Wind-sails were put up while the vessel was passing down the bay, and kept up during the voyage. The hatches and ventilators were also kept open. Between Sunday night and Wednesday morning eighteen of the cattle in the between-decks died. The vessel arrived at Bristol July 21st, with the cattle in the between-decks in a sick and emaciated condition. Those on deck were in good condition, one having died from natural causes during the voyage. The court finds that the Powhattan was not adapted to the carriage of cattle below deck in July; also that the death of the cattle below decks was due to heat and insufficient ventilation; also that it does not appear that the loss was due to the failure to put up wind-sails while the vessel lay at the pier, or that anything was due to the negligence of the officers. The cattle were sold at a loss.

The court finds, as a conclusion of law, that the libel must be dismissed, with costs to the claimant in both courts.

§ 548. *Upon whom is the burden of proof of negligence in stowing cattle on ship-board.*

Opinion by BLATCHFORD, J.

On the question as to whether the wind-sails were not put up till Wednesday morning, as contended by the libelant, or were put up on Sunday before reaching Sandy Hook, as contended by the claimants, the district court found in favor of the latter view. As to the omission of the ship to put up wind-sails while she lay at the pier, the district court held that wind-sails would have been of use while the vessel was at the pier; that it was negligence in the ship not to put up wind-sails then; and that the subsequent sickness and death of the cattle in the between-decks were caused by such omission. The argument on the part of the libelant is that the cattle in the between-decks were shipped in good condition, not overheated or exhausted by their transfer from the yards to the ship; that if there were no means of ventilating the between-decks at the pier by wind-sails, the ship should have notified Mr. May that she could not sail till three o'clock, so that he might have kept the cattle on the pier; and that the failure to put up the wind-sails was negligence, and all the damages sustained by the libelant can be reasonably attributed to its results. It is further contended for the libelant that such injury was aggravated by the neglect of the ship to put up wind-sails till Wednesday, and that the permanent ventilators of the vessel were insufficient. My conclusions as to these propositions of fact appear in the findings. The burden of proving negligence and of proving that the damage arose from the facts alleged to constitute negligence is on the libelant.

§ 549. *Negligence will not be presumed from the sickness and death of cattle on ship-board.*

It is not established that there was any negligence anywhere except such as existed in confining live cattle in the between-decks of an iron vessel such as the Powhattan was in hot weather in July. That was the act of the libelant. Negligence in the carrier is not to be presumed from the sickness and death of cattle under such circumstances. The necessity for putting up wind-sails at the pier must be shown, and that it would have prevented the sickness and death; and that the damage was the direct and proximate result of the omission. This has not been done. The continuance of the mortality through Wednesday, although the wind-sails were put up before reaching Sandy Hook, and kept up, and the bad condition of the surviving between-decks cattle, lead irresistibly to the conclusion that the fatal thing was the keeping the cattle at all in the between-decks of that ship in that weather, and not the omission to put up

wind-sails at the pier or to keep the cattle on the pier till the hour of sailing. Certain it is that, with the ship as she was from Sandy Hook on, with wind-sails up and all the appliances she had in use and the hatches open, in view of the causes operating and of the results, no possible discrimination can be made between the damage resulting from the operation of those causes before reaching Sandy Hook and the damage resulting from those causes after reaching Sandy Hook. The evidence is all of it very vague and general. There was not, on the part of any one, any intelligent observation of particular animals, as there might have been, so as to show that they sickened or died from the effects of the heat at the pier. All the deaths and all the sickness and all the damage cannot on the evidence be legally attributed to the subjection of the cattle to the heat in the between-decks before reaching Sandy Hook.

The libel must be dismissed, with costs to the claimant in both courts.

THE PEYTONA.

(Circuit Court for Maine: 2 Curtis, 21-28. 1854.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is a libel filed by John Plaisted, of Gardiner, in the district of Maine, against the schooner Peytona, in which it is alleged that on or about the 4th day of February, 1854, Lee Claflin & Company, by order of the libelant, shipped on board the Peytona, then lying at Boston, four hundred and seventy-three slaughter hides, the property of the libelant, to be carried to Belfast, in the district of Maine, and there delivered in like condition as when shipped to the libelant, or his agent, the dangers of the seas only excepted. That the schooner arrived at Belfast on or about the 9th day of the same February, but the hides were not then and there delivered to the libelant or his agent. That the master of the schooner, contrary to his duty in that behalf, stowed the hides on deck, whereby over one hundred and eighty-four were lost, and the residue were landed at Belfast, and left in the open air for the space of four weeks, without any notice to the libelant, or his agent, and thereby were materially injured.

The answer admits the shipment of the hides, but alleges that the shippers knew they were to be carried on deck, and assented thereto; that it became necessary in the course of the voyage to make a jettison of some of the hides, and that others were washed overboard. That on the arrival of the schooner at Belfast, the remainder of the hides were landed as soon as practicable, the schooner having been delayed in the river six or seven days by the ice. That the master was not informed by the shipper who was the owner of the hides, nor to whom they were to be delivered at Belfast. That they were not in a condition to be stored; that all that could be done was to pile them up on a wharf, and that this was done. Upon these allegations, proofs having been taken, the district court made a decree in favor of the libelant, and the claimant appealed.

§ 550. *The burden is on the ship-owner to show a mutual assent to carrying goods on deck.*

The case presents two distinct questions. The first being whether the vessel is answerable for the hides washed or thrown overboard on the passage—the second, whether the vessel is liable for the damage suffered by the hides which were landed. The first of these questions depends upon the authority of the master to stow the hides on deck. If he was authorized so to do, it is

not seriously questioned by the libellant that the destruction was, under the circumstances, his loss. If he wrongfully placed them on deck, it is not denied by the claimant that they were at the risk of the vessel. And it was also properly conceded by the counsel for the claimant that the burden is upon him to prove the consent of the shippers to have them carried on deck. Upon a shipment being made, it is an implication of law, in the absence of a special contract, that the master is to sign bills of lading in the usual form; and the effect of such a bill of lading is to oblige the master to carry the goods under deck.

§ 551. *The master an incompetent witness unless released from liability to the owners.*

This part of the case, therefore, is merely a question of fact whether the claimant has proved a special contract to carry the goods on deck. He relies on the testimony of Asa S. Small, the master of the schooner, of Horace G. Small, the mate, of Samuel West, who was temporarily employed on board while the vessel lay at Boston, and of Benjamin Small, the master of another vessel, who speaks to the state of the cargo of the Peytona on the day when the hides came on board. The testimony of the master was objected to, as not competent. I consider him interested in the event of this suit. If a recovery is had against the vessel, the master will be liable to the owners for the amount of damages and costs which they will have been obliged to pay. In such a case it is well settled, at the common law, that the master is not a competent witness to disprove his own negligence or improper conduct. *Green v. New River Co.*, 4 Terin R., 589; *De Symonds v. De La Cour*, 2 Bos. & Pull. (N. R.), 374; *Hawkins v. Finlayson*, 3 Carr. & P., 305; *Whitmore v. Waterhouse*, 4 id., 383. No reason is perceived why the same rule should not be applied in the admiralty, in cases not coming within the exception on account of necessity. *The Boston*, 1 Sumn., 343. And it has been so applied by Mr. Justice Story in *The Hope*, 2 Gall., 48, and by Judge Ware in *The William Harris*, 1 Ware, 367. In the case of *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story 16 (§§ 63-83, *supra*), which was very strongly contested, and in which I was of counsel while at the bar, no doubt was entertained that the master was incompetent without a release. It was so held by Sir William Scott in *The Exeter*, 2 Rob., 261. But this witness has been released by all but one of the part owners of the Peytona, and I am of opinion this release has rendered him competent. A claim over on him by the part owners would be a joint claim, and, consequently, a release by one bars all. *Whitmore v. Waterhouse*, 4 Carr. & P., 383; *Hockless v. Mitchell*, 4 Esp., 86; *Bulkley v. Dayton*, 14 Johns., 387. I have, therefore, taken the deposition of the master into consideration. But I am not satisfied, upon the whole evidence, that the shippers assented to the carriage of this property on deck. I do not deem it necessary to detail the evidence, or the considerations which, upon a careful examination of it, have left serious doubts on my mind concerning the correctness of the master's last deposition. He is a released witness, testifying to the controlling fact in the cause, so as to exonerate himself from blame. There are important discrepancies between his two depositions. Though he is corroborated by the mate, and by Wells, in part, yet the latter admits he paid no particular attention to the conversation, and the memory of the former is so much at fault upon facts of some importance that full confidence cannot be given to his evidence. The rate of freight is admitted to have been the customary rate, and this renders it improbable that the shippers agreed to have the property go on deck. The witness Cunningham, who ap-

plied to the master to have the hides carried, denies that he agreed to have the hides go on deck, or undertook to inquire of the shippers if they would consent thereto. The fact that the bills of lading were made out as for under-deck freight tends to support his statement. Pingree, who brought down the bills of lading, and Gill, who accompanied him, contradict the master on very material points. If their evidence is credible, it is hardly possible there could have been a contract to carry on deck, and there is nothing in the cause which tends to shake their credit.

There is testimony from the claimant's four witnesses tending to show that when the hides were shipped the hold was full, and they could only be carried on deck. There is evidence from two of the libellant's witnesses to the contrary. Without undertaking to decide how the fact was, I think it safe to conclude that, if the hold were then full, Cunningham did not know it. If he is to be credited, he certainly did not. If the claimant's witnesses are believed, the hatches were on and he could not know what was in the hold. But at all events, the fact is not decisive, because the master might choose to take this property on deck at the risk of the vessel, as, indeed, he admits he did some of his deck freight; for, in enumerating his deck load, he mentions "some satin white, which ought to have gone into the hold, but we could not get the casks in there, the hold was so full." Upon a careful consideration of the evidence, such serious doubts remain in my mind that I cannot pronounce the contract to carry on deck proved, and must therefore hold the vessel liable for the loss of the hides thrown or washed overboard.

§ 552. *The master must give the consignee due notice of the delivery of the cargo.*

The other part of the case is attended with less difficulty. The duty of a master is to deliver property to its consignee. Where such a mode of delivery is usual, it may be made by depositing the goods on a customary wharf and giving notice thereof to the consignee. But this notice, or some equivalent for it, or excuse for not giving it, is indispensable. *Ostrander v. Brown*, 15 Johns., 39; *Chickering v. Fowler*, 4 Pick., 371; *Gibson v. Culver*, 17 Wend., 305; *Merwin v. Butler*, 17 Conn., 138; *Gatliff v. Bourne*, 4 Bing. N. C., 314; and *S. C. in error*, 3 Scott's N. R., 1.

§ 553. *Where the master is at fault in not signing bills of lading he can take no advantage from his own omission of duty.*

The excuse set up by the answer in this case is that the master was not informed by the shipper who was the owner of the hides, or to whom they were to be delivered at Belfast. This is not supported by the proofs. It is true no bills of lading were signed, and so there was no consignee named in the customary way. But, in the first place, I consider the master in fault that bills of lading were not signed. Pingree says, when he presented the bills of lading a second time to the master, he promised to come to the counting-room of the consignors that afternoon at four o'clock and see the senior consignor about the bills. The master does not deny this. He did not go. He moved his vessel to another wharf, so that when Pingree went to his former berth the next day he did not find the vessel, and supposed she had sailed. In point of fact, the vessel waited four or five days for a wind and then sailed. Now, though it is, I think, usual to present bills of lading to the masters of vessels for signature, and, ordinarily, it is not incumbent on them to seek out consignors and sign them at their places of business, yet a bill of lading is the customary and proper shipping document, and should be signed by the master before sailing.

The particular place where they are to be signed is regulated by usage, founded on convenience, in the absence of a special undertaking. When a master agrees to go to the counting-room of the consignor and settle the terms of the bills of lading, and sails without doing so, it would be allowing him to take advantage of his own wrong, if he were permitted to avail himself of the want of a bill of lading, to excuse himself from the performance of the duty of giving notice to the consignee of the arrival of the goods. Besides, the master did know that it was the intention of the shippers to consign these goods to Lewis & Millan. They were named as consignees in the bills of lading presented to him for signature. He did not object, and he had no right to object, to their being the consignees. The point left unsettled was whether he should agree to deliver to Lewis & Millan at their wharf. I am by no means clear that under the circumstances he was not bound to do so. As the bills of lading were drawn, they imposed that obligation on him. He refused to sign them, but agreed to see one of the consignors. He sailed with the goods without doing so. Certainly the consignors had not assented to any other delivery than that provided for by the bill of lading. *Non constat* that they would have assented to any other. And I think it would be difficult to maintain that sailing with the goods under such circumstances was not an assent on his part to the terms of the bills of lading. But it is not necessary to decide on this ground. The master was apprised by the bills of lading that Lewis & Millan were designated by the shippers as the consignees of the goods, and to them he was bound to give notice of their arrival. Having failed to do so, the vessel is liable for the deterioration of their value from exposure to the weather on the wharf.

§ 554. *A libellant who did not appeal cannot claim additional damage.*

In respect to the amount of damage, I affirm the judgment of the district court. The libellant, having taken additional evidence on the question of damages, has sought to increase the sum awarded below. But he did not appeal from the decree. It is only where the circuit court reverses the decree of the district court that it is to proceed to render such a decree as the district court ought to have rendered. 1 Stat. at Large, 85, § 24. This court cannot pronounce a decree for increased damages, without first reversing the decree of the district court on the subject of damages. This it cannot do on the prayer of the appellee. *Stratton v. Jarvis*, 8 Pet., 4; *Canter v. American Ins. Co.*, 3 Pet., 307. A cross-appeal should have been taken, if he was dissatisfied with the amount of damages awarded by the district court. Having omitted to do so, he has waived all right to further damages, and can claim nothing more than an affirmance of the decree of that court. The decree of the district court is affirmed, with costs.

§ 555. *Bills of lading in general.*—The mere carriage of goods, in the absence of a bill of lading or other agreement, renders the vessel liable as a common carrier; but any agreement, however informal, must be conformed to by the vessel. *Brower v. Brig Water Witch*,* 19 How. Pr., 241; 16 Leg. Int., 348; S. C., on appeal, *The Water Witch*,* 1 Black, 494.

§ 556. The rules governing contracts of affreightment differ in no essential respect from those controlling other contracts. The contracting party must do what he agrees to do, according to the terms of his undertaking. If he departs from his agreement, he becomes an insurer. *Dorris v. Copelin*,* 5 Am. L. Reg. (N. S.), 492.

§ 557. A contract to ship goods by steamer A., or such other steamer as should sail in her place on a given date, or, failing in that, to ship on the first steamer after that date, is a maritime contract. If the carrier company ships by an earlier and different vessel, there is such a breach of contract as renders the company strictly liable for the goods. *Bazin v. Steamship Co.*, 3 Wall. Jr., 209; S. C., 5 Am. Law Reg., 459 (§§ 1162-66).

§§ 558-577. CARRIERS.—RESPONSIBILITIES AS SPECIALLY MODIFIED.

§ 558. The master cannot, after a loss has occurred, create a liability by bill of lading. But one who thus impeaches successfully the validity of a bill of lading cannot rely upon it as merging a prior contract. *The Bark Edwin*,* 1 Spr., 477.

§ 559. Bill of lading prevails over verbal contract as to the choice of vessels for the transportation. *Helliwell v. Grand Trunk R. of Canada*, 7 Fed. R., 68 (§§ 98-105). See § 53.

§ 560. A refusal to carry goods by a specified vessel, according to the tenor of a bill of lading, renders the carrier liable to damages for breach of contract unless legal justification be shown. *Harrison v. Stewart, Taney*, 485 (§§ 1167-69). See § 1131.

§ 561. A freight bill peculiarly expressed, but in general features a bill of lading, describing the goods, their receipt, and the liabilities of the carrier, and ending "acct. of H. D.," who is shown to be the real party in interest, held to be a bill of lading to H. D. as consignee, and binding as a contract. Where it is signed "W. T. N. & Co., agents," and does not appear on its face to be the contract of a certain railroad company, parol evidence is inadmissible to show that it is the contract of that company. *Dixon v. C. & I. R. Co.*,* 4 Biss., 187.

§ 562. A document purporting on its face to be a bill of sale by a vessel of certain stone is not to be interpreted as a bill of lading; nor upon such a purchase by master or vessel is the vessel to be charged as carrier. *The Skylark*,* 1 Brown, 361.

§ 563. In the absence or silence of a charter-party, the bill of lading must be looked to to determine the contract. *Strong v. Carrington*,* 2 Am. L. Reg. (N. S.), 287.

§ 564. The contract created by giving a bill of lading is a maritime contract and within the jurisdiction of admiralty. *Harrison v. Stewart, Taney*, 485 (§§ 1167-69). And see *post*, VI.

§ 565. Where a bill of lading excepting from liability for loss by fire was shown to have been delivered to the consignor's agent, who had been accustomed to ship under similar bills, or to his teamster, or to have been left at a box to which the agent and his teamster had access, it was held in a suit by the consignor to recover for the loss by fire of goods so shipped, that the burden of proof was on the plaintiff to show that the bill of lading was not received by him. *Van Schaack v. Northern Transportation Co.*,* 5 Ch. Leg. N., 181.

§ 566. A receipt with the words "not accountable for contents," given by a vessel's freight clerk to a shipper's drayman at receiving a package for shipment, which statement was at once repudiated by the shipper, and the freight clerk so told by the drayman, is not such an agreement as will free the carrier from liability for subsequent injury to the package. *Seller v. Steamship Pacific*,* 1 Oreg., 409.

§ 567. Brokers employed in a foreign shipment are authorized to bind to the usual stipulations limiting the carrier's liability, the bill of lading being of the usual form used by the line of steamers whose transportation the shipper authorized. *Hus v. Kempf*,* 10 Ben., 231.

§ 568. Evidence of prior conversations cannot be shown to contradict a bill of lading. *O'Rourke v. 221 Tons of Coal*, 1 Fed. R., 619 (§§ 821-825).

§ 569. A bill of lading does not by implication merge a distinct verbal agreement to carry but one kind of freight. *Knox v. The Ninetta*,* Crabbe, 534.

§ 570. The master has no power to charge the owners of the vessel by signing bills of lading for goods not put on board. And the owner not being charged neither is the vessel, and there is no lien capable of enforcement in admiralty. *Schooner Freeman v. Buckingham*, 13 How., 182; *The Loon*,* 7 Blatch., 244.

§ 571. Where bills of lading are falsely made out for more goods than were actually put on board, the ship-owners, unless participants in the fraud, are only to be held liable for what was actually received. *The Alice*,* 12 Fed. R., 496.

§ 572. A bill of lading may be disputed as to its genuineness and authenticity and the truthfulness of its statements. *Blagg v. Phoenix Insurance Co.*, 3 Wash., 5.

§ 573. The bill of lading, reducing to writing the contract of carriage, is not to be varied by parol evidence, nor can a party unauthorized by the shipper sanction the carrier's departure from its terms. Rule applied where, upon representations made by the drayman who delivered the goods for transportation, a steamboat claimed justification for carrying goods through to New Orleans and delivering them on the return trip instead of delivering them on the way down. *The Golden Rule*,* 9 Fed. R., 334.

§ 574. A bill of lading signed by the master binds the vessel, although the word "master" is not appended to his signature. *Fox v. Holt*,* 36 Conn., 558.

§ 575. Holder of bill of lading.—The master's signature to a bill of lading expressed as "under protest" affords notice which should put an indorsee of the bill upon his guard. *779 Boxes of Sugar*, 7 Ben., 242.

§ 576. The indorsement of a bill of lading for a valuable consideration carries the title of the goods to the *bona fide* indorsee. *The Thames*,* 3 Ben., 279.

§ 577. One may, for various purposes, acquire title to the goods and incidental responsibilities by a *bona fide* purchase, notwithstanding the bill of lading is not formally indorsed to him, or not even delivered. *Philadelphia, etc., R. Co. v. Barnard*,* 3 Ben., 89.

§ 578. Mere delivery or indorsement of a bill of lading is not enough, without a distinct acceptance of the same by the purchaser. But anything amounts to a delivery and acceptance which was intended to be so, and received as such, and which actually put the goods within the reach and power of the buyer; and such symbolical delivery applies to the indorsement and delivery of a bill of lading. *Audenreid v. Randall*, 3 Cliff., 112; *United States v. Delaware Ins. Co.*, 4 Wash., 422.

§ 579. The shipper, if the owner of goods which are transported at his own risk, may, by an assignment on the bill of lading, or by a separate instrument, pass the legal title as against himself and his own creditors and representatives. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386; *Harris v. D'Wolf*, 4 Pet., 147. And see *The Mary Ann Guest, Olc.*, 498 (§§ 1144, 1145).

§ 580. Bill of lading sent to a purchaser as a "liquidation of accounts" within the Illinois statute. *Cooper v. Coates*, 21 Wall., 105.

§ 581. Bill of lading considered with reference to the right of stoppage *in transitu*; a *bona fide* transferee by purchase excludes such right of the seller. *Walter v. Ross*, 2 Wash., 283; *Ryberg v. Snell*, 2 Wash., 403. But not where the transfer was as mere collateral to secure previous obligations, without anything advanced, given up or lost by the transferee. *Lesasier v. The Southwestern*, 2 Woods, 37.

§ 582. Indorsement and transfer of a bill of lading transfers all legal right in the property as against the consignee's claim upon the property shipped to him, if such property be not already in the latter's possession. *Ryberg v. Snell*, 2 Wash., 294.

§ 583. The apparent ownership upon the bill of lading is conclusive upon no one unless it be in favor of a *bona fide* purchaser for a valuable consideration under the assignee. If a person *bona fide* assigns goods at sea and their proceeds by an instrument, given as security, but containing apt words of transfer, the mere fact that, in the bills of lading, the assignor remains the ostensible owner or consignee will not affect the assignee's title; and such assignee is diligent in availing himself of his rights, as against the assignor's creditors, if, as soon as he reasonably may after the return of the ship, he takes possession of the proceeds. *D'Wolf v. Harris*, 4 Mason, 535.

§ 584. Where a bill of lading of goods deliverable to order is attached to, and forwarded with, a time draft, and sent to an agent for collection, the agent may infer, unless more clearly instructed to the contrary, that the bill of lading may be surrendered to the drawee when he accepts the draft. *National Bank v. Merchants' Bank*, 1 Otto, 92; S. C., 8 Ch. Leg. N., 66; *Woolen v. New York & Erie Bank*, 12 Blatch., 359.

§ 585. One who becomes the holder of a bill of lading by indorsement or by discounting the draft drawn against the goods succeeds to the shipper's rights. He has the same right to demand acceptance of the accompanying bill and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder, for bills of lading are not, in the fullest sense, negotiable. *National Bank v. Merchants' Bank*, 1 Otto, 92. See *BILLS AND NOTES*, §§ 176-182.

§ 586. One who discounts a draft and receives therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, may hold them as security for the acceptance and payment of the draft. Where such holder forwards the draft and bill of lading to an agent, with instructions, by special indorsement of the draft and by letter, to hold the goods until payment of the draft, the agent must not deliver contrary to such instructions. *Dows v. National Exch. Bank*, 1 Otto, 618.

§ 587. The *bona fide* holder of a bill of lading, who has made advances on the faith thereof, has a lien upon the goods which the consignee of the goods cannot disregard. *Lee v. Bowen*,* 5 Biss., 154; *Stille v. Traverse*,* 3 Wash., 43.

§ 588. A consignee, who, on the receipt of the indorsed bill of lading, makes advances on the goods consigned, may maintain an action *in rem* against a vessel causing a loss of such goods by a collision. *The Vaughan and Telegraph*, 14 Wall., 253.

§ 589. B. being indebted to G. sent him some goods in payment, took a bill of lading to F. for the use of G., notifying F. of the fact on the day of shipment. *Held*, that the property vested in G. by the bill of lading, and therefore was not afterwards attachable by a creditor of B., nor subject to any lien by F. for former advances to B. *Grove v. Brien*, 8 How., 429.

§ 590. Usage between consignor and carrier as to the delivery of cattle at the end of the transit cannot so control the contract manifested by the bill of lading as to affect the rights of a *bona fide* assignee of such bill of lading, who has made advances on the faith thereof. *Myrick v. Michigan Central R. Co.*, 9 Biss., 52 (§§ 1297-1302).

§ 591. Where an assignee for the benefit of creditors was under an indorser's liability for notes of the assignor, it was held that as against creditors of the assignor, not parties to the assignment, he was entitled to retain as security a bill of lading indorsed and delivered to him by the assignor. *Balderston v. Manro*, 2 Cr. C. C., 623.

§ 592. The master of a vessel was ordered by the charterer to sign no bill of lading except to the latter, but did sign one to the order of the shipping vendor on his refusal to let the goods go otherwise. The vendor who had been paid drew on the charterer, and sent the bill of lading as security, and the charterer, to obtain the goods, accepted and paid the draft. *Held*, that the master had no right to refuse to sign according to the vendor's orders; that the vendor obtained no valid title under the bill of lading, and that, consequently, the money paid to obtain the goods was not paid under compulsion, and that the master was not liable for the amount so paid. *The M. K. Rawley*, * 3 Cent. L. J., 56.

§ 593. Cancellation of one of the bills of lading, with the consignor's assent, does not discharge the vessel, as against a *bona fide* advancement on the other bill which was sent to the consignee. *The Matilda A. Lewis*, 5 Blatch., 520.

§ 594. Conclusiveness of bill of lading as to condition.—A bill of lading is a receipt and a promise; it acknowledges the receipt of goods, and engages to deliver them; as between the shipper and the carrier it is only *prima facie* evidence of all matters descriptive of the cargo, and as to these may be modified or contradicted by parol. *Cafiero v. Welsh*, * 1 Leg. Gaz. R., 121.

§ 595. Where the bill of lading acknowledges the receipt of the goods in good condition, the *onus* is on the carrier to prove that the damage resulted from one of the excepted causes. *Turner v. Ship Black Warrior*, * McAL, 182; *Seller v. Steamship Pacific*, * 1 Oreg., 409.

§ 596. After he has proved this, he may then be charged with negligence, in which case the burden of proof shifts. *Turner v. Ship Black Warrior*, * McAL, 182.

§ 597. Where the articles are easily inspected, the admission in the bill of lading that they were in good condition is entitled to much weight. *Ibid*.

§ 598. Customer makes a *prima facie* case of delivery in good condition where he produces a receipt or bill of lading of the carrier expressed as "received in good order." But these words constitute no agreement but an admission, and the carrier may show to the contrary. *The Pacific*, * Deady, 17; *The Adriatic*, * 16 Blatch., 424; *The Ship Howard*, * 18 How., 231.

§ 599. The acknowledgment in a bill of lading that the goods are received in good order puts the burden of proving to the contrary upon the carrier; he may as against the owner show that the loss actually resulted from the insufficiency of the package, and not from any negligence on his own part; but it is not enough to show simply that the packages were insufficient, and that the defect was not discoverable by him. *Zerega v. Poppe*, * Abb. Adm., 397.

§ 600. So where iron is delivered from the vessel damaged by rust or stain, it is not enough for the carrier to raise a doubt as to whether it came to the ship wet, but he must show affirmatively that the injury was thus occasioned, or at least show circumstances affording a violent presumption that the rust or stain could not have been communicated on ship-board. *The Ship Martha*, * Olc., 140.

§ 601. If the cargo is received in good condition and delivered in bad condition, the burden of justification is upon the carrier. A bill of lading implies receipt of the goods in good condition, where it provides that upon their delivery in sound condition the freight shall be paid, even though it contains no express admission of the receipt of the goods in good order, or promise to deliver them in good order, nor excepts perils of the seas. *The Ship Zone*, * 2 Spr., 19.

§ 602. Where the bill of lading and testimony show that coffee bags were received on board in good condition, and reached the consignees in a damaged condition, the presumption of damage is against the carrier. Where the coffee was reshipped in a damaged state, the testimony of witnesses who examined it at the time may be taken for ascertaining the extent of the damage. *Kerr v. The Ship Norman*, * 1 Newb., 525; *Soule v. Rodocanachi*, * 1 Newb., 504.

§ 603. As between the original parties to the bill of lading, its statements respecting the condition of the goods when laden may be disproved by oral testimony; but as against an assignee of the bill upon valuable consideration, who relies upon such statements, the master and owners are concluded. *Bradstreet v. Heron*, Abb. Adm., 209; *S. C.*, 2 Blatch., 116 (§§ 799-802). See § 718.

§ 604. Conclusiveness as to quantity.—Where a mate, through carelessness, gave drayage receipts for more goods than were received, and in consequence a bill of lading was given for such amount, the master is not bound to deliver other than what was actually shipped, and cannot, by paying to the consignee the difference between that called for by the bill of lading and the amount actually shipped, bind the mate therefor. *The Tuskar*, 1 Spr., 71; *Cafiero v. Welsh*, * 8 Phil., 130.

§ 605. A bill of lading reciting that the cargo, when received, consisted of twenty thousand bushels, may be deemed conclusive when it further stipulates that "all the deficiency in the cargo shall be paid for by the carrier and deducted from the freight, and any excess in the cargo shall be paid for to the carrier by the consignee." *Merrick v. 9,514 Bushels of Wheat*, * 3 Fed. R., 840.

§ 606. A bill of lading establishes conclusively the articles shipped, unless fraud or mistake be shown. *Backus v. Schooner Marengo*,* 6 McL., 487.

§ 607. That part of a bill of lading which acknowledges that goods have been shipped may be shown by parol evidence to have been made by mistake; as between the parties it is like any other receipt. *Sutton v. Kettell*,* 1 Spr., 309; *The J. W. Brown*,* 1 Biss., 76.

§ 608. The expression "shipped in apparent good order and condition, value and contents unknown," has reference to external appearance, and admits nothing on the carrier's part, as to quantity or quality of contents, or that specific articles were placed therein, beyond what was thus apparent. *The California*,* 2 Saw., 12; S. C., 5 Am. L. T., 182.

§ 609. A bill of lading signed by agents of the vessel alleged that a certain number of bales of cotton were received. The pleading having admitted the authority of the agents to bind the vessel, *held*, that the burden of proof was on the vessel to show that a less number was received. *The Steamship Saragossa*,* 2 Ben., 544.

§ 610. Where a bill of lading for cork in bales recited "weight and contents unknown, not accountable for the cork on deck and bursting of bundles, several of which open for stowage," *held*, that the provision justified cutting certain bales for convenience of stowage; also that the vessel's obligation as respected delivery in good condition did not extend beyond a requirement to comply with the usual custom of stowing such a cargo. *Carao v. Guimaraes*,* 10 Fed. R., 788.

§ 611. Miscellaneous stipulations.—A carrier by water is bound to give a bill of lading. But a bill of lading in its essence contains only a receipt of the goods with a promise to carry and deliver them according to the terms of the contract. The sum to be paid for their carriage is no essential part, but is inserted only for mutual convenience; and where master and shipper fail to agree in advance, the master is not bound to insert a statement on this point in the bill of lading. *The May Flower*,* 3 Ware, 300.

§ 612. A clause in a bill of lading for "privileges of lighting and reshipping" grants to the original vessel the privilege of reshipping during the voyage at its convenience; and imposes the duty to do so when practicable and necessary. *Dorris v. Copelin*,* 5 Am. L. Reg. (N. S.), 492.

§ 613. But the privilege cannot be exercised before the voyage is undertaken. *Ibid*.

§ 614. Liability of carrier.—The carrier's liability commences with his receipt of the goods for transportation, although the bill of lading expresses a subsequent date. *Snow v. Carruth*,* 1 Spr., 324.

§ 615. The owner of the vessel is liable for all injuries sustained through the misconduct or negligence of the master; nothing can excuse him but the act of God, the public enemy, or the fault of the party complaining. *Dusar v. Murgatroyd*,* 1 Wash., 17.

§ 616. A carrier may be liable for damage done to the cargo although he takes the usual precautions and conveys goods in the usual manner; for in order to exonerate himself he must bring himself within the exceptions allowed by law or the bill of lading. *Bearse v. Ropes*,* 1 Spr., 331.

§ 617. Deviation, delay, etc.—By the terms of his contract the master was to sail with the cargo directly to a point named. He deviated, and without consent took in other cargo, thereby putting the shipper to considerable trouble and expense. *Held*, that the vessel was liable. *Knox v. The Ninetta*,* Crabbe, 534.

§ 618. Where a gale appears imminent, much must be left to the discretion of the master of a coasting vessel, as to deviating and putting into a port of refuge for a time. *The Schooner Sarah*,* 2 Spr., 81.

§ 619. As to deviation on the western rivers the principles of the maritime law do not strictly apply. *Dorris v. Copelin*,* 5 Am. L. Reg. (N. S.), 492.

§ 620. It is justifiable deviation to ascertain whether those on board another vessel, apparently in distress, need relief, and to delay to afford such relief. It is not justifiable to depart from the vessel's own course or delay merely to save property. But where the circumstances are not decisive, the master's motives and conduct will receive the more favorable interpretation. *Crocker v. Jackson*,* 1 Spr., 141.

§ 621. Delay occasioned by sailing with a sick and incompetent crew renders the carrier liable. *The Gentleman*, 1 Blatch., 196. And see as to delay, §§ 120-122.

§ 622. Unseaworthiness.—The failure of the rudder in a gale of no extraordinary violence shows unseaworthiness in the vessel. 928 Barrels of Salt*, 2 Biss., 319.

§ 623. Seaworthiness of vessel with reference to cargo considered. *Dupont de Nemours v. Vance*, 19 How., 162. And see §§ 128-132.

§ 624. In the transportation of grain in barges on navigable rivers the barge should be strong enough to bear the shock of rubbing on a sand bar. *The Steamboat Keokuk v. Home Ins. Co.*,* 2 Ch. Leg. N., 249; *The Northern Belle*, 9 Wall., 526 (§§ 163-166); affirming 1 Biss., 529. See §§ 131, 132, 183.

§§ 625-638. CARRIERS.—RESPONSIBILITIES AS SPECIALLY MODIFIED.

§ 625. **Stowage and handling of cargo.**—Stowage under deck is the condition implied in a clean bill of lading. It is for the carrier to prove a different agreement. And a bill of lading containing the exception of liability for "dangers of the seas," will not excuse the carrier if he carries the goods on deck, unless the calamity by which they are lost would have been equally fatal if they had been properly secured below deck. *The Delaware*, 14 Wall., 579 (§§ 385-392); *The Waldo*, Dav., 161; S. C., 4 Law Rep., 382; *Stinson v. Wyman*, Dav., 173; *Vernard v. Hudson*, * 3 Sumn., 405; *Brower v. Brig Water Witch*, * 19 How. Pr., 241; S. C., 16 Leg. Int., 848; *The Water Witch*, * 1 Black, 494; *The Rebecca*, 1 Ware, 183.

§ 626. But this right as to the stowage of goods may be waived by the shipper under the bill of lading. *The Bobolink*, * 6 Saw., 145; *Ray v. Schooner Belle*, * 9 Am. L. Reg. (N. S.), 311.

§ 627. Parol contract for stowage of goods on the deck of a canal boat may be shown; and if under such circumstances damage resulted from such stowage, and the carrier used all reasonable care and protection of the goods consistently with such mutual understanding, the carrier is not liable. *The Canal Boat Thomas P. Thorn*, * 8 Ben., 3.

§ 628. It is not negligence to stow casks of oil on the main deck of a propeller when the larger portion of the hold is used for water, engines, boilers, coal, etc., and the main deck is completely bulwarked and covered by the upper, although greater care may be required in packing casks on the main deck than in the hold, to prevent them from rolling in stormy weather. *The Neptune*, 6 Blatch., 193.

§ 629. Proof of a custom in a particular carrying trade to carry goods on as well as under deck, owing to the nature of the route followed, is admissible to rebut the usual presumption of law that goods are to be stowed beneath decks. *Chubb v. Bushels of Oats*, * 26 Law Rep., 492.

§ 630. A usage in coasting voyages to carry on deck a portion of the cargo, not exceeding one-quarter, consisting of heavy goods not likely to be injured by wet or washed overboard, is reasonable. *The William Gillum*, 2 Low., 154.

§ 631. Oranges and lemons should be stowed so as to permit of proper ventilation; and if the decay of the fruit be unduly hastened by the carrier's negligence in this respect, the vessel is liable, notwithstanding the bill of lading exempts as to damages arising from "inherent deterioration." *The Steamship America*, * 3 Ben., 491.

§ 632. Where table salt in sacks is negligently stowed near powdered arsenic in casks, and arsenic from broken casks penetrates and impregnates sacks, it will be inferred that the whole shipment of salt is spoiled for domestic use, without requiring an analysis of each sack. *The Niagara*, 16 Blatch., 516 (§ 1171). See § 1183.

§ 633. The carrier should observe reasonable care in loading and stowing. Casks of bleaching powder, or other chemicals known to be liable to injure, should not be placed near cloth, dye-woods, iron, and the like. *The St. Patrick*, * 7 Fed. R., 125; *Hamilton v. Bark Kate Irving*, * 5 Fed. R., 630; *The Antoinetta C.*, * 5 Ben., 564; *The Pharos*, * 9 Fed. R., 912.

§ 634. Wheat was well stowed and properly cared for; but it was stowed in the neighborhood of kerosene oil, then a new article of commerce. Whether, on the contradictory evidence, the carrier was liable for alleged injury done to the wheat by becoming impregnated with the oil, *quære*. But the consignees having, on discharging the vessel, mingled the wheat which had been stowed near the oil with wheat stowed elsewhere, their libel for damages was dismissed. *The Fanny Fosdick*, * 4 Blatch., 374.

§ 635. Under the ordinary bill of lading a common carrier is not liable for damage or deterioration from the nature of the article and its confinement during the voyage as well as from perils of the sea or navigation, unless he was guilty of want of care or skill, when such damage will be ascribed to negligence, and render him liable. *Lamb v. Parkman*, 1 Spr., 343. See § 135. And see as to cutch carried from Calcutta to Boston, which evaporated and melted, owing to its inherent qualities, and without the carrier's fault, *Janney v. The Tudor Co.*, * 3 Fed. R., 814.

§ 636. A vessel is liable *in rem* for damage caused to the goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by receiving on board in bad condition such third party's goods. *The Bark Cheshire*, * 2 Spr., 23.

§ 637. Where coal, coal oil and paper stock are transported together the carrier is bound to use especial care in stowing them so that the oil and coal shall not injure the paper; and this notwithstanding the shipper of the paper stock knows that oil and coal are to form part of the cargo. *The Ship Sabioncello*, * 7 Ben., 357. Escape of oil in the ordinary way so as to damage other goods near it is not excusable as "dangers of the seas." *Bearse v. Ropes*, * 1 Spr., 331.

§ 638. Damage to skins caused by sweat of the hold of a vessel is excused as a "peril of the seas," etc., unless the carrier fails to exercise reasonable care for their stowage and protection; and it is for the shipper to so pack them as to guard against such natural damage. Under the stringer of an iron ship, in the between-decks, is not an improper place for the car-

rier to stow skins, when so dunnaged as to be protected from the moisture on the sides of the ship. *The Viscount*,* 11 Fed. R., 168.

§ 639. Soda which had been stowed carefully and properly was damaged by the sweating unavoidable in the hold of an iron ship loaded at a northern port and proceeding to a southern port in the spring. No negligence of the master or seamen contributed to the injury. The bill of lading expressly excepted "sweating," as well as "accidents of navigation." *Held*, that the vessel was not liable. *Mendelsohn v. The Louisiana*,* 3 Woods, 46.

§ 640. *Held*, upon facts and circumstances considered, that the vessel did not have sufficient dunnage under the cargo in the bilges to protect the cargo from injury by water reaching it as the vessel rolled, and that the carrier was liable as for bad stowage. *The Brig Sloga*,* 10 Ben., 315.

§ 641. Coal, for the carriage of which freight is received, is cargo and not dunnage, although received and used as such with the shipper's knowledge. *Insurance Co. v. Thwing*, 13 Wall., 672.

§ 642. If brittle ware is offered for transportation by sea, cased in straw, the carrier should either refuse to receive it or else stow it with reference to the imperfect state of the covering. *Held*, on facts, that piling such cases without support was bad stowage, so as to render the vessel responsible, notwithstanding she encountered a severe storm. *The David and Caroline*,* 5 Blatch., 266.

§ 643. Neither exception of "perils of the sea" in a bill of lading, nor a memorandum at the foot, "ship not accountable for leakage, breakage and rust," will excuse the carrier from a loss attributable to negligent stowage of the goods transported. *Ibid*.

§ 644. Evidence offered by libelants considered insufficient to show negligence rendering the vessel liable for the breakage of glass; the transportation being under a bill of lading which, by its terms, exempts the vessel from liability for "breakage." *The Steamship Pereire*,* 8 Ben., 301.

§ 645. Facts considered showing no want of proper care in stowing soap and in protecting it against leaks from the deck. *McKinlay v. Morrish*, 21 How., 343 (§§ 1150-55). See § 1137.

§ 646. For wine lost by reason of pressure of the cargo and heavy weather, the carrier is not answerable, especially if the stowage was under the shipper's special direction. *The Bark Diadem*,* 4 Ben., 247.

§ 647. A bill of lading excepted "insufficiency of package, leakage, breakage and perils of the sea." Good stowage was proved, and also heavy weather, during which the casks broke. *Held*, that on the evidence the carrier was not liable. *Hus v. Kempf*,* 10 Ben., 231; *Carey v. Atkins*,* 6 Ben., 562.

§ 648. A clause in a bill of lading excepted "any act, neglect or default whatsoever" of the master and mariners, and provided that the carrier should not be liable for leakage or breakage of the goods, "when properly stowed." *Held*, that the carrier could not avoid liability for leakage and breakage occurring as the result of bad stowage by the master and mariners. *The Steamship Colon*,* 9 Ben., 354.

§ 649. A ship as a common carrier is not liable for damage caused by inherent defects in goods carried, such as stone-ware, if in apparent good order when put on board and properly stowed with reference to their character and such condition, but the consignee must pay freight both on those delivered broken as well as unbroken. *Dunham v. Sewer-pipes*,* 15 Int. Rev. Rec., 28.

§ 650. Where a bill of lading stipulates that the oil which was part of the cargo should be wet twice a week, and also the clause "not accountable for leakage or stowage," the carrier is liable for loss of oil by leakage caused by the casks not being properly wetted. *Hunnell v. Taber*,* 2 Spr., 1.

§ 651. Where damage done to the cargo is because of a defective arrangement of the vessel's bulwarks and stanchions, necessitating extra precautions as to dunnage, which precautions were neglected, the vessel is liable notwithstanding heavy weather was encountered on the voyage. *The Ship Howden*,* 5 Saw., 389.

§ 652. A vessel, unseaworthy by reason of defective condition of timbers, so that water comes in at a leak and collects in the hold, is answerable for damage caused thereby to cargo, especially where the leak, if discovered in due season, might have been stopped. *Standard Refinery v. The Centennial*,* 2 Fed. R., 409.

§ 653. Where a bill of lading of oil expressly disclaims liability for "rust, leakage, or shrinkage," the burden of showing negligence of the carrier in causing a leakage is upon the customer. Proof of greater than average leakage is not sufficient. The presence of other articles, such as dry hides, rags and wood, as part of the cargo, or the stowage of the oil between decks, are not facts conclusive against the carrier, provided it appear that, notwithstanding such carriage tends to dry the casks and produce leakage, the carriage of such other

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articles and the mode of stowing were customary on such voyages, and that the shipper made no objection. *The Invincible*,* 1 Low., 225.

§ 654. Under a provision in a bill of lading, that the vessel shall not be accountable for leakage, breakage or rust, the vessel is nevertheless responsible for negligence or want of skill and care in lading, stowage or delivery of the consignment. But negligence, or want of skill or care, must, in such case, be affirmatively shown as the cause of the damage alleged. Rule applied where plate glass was delivered broken, and the consignee showed that cases were piled flatwise, but not that such piling caused the damage. *The Ship Delhi*,* 4 Ben., 345.

§ 655. Cargo is presumed to be shipped in good condition; and if unjustifiable delay and dampness would have sufficiently caused the damage, the carrier's fault may be regarded as the occasion of the damage. *The Alice*,* 12 Fed. R., 496.

§ 656. Damage to tin by sea water, in the nature of rust, held to be embraced under the exception of liability for "rust" in the bill of lading, the shipper failing to show actual negligence on the carrier's part. *The Bristol*,* 6 Fed. R., 638.

§ 657. Where a cargo of salt was damaged through the neglect of the vessel's owner to provide means for keeping the limber holes open, so as to allow water taken in by leakage in a storm to flow freely to the well, and the master's omission to provide proper dunnage for the wings of the forward part of the vessel, where the salt was stored, the vessel was held liable for the loss. *The Brig Casco*, Dav., 184.

§ 658. Perils and dangers of the sea, etc.—Blowing of a vessel is a peril of the sea, which, however, unless excepted in the bill of lading, renders the vessel liable for damages to cargo thereby caused. *Crosby v. Grinnell*,* 9 N. Y. Leg. Obs., 281.

§ 659. A loss by perils of the sea, or dangers of river navigation, includes only such losses to the cargo as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. *The Northern Belle*,* 1 Biss., 529; affirmed, 9 Wall., 526 (§§ 163-166). And see *Bazin v. Steamship Co.*, §§ 1162-66; *Dupont de Nemours v. Vance*, 19 How., 162.

§ 660. The explosion of the boiler of a steam vessel is not a peril within the meaning of the exception of the ordinary bill of lading. *Propeller Mohawk*, 8 Wall., 153.

§ 661. The phrase "perils of the river" in a bill of lading for goods to be carried on a steamboat on the Mississippi river did not include fire, for a loss by which the carrier is liable, although not caused by the fault of the owners or their agents. *Garrison v. Memphis Ins. Co.*, 19 How., 312.

§ 662. Where the bill of lading contains an exemption against loss by fire, negligence cannot be inferred from the fact that the vessel was found to be on fire from some unknown cause, proper means being taken to have the fire extinguished. *The Buckeye*,* 7 Biss., 23.

§ 663. The exemption from fire in a bill of lading does not excuse the carrier, unless he uses reasonable care and diligence, or such as an ordinarily prudent man would exercise over his own property, whether for preventing the calamity or averting its effects. *Woodward v. Illinois Central R. Co.*,* 1 Biss., 403.

§ 664. Damages occasioned by vermin on board of a ship in the course of a voyage are not excused under clauses in the bill of lading which except "perils of the sea" or "dangers or accidents of navigation." *The Milotus*,* 5 Blatch., 335; S. C., 2 Int. Rev. Rec., 61.

§ 665. For damage done to bags of coffee by rats on the vessel, the carrier is responsible; and even though a bill of lading should expressly except damage done by rats or vermin, the fact of such injury is *prima facie* proof of negligence, which, unless rebutted, would leave the vessel in any event liable. *The Steamship Isabella*,* 8 Ben., 139.

§ 666. Where the charterers of a vessel, under a charter-party providing that the vessel was to be "cleaned as customary previous to loading homeward cargo," as the vessel carried out petroleum, after fumigation to destroy rats and cleansing as above, took directly or as assignees from the master bills of lading for the return cargo with the usual exceptions, such bills of lading govern the rights of the parties respecting matters covered by them; the facts that damage by rats, the same not being within the exceptions of the bills of lading, took place, and that damage was caused by petroleum, are proof that the fumigation was not skillfully or the cleansing properly done, as required by the charter. *The Carlotta*, 9 Ben., 1.

§ 667. Where a master fraudulently concerted with wreckers to strand his vessel and they came to his relief, a libel may be brought *in personam* against the owners by the owner of the cargo for indemnity, money having been extorted for salvage by reason of such fraud; and the contract under the bill of lading to convey the merchandise safely, dangers of the seas excepted, gives admiralty jurisdiction of the case. *Church v. Shelton*, 2 Curt., 271; *The William Taber*,* 2 Ben., 329.

§ 668. A ship-owner is not liable for the loss of goods carried on his vessel, occasioned by a collision at sea through no fault of his. *The Steamboat New Jersey, Olc.*, 444.

§ 669. Where a steamer and a schooner collided during the night, on Long Island Sound, and it was claimed by the steamer that she did not see the schooner until it was too late to change her course, *held*, that this showed negligence on the part of the steamer in causing the collision, so that for damage to the cargo on board, resulting from a fire incident to such collision, the vessel was answerable. *Held*, also, that the vessel was liable to all the libellants, although some of the cargo was shipped on simple receipts, and some on bills of lading which contained a special clause of exemption, on the carrier's part, from the risk of "fire" and "all other accidents." *The City of Norwich*, * 3 Ben., 575.

§ 670. The wetting of a cargo of barley by sea water, in consequence of a leak, and the destruction of the malting quality apparently from the same cause, *held*, as to a sound and staunch vessel, encountering heavy weather, excusable to the carrier as a "peril of the sea." *The Blue Jacket*, * 10 Ben., 248.

§ 671. Where everything has been done by the officers of the vessel which reasonable care and skill require in the navigation, the owners are not liable for damage which results to the cargo from grounding during perilous exposure. *Levy v. The Great Republic*, * 2 Woods, 33.

§ 672. Navigation of vessel.—The owners of a steamer undertaking to carry wheat by towing a barge are responsible for an accident which results from the master's want of proper knowledge as to the difficulties of navigating the river in which the steamer plies, and in passing under a bridge built on piers. *The Lady Pike*, 21 Wall., 1; reversing *S. C.*, * 2 Biss., 141.

§ 673. Duties of master in a fog in inland waters stated. The carrier is not excused for a loss which occurs by a peril which might have been avoided by the exercise of reasonable care and diligence. *The Rocket*, * 1 Biss., 354.

§ 674. A steamer towing a flat-boat upon a western river, when at its lowest stage and navigation extremely difficult, is not, in the absence of negligence, carelessness and want of skill, liable for its loss by a peril incident to navigation. *Brawley v. Steamboat Jim Watson*, 2 Bond, 356; *The Steamboat Angelina Corning*, 1 Ben., 109.

§ 675. "Unavoidable dangers of the river" and "dangers of the river" are essentially the same when excepted in a bill of lading. These words exonerate a carrier by inland waters from liability for a loss occasioned by hidden and unknown obstructions in a river, such as logs and stumps. *The Favorite*, * 2 Biss., 502.

§ 676. A bill of lading given by a carrier on the great lakes excepted "the dangers of lake navigation." Upon evidence showing an imprudent attempt by the master to enter port in a fog, whereby the vessel ran aground, also carelessness as to saving the cargo and an imprudent jettison of part of it, *held*, that the excepted "dangers" could not exonerate. *The Portsmouth*, * 9 Wall., 682; affirming *S. C.*, 2 Biss., 56; *S. G.*, *Onondaga Salt Co. v. Propeller Portsmouth*, * 1 Ch. Leg. N., 65.

§ 677. Where the vessel, without any necessity, attempts to enter a harbor in a dense fog, and is stranded, she is guilty of negligence. *The Costa Rica*, * 3 Saw., 538.

§ 678. The master has no right to expose his vessel, and the lives of his passengers, to unnecessary danger. *Ibid.*

§ 679. The weather, on the arrival of the vessel at the harbor, was threatening, and no pilot could be had; the captain followed a pilot boat and ran his vessel aground in consequence. Casks of brandy on deck were ordered overboard to lighten the vessel, and as they could not be thrown over they were staved. *Held*, that the captain was not in fault, and the loss was occasioned by "peril of the seas." *Van Syckel v. The Ewing*, * Crabbe, 405.

§ 680. Where a bill of lading excepts "dangers of navigation," a carrier on the lakes brings himself within the exception by showing that on a dark and stormy night, at the entrance of a harbor difficult of access, he mistook a light on shore, in a line with the pier light, for the latter, whereby the vessel went ashore and part of the cargo was damaged. Entering a lake harbor under such circumstances *held* not to impute negligence. *The Juniata Paton*, * 1 Biss., 15; *S. C.*, 1 Am. Law Reg., 262.

§ 681. Where the benefit of an exception is claimed from loss occasioned by a danger of navigation, the carrier should bring himself strictly within the exception. *Ibid.*

§ 682. The expression in the bill of lading, "the dangers of the sea only excepted," is not exclusive in any such sense as to make a carrier responsible for unavoidable accidents, such as running without fault upon a sand-bar at the entrance to a river. *The Jenny Jones*, * Deady, 82; *Levy v. The Great Republic*, * 2 Woods, 33.

§ 683. But where the vessel is thus grounded because of the carrier's remissness in procuring a pilot, and while the master attempts to take his vessel over the bar without such assistance, the vessel is liable for loss of the cargo, by jettison or otherwise, in consequence. *The Jenny Jones*, * Deady, 82.

§ 684. A vessel, chartered to carry oranges from Havana to New York, was delayed in consequence of the master's negligence in not carrying sail and was obliged to put into Dela-

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ware Bay on account of threatening weather. While anchored there snow came and the wind rose and the weather grew cold. The anchor chain parted, and the other anchor and the sail were so covered with ice that nothing could be done to prevent the vessel from being driven on shore. To float the vessel, a portion of the cargo was taken ashore in a frozen condition and transported by rail to New York, where it was tendered to and refused by the charterers, on account of its damaged condition. *Held*, that the vessel was liable for such damage. *Schooner Thomas Jefferson*, 3 Ben., 302.

§ 685. Master's conduct in distress.—Circumstances considered under which towage can be charged *pro rata* to the cargo. This expense may be disputed by the owners of the cargo, where the master fails to show that this was his only reasonable alternative in a case of distress. 928 Barrels of Salt, * 2 Biss., 319; S. C., 2 Ch. Leg. N., 317.

§ 686. In cases involving the construction of a charter-party and the validity of the acts of a master in executing a bottomry bond, the common law rules as to common carriers are inapplicable. A pledge by the master in a foreign port of the cargo, as well as of the ship and freight, does not bind the ship-owner for the value of the cargo. *Naylor v. Baltzell*, Taney, 55. See MARITIME LAW.

§ 687. Where a strong vessel, shown to be seaworthy and carefully managed, while carrying a cargo of wheat well stowed in a proper bin, experienced hard winds, rough waves and heavy weather, and leaked badly, the pumps becoming obstructed, and finally choked from the wheat getting into them, so that the vessel put into an intermediate port as a measure of safety, where, upon unloading in order to repair, it was found that much of the wheat was spoiled, *held*, that the damage might be presumed as occasioned by "perils of the sea," although the storm was not violent enough to dismast the vessel or carry away her sails. *Hooper v. Rathbone*, * Taney, 519.

§ 688. *Held*, also, upon circumstances shown, and the inconvenience of storing the wheat unloaded, while waiting for the owner's instructions, that the master was justified in selling the wheat at the port of repair. *Ibid*.

§ 689. Where a vessel carrying a perishable cargo is compelled, by bad weather and injuries, to put into a port of distress for repairs, and the master uses due diligence in repairing the vessel and in the care and preservation of the cargo, neither he nor the vessel should be held liable for loss caused by the decay and spoliation of such perishable cargo. Rule applied where oranges and lemons were thus injured and the master's course appeared judicious, honorable and according to the best advice he could obtain at the port of distress. *Lawrence v. Denbreuns*, * 1 Black, 170; *Debruns v. Lawrence*, * 16 Leg. Int., 324.

§ 690. Where the vessel is driven ashore by a "peril of the sea," within the exception of the bill of lading, and the master, in taking measures to save vessel and cargo, throwing overboard part, and selling what was saved, acted, in good faith and under a sufficient necessity, for the best interests of all concerned, and with reasonable discretion, the vessel is not liable for non-delivery of the cargo. But owners of parts of the cargo are, under such circumstances, entitled to their contribution in general average. *The Brig Wiley Smith*, * 6 Ben., 195.

§ 691. But a ship-master, who knows that his cargo is of a perishable nature, and has begun to deteriorate, and who fails, during a delay of his vessel at an intermediate port, especially where such delay is due to his failure to furnish her with an adequate crew, to take the usual and proper means for the cargo's preservation, renders the vessel liable for the damage ensuing. *The Bark Gentleman, Olc.*, 110.

§ 692. Capture by the enemy, where the carrier transhipped without necessity, affords him no excuse for loss of the goods. *Trott v. Wood*, 1 Gall., 442. See § 183.

§ 693. Where a vessel having flour on board capsizes at the wharf before sailing, the carrier should not make a peremptory sale of the damaged goods where the owner's directions may be procured. *The Joshua Barker*, Abb. Adm., 215 (§§ 1176-78).

§ 694. If the master, in an extreme emergency, pursues, in the exercise of a sound discretion, the course which, under all the circumstances, he deems the most expedient to promote the interests of all concerned, his discretion will be favorably regarded. *Soule v. Rodocanachi*, * 1 Newb., 504.

§ 695. When a ship, in consequence of a disaster occasioned by an excepted peril, puts into a port for repairs and considerable detention is likely, the master may, for the interest of the shipper, sell perishable goods in such port; and for the proceeds of such sale the vessel should duly account. *The Velona*, 3 Ware, 189 (§§ 933-935).

§ 696. The advice of a fair, competent and disinterested survey is strong justification of the course adopted by the master of the ship in case of distress. *The Amelie*, 6 Wall., 27; *The Blue Jacket*, * 10 Ben., 248.

§ 697. Though a loss by a jettison occasioned by a peril of the sea is ordinarily a loss by peril of the sea, yet if such jettison is rendered necessary by fault of the carrier, without

which the peril would not have occurred, the jettison must be attributed to such fault. (*Lawrence v. Minturn*, 17 How., 100, §§ 463-470, approved.) *The Portsmouth*,* 9 Wall., 682; affirming S. C., 2 Biss., 56.

§ 698. Where a voyage is virtually broken up by a delay at the port of shipment by reason of necessary repairs and the sickness of the master, mate and a portion of the crew, and where steamers and other vessels were constantly leaving for the port of consignment, it is the duty of the ship-owner to tranship and forward certain brandy aboard to the port of destination, failing which he is liable for its loss by leakage or otherwise during the delay. *Phelan v. The Schooner Alvarado*,* 4 Am. L. J., 332.

§ 699. Where the master of a coasting vessel, anchored in a harbor, has permitted his crew to go on shore, and, while he remains alone on board, the vessel is driven by a gale on a ledge of rock, dragging her anchor, there is such negligence in precautions against accident that the carrier is not excused for loss to the cargo. *The Schooner Sarah*,* 2 Spr., 31.

§ 700. *Miscellaneous points.*—A vessel must make good any damage occasioned to a cargo of sugar by negligence in pumping out the vessel or through the clogging of the limbers by coal dust or by sugar, or by both coal dust and sugar. *The Centennial*,* 7 Fed. R., 601.

§ 701. Where the master lays his vessel up for the winter with cargo on board, he is bound to take precautions to prevent injury from dampness or mould, and to protect his deck load against snow and ice. *The Tan Bark Case*,* 1 Brown, 151.

§ 702. *Burden of proof where loss occurs.*—As a loss by perils of the sea is an exception to the undertaking of a vessel to deliver cargo safely at the port, the carrier may show that the loss was occasioned by such peril; as otherwise he is liable (with the usual common law reservations) for the whole damage sustained, where part of the cargo is lost or injured. *Hooper v. Rathbone*,* Taney, 519.

§ 703. In an action to recover for damages to goods shipped by water, the presumption is that the goods were properly packed by the shipper, in a fit state for transportation, unless there is something in the appearance or condition of the goods, on their being opened after delivery, affording ground for reasonable inference that such was not the fact. *English v. The Ocean Steam Nav. Co.*,* 2 Blatch., 426; *Bazin v. Steamship Co.*, 3 Wall. Jr., 229; S. C., 5 Am. L. Reg., 559 (§§ 1162-66). See § 1180.

§ 704. And the burden is on the carrier, though the bill of lading contains the clause "weight, contents and value unknown." *English v. The Ocean Steam Nav. Co.*,* 2 Blatch., 426.

§ 705. A cask of spirits was found to be badly leaking when delivered. The bill of lading admitted that it was shipped in "apparent good order." *Held*, that *prima facie* evidence of external good order was thus afforded, and that the burden of proof is upon the carrier to show to the contrary and relieve himself of liability. *The Oriflamme*,* 1 Saw., 176.

§ 706. Where casks of wine are received in good order, to be delivered safely, "dangers of navigation excepted," and they are delivered at the end of the voyage, jammed and leaking badly, with much of the contents gone, the burden is on the carrier to excuse himself; if the proof leaves the cause of injury and loss in doubt, the consignee shall recover. *The Live Yankee*,* Deady, 420; *The Ship Black Hawk*,* 9 Ben., 207.

§ 707. But where the bill of lading for a cask of wine stated that the cask was "in good order," etc., but expressed further, "not accountable for leakage," and the cask was delivered empty at the end of the voyage, the proof showing that the leakage was due to a plugged hole in the cask, which was a latent defect existing when the cask was put on board, *held*, that the carrier was exempt from liability. *The Bark Obers*,* 3 Ben., 148.

§ 708. If a bill of lading states "contents unknown," the shipper must prove actual damage. *Vernard v. Hudson*,* 8 Sumn., 405.

§ 709. Wine was shipped under a bill of lading which stated that the casks were in good order and well conditioned, with the clause "weight and contents unknown; not liable for average, leakage or breakage." *Held*, that the exception exempted the ship from liability for leakage or breakage not arising from her own negligence; proof that the casks were of an inferior quality threw upon the claimant the burden of proving that an injury to the casks was caused by the negligence of the ship, and that the leakage was greater than the average in such casks. 630 Quarter Casks of Sherry Wine,* 14 Blatch., 517; *Vaughan v. 680 Casks of Sherry Wine*,* 7 Ben., 506.

§ 710. Where the injury is shown to be due to defective decks, through which water leaked badly, the carrier is responsible. It is not enough to show the occurrence of "perils of the sea" which might have caused the injury; the carrier must show that such was actually the cause of the injury in order to excuse the vessel under such circumstances. *The Ship Compta*,* 4 Saw., 375.

§ 711. The bill of lading of marble statuary receipted as for a case containing "marble works" in good order, "measurement and contents unknown." On delivery the consignee

opened the wooden case and found that the statutory was broken. *Held*, that the burden was on such libellant to show that the statutory was placed on board the vessel in good order, and that, in the absence of such proof, evidence of good stowage and handling, and of rough weather, exonerated the vessel. *The Vincenzo T.*, 10 Ben., 223.

§ 712. Fire being an excepted peril in a bill of lading, the burden is upon the shipper to establish that it was caused by the negligence of the carrier or his servants. *Railroad Co. v. Reeves*, 10 Wall., 176 (§§ 136-143); *Union Ins. Co. v. Shaw*, 2 Dill., 14, 21. And see, for a case of connecting carriers, *Railroad Co. v. Androscoggin Mills*, §§ 1285-1287. See § 1250.

§ 713. Facts considered showing damage to sugar from drainage of the sugar, and not from fault of the carrier. For "sweepings," where the carrier handled the sugar with ordinary care, and the bags were not strong enough to endure ordinary handling, the carrier is not chargeable as for clean sugar in any event. *Hewat v. Havemyer*, 1 Fed. R., 47.

§ 714. Where a vessel encounters a severe storm, sufficient to account for the damage within the exception in the bill of lading, the burden is on the shipper to prove negligence. *The Neptune*, 6 Blatch., 194.

§ 715. Where it is claimed that goods were injured by a chemical cause, the carrier should be prepared to prove the point by experts. *Turner v. Ship Black Warrior*, McAl., 184.

V. DELIVERY BY CARRIER; HIS COMPENSATION, ETC.

SUMMARY—*Liability for forfeiture*, § 716.—*Delivery at wharf, etc., with due notice*, §§ 717-738.—*Delivery to the proper person*, §§ 739-744.—*Demurrage in delivery from a vessel*, §§ 745-758.—*The carrier's compensation, freight, etc.*, §§ 759-770.—*Lien and remedies for freight*, §§ 771-776.—*Consignee's acceptance, claim for injuries, etc.*, §§ 777-780.—*Consignee's lien against the vessel*, §§ 781, 782.

§ 716. Master of vessel should know revenue and navigation laws of the country with which he trades. Ship-owners held liable as carriers where, through the master's failure to include goods in the manifest, as required by revenue laws of the port of destination, they were seized by the custom officers and forfeited. *Howland v. Greenway*, §§ 733-735.

§ 717. Delivery of goods on a wharf, with due notice to the consignee, was completed at Boston on a public fast-day. The consignee failed to remove the goods the same day, and part was consumed on the wharf by accidental fire. *Held*, that delivery on such a holiday was sufficient to divest the carrier's responsibility. *Richardson v. Goddard*, §§ 786-796; *Piereson v. Richardson*, §§ 797, 798; *Salmon Falls Manufacturing Co. v. Bark Tangier*, § 844; *Powhatan, etc., Co. v. Appomattox R. Co.*, § 1252.

§ 718. The interposition of sanitary or prohibitory laws controlling the carrier excuses him from delivering at the port specified in the bill of lading. And the usage of consignees at a particular port to receive shipments, during the quarantine season, at the quarantine grounds, is valid, and, if proved, will be regarded as affecting the carrier's contract. *Bradstreet v. Heron*, §§ 799-802.

§ 719. Carrier by water terminates his responsibility as such by a deposit on a proper wharf at the place of destination at a proper time and after such notice has been given to the consignee as to afford him reasonable opportunity to take possession. A special custom, mutually understood, or special contract, may vary this rule. *The Tybee*, §§ 803, 804.

§ 720. Usage and practice is to put goods not called for into a warehouse and protect them at the owner's extra charge. As to the care of such goods the carrier by water becomes answerable for negligence on the footing of a bailee for hire, the carriage risk terminating. *Ibid*.

§ 721. Mutual duties of vessel and consignees considered, where consignees give notice that they will not receive goods in unfavorable weather. The vessel is not compelled to regard the consignee's unreasonable notice; but on the other hand it should not abandon or injuriously expose the goods. *The Ship Grafton*, §§ 805-813; *The Grafton*, §§ 814, 815.

§ 722. Rule stated as to "usual or suitable wharf;" evidence of usage in respect of delivering cargoes of coal. *The Boston*, §§ 816-820.

§ 723. Consignee's right to designate place of discharge stated. But a wharf unreasonably inconvenient, inaccessible or dangerous to the vessel cannot be designated. *O'Rourke v. 221 Tons of Coal*, §§ 821-825.

§ 724. A private wharf is a proper place to discharge a cargo, where strangers who pay compensation may use it. *Ibid*.

§ 725. The carrier having offered to deliver all the goods at one place within a reasonable time and during proper hours of business, as the consignee may direct, is permitted, on the latter's refusal to designate a place or to receive them, to land them at a suitable place, give rea-

sonable notice, and, divesting himself of the risks of carrier, become a bailee. The consignee cannot require delivery in different parcels. *The Richmond*, §§ 826-830.

§ 726. Usage of delivery at a wharf stated. Consignee may choose wharf, and so may a majority in interest, where there are two or more consignees not unanimous. But this right to select a wharf, as against the carrier's own selection, is waived where prompt notice is not given him as to the particular wharf chosen. *The E. H. Fittler*, §§ 831-835.

§ 727. Damage done to the consignee's goods by negligently overloading the pier with other goods should be compensated, and the vessel is responsible if the master thus acted within the scope of his employment and not wantonly or maliciously. *Kennedy v. Dodge*, §§ 836-840.

§ 728. Where the master discharges at a wharf of his own selection, the consignees having failed to select promptly, he must not only select a customary and reasonably fit one for such goods as he carries, but must also discharge with proper care and skill; and especially where his selection of the wharf is against the consignee's express wishes. *Vose v. Allen*, §§ 841-848.

§ 729. The consignees of a ship, having control of her for the purpose of delivering the cargo, may arrange specially with the consignees of the cargo as to the time and manner of delivery. *The Grafton*, § 815.

§ 730. Due notice of arrival and unloading having once been given to the consignee, a temporary suspension of delivery at the wharf necessitates no new notice, provided the unloading proceed without unreasonable delay. As to hours of unlading the rule of proper time is not strictly construed against the carrier, for the consignee should seek to co-operate in unloading. *Salmon Falls Manufacturing Co. v. Bark Tangier*, §§ 844-847.

§ 731. Where the course of trade at a port requires delivery of wheat at an elevator, the carrier must so deliver, awaiting his turn. If delay be thus occasioned he has no right to deliver the wheat at another port on his own responsibility at the owner's expense, especially when he might have obtained the owner's instructions by telegraph and failed to consult him. *The Convoy's Wheat*, §§ 848-850.

§ 732. Consignees are entitled to a reasonable opportunity to ascertain whether goods delivered to them correspond with the terms of the bill of lading in quantity and condition. *Bradstreet v. Heron*, § 802.

§ 733. What constitutes delivery by a carrier by water. Good delivery on a wharf includes a fair opportunity to consignee to inspect and remove what belongs to him. Where goods of several consignees are piled together upon the wharf during a rainy day and covered with tarpaulins, they are not delivered so as to discharge the carrier. *Dibble v. Morgan*, §§ 851-853.

§ 734. "Dangers of seas" or "act of God" are not exceptions open to the carrier, where he lands goods in bulk on the wharf on a stormy day, covers them over, and leaves them in charge of one who should have placed them under shelter before the storm increased to a hurricane but deserted his post. *Ibid.*

§ 735. A clause in the bill of lading that "landing of the goods upon the wharf shall be considered a delivery to the consignee" does not excuse negligence of the carrier in connection with an incomplete delivery. *Dibble v. Morgan*, § 858; *The Steamship Ville De Paris*, §§ 854, 855.

§ 736. Whether carriers by inland waters may divest themselves of responsibility like carriers by sea, or not, usage long established, uniform and well-known, may regulate the mode of delivery. *The Richmond*, §§ 826-830.

§ 737. Methods of weighing grain considered. Where the carrier is charged with short delivery on a cargo of grain, and no bill of lading admitting the amount received was given, and the shipper attended exclusively to the loading and unloading, the burden of proving a short delivery is upon the latter. *Manning v. Hoover*, §§ 856-858.

§ 738. Where a carrier is charged with short delivery on a cargo of grain, it may be shown that by the modes of measurement adopted variations are frequent. *Ibid.*

§ 739. The bill of lading delivered to the shipper controls as to the person entitled to delivery, if different from that retained by the carrier. The carrier is bound to respect the indorsee of the bill so delivered, and if he delivers to another, regardless of such title, he is liable accordingly; and neither his ignorance as to who held the bill, nor the holder's delay in presenting it, affords excuse for the misdelivery. *The Thames*, §§ 859-864.

§ 740. When an express company, knowing that certain goods received for transportation to a place specified in its receipt were owned by the consignor, has delivered them without his knowledge to a third person on the consignee's order at the place of shipment, the consignor may hold the company liable, as for a misdelivery. *Southern Express Co. v. Dickson*, §§ 865-870.

§ 741. Common carriers are bound to deliver goods to the proper person. A negligent delivery to the wrong party, as between two adverse claimants, is inexcusable. Nor is negli-

gent misdelivery excused by the carelessness of the shipper in failing to have the goods properly marked and entered on the freight list. The *Huntress*, §§ 871-876.

§ 742. But stipulations by special contract or bill of lading may place the burden upon the consignees of attending at the vessel's discharge, so that each must see to the safety of his own consignments, as each package is delivered from the vessel. The *Steamer Santee*, §§ 877-879.

§ 743. Rule of bailment stated, which justifies actual delivery by bailee on the demand of the true owner. A carrier may thus excuse himself for failure to deliver to the order of the shipper. Nor does removal from the vessel without the true owner's assent impair such owner's right to recover it. The *Idaho*, §§ 880-887. And see *Rosenfield v. Express Company*, 1 Woods, 181 (§ 1139).

§ 744. Effect of wrongful intermixture considered in this connection. The *Idaho*, § 887.

§ 745. Where the carrier negligently loses the marks which identify the package, and undue delay in delivery results, he is responsible. *Rowe v. Steamer City of Dublin*, §§ 888, 889.

§ 746. Damages resulting from such undue delay considered. *Ibid*.

§ 747. There is a lien or privilege in admiralty for demurrage in case of a consignee's unreasonable delay in taking his cargo, even though demurrage was not expressly stipulated for by the bill of lading. The *Hyperion's Cargo*, §§ 890-892; *Donaldson v. McDowell*, §§ 893, 894; *Sprague v. West*, §§ 895-897; The *M. S. Bacon v. Erie & Western Trans. Co.*, §§ 898-900.

§ 748. If the ship-owner abandons his lien on the cargo for demurrage, he cannot bring a suit for damages against the shippers who were merely agents. *Stafford v. Watson*, §§ 901, 902.

§ 749. Where there is no special agreement as to the time within which the vessel shall be unloaded, the law implies a reasonable time after her arrival, according to the circumstances. As against risks of detention incidental to the discharge of such a cargo, the carrier should stipulate if he desires to be secure. *Henley v. Brooklyn Ice Co.*, § 903.

§ 750. But grain-bearing vessels on the great lakes consigned to an elevator must await their turn reasonably long; they cannot fix an arbitrary time for unloading against the shipper's consent. Custom in this respect approved. The *M. S. Bacon v. Erie & Western Trans. Co.*, §§ 898-900; *Weaver v. Walton*, §§ 904-906.

§ 751. Custom of Chicago stated as to allowing consignee one day to find a dock. Great fire of 1871 excused delay in this respect. *Fulton v. Blake*, §§ 907-912.

§ 752. Duty of the consignee of many vessels is to provide such reasonable dock room as his business usually requires. If he provide for expected vessels in their order, a vessel arriving out of time cannot claim for demurrage, but should await its turn. *Ibid*.

§ 753. Where the consignee of a cargo requires it to be taken to a particular place, and the vessel is there detained in getting a berth, the consignee should pay the stipulated demurrage, the vessel not being at fault. Demurrage "after four lay-days" refers to delay after arrival at the specified place of delivery, and not to delay after getting a berth at the place required by the consignee; usage to the contrary in interpreting such phrase held insufficient. *Philadelphia, etc., R. Co. v. Northam*, § 913.

§ 754. Contract construed as to demurrage allowable to the vessel where it was not ready to deliver within the time stated for discharging. Hypothetical results of such tardiness are not to be considered. *Hall v. Eastwick*, § 914.

§ 755. Where a bill of lading stipulates for demurrage "after three days," the lay-days do not begin until after the arrival at the wharf or readiness to deliver cargo. If the vessel becomes frozen up, without fault of master or consignee, too far from the wharf for a safe delivery of the cargo, there is no such completion of the voyage as to permit of demurrage. *Aylward v. Smith*, §§ 915-917.

§ 756. New form of bill of lading construed, stipulating that lay-days should commence "twenty-four hours after arrival at the port and notice thereof to the consignee." Demurrage allowed where consignee's wharf was inaccessible by reason of ice, and the master reached another suitable wharf at the port and there gave notice. *Choate v. Meredith*, § 918.

§ 757. "Privilege of reshipping" inures to the benefit of the carrier, but not, ordinarily, so as to excuse a delay in delivering on his part. A carrier should deliver within a reasonable time. But long established, uniform and well-known usage to the effect that, in a bill of lading given by a Mississippi steamboat, the words "privilege of reshipping" sanction a delay at the falls of the Ohio until the water rises, will justify a corresponding interpretation of the contract. *Broadwell v. Butler*, §§ 919-921.

§ 758. Where delay in discharging a vessel is owing to the prevalence of an epidemic among horses, and the carrier uses reasonable diligence under the circumstances, no demurrage can be claimed by the consignee in the absence of express contract binding the carrier to deliver within a specified period. *Coombs v. Nolan*, § 922.

§ 759. Freight is the hire agreed upon for the carriage of the goods. It is payable only when the merchandise is ready to be delivered. Where a shipment is landed in parts, freight upon the whole shipment cannot be demanded on a part delivery. *Brittan v. Barnaby*, §§ 928-937.

§ 760. In computing freight on hides, the weight on delivery should be taken, especially if the weight was not ascertained at the shipment. Whether weight on receipt or weight on delivery should be the basis of computation in other cases considered. 9,681 Dry Ox Hides, §§ 928-931.

§ 761. Where weighing is necessary to enable the vessel to compute the freight, the vessel should bear the expense. *Ibid*.

§ 762. Though the bill of lading should stipulate for increasing the freight by each bridge the vessel may pass through, the master cannot claim for going to a distant wharf, through unnecessary bridges, against the consignee's wishes. *The Boston*, § 817.

§ 763. No freight is due, whether full or *pro rata*, where a vessel has been captured and condemned with its cargo at an intermediate port, though part of the cargo is restored and sold at the same port. *Sampayo v. Salter*, § 933.

§ 764. Nor generally in case of a compulsory sale at an intermediate port, by reason of disaster. *The Velona*, §§ 933-935; *The Ann D. Richardson*, §§ 936-939.

§ 765. When a cargo is so far damaged by perils of the sea that its delivery *in specie* at the port of destination becomes impossible, the shipper is not liable for freight out of the proceeds of the sale thus compelled. *Ridyard v. Phillips*, § 940.

§ 766. General principles stated on which freight is payable, where the transportation is delayed or broken up. Where through any cause, not within control of the master, the voyage is terminated at an intermediate port, where the cargo is voluntarily received by the owner, freight *pro rata* may be demanded. *Bork v. Norton*, §§ 941-944.

§ 767. The fact that a vessel is dismantled and temporarily delayed by stress of weather at an intermediate point does not break up the voyage or deprive the carrier of his opportunity to earn freight. And if the owner sells the cargo while thus temporarily unloaded at the place of detention, freight is payable. *Murray v. Aetna Ins. Co.*, §§ 945-947.

§ 768. A transportation contract between two stated points, A. and B., and all intermediate points, does not justify the contractor in claiming to furnish transportation and charge freight where vessels come from a lower point, C., and touch at B. without discharging there, intending to make a continuous trip from C. to A. *Scott v. United States*, §§ 948, 949.

§ 769. The assignee of a bill of lading cannot require a delivery of the cargo without paying freight. He may have it examined and weighed to verify its quantity and quality. But if he insist upon unreasonable methods of weighing, it is a refusal to receive, and the person assigning the bill of lading may act accordingly. *The Schooner Treasurer*, §§ 950, 951.

§ 770. One to whom a bill of lading is assigned as security for the payment for goods purchased of him by the shipper under the bill of lading is not liable to the ship-owner for the freight. *Swett v. Black*, § 952.

§ 771. Maritime liens do not depend on possession. But lien for freight is lost by unconditional delivery of the goods or by stipulating for credit beyond the time when the vessel was to arrive and the goods were to be delivered. Cargo of the Ship *Anna Kimball*, §§ 953, 954; *Scars v. Wills*, §§ 955-958. See *The Steamer Santee*, §§ 977-979.

§ 772. Presumption is against an intended displacement of a ship-owner's lien for freight. But clear stipulations for credit will displace such lien; in which case the subsequent insolvency of the shipper will not restore the lien. But a bill of exchange given for a precedent instalment of freight does not amount to a payment thereof; and the lien for such instalment not having been waived, such lien holds good. *The Bird of Paradise*, §§ 959-967.

§ 773. Circumstances stated under which ship-owner's lien is kept or waived. Discharge of cargo upon the wharf with notice preserves the lien, and a consignee cannot insist upon removing goods to his store for inspection without paying freight, unless there is an agreement to preserve the lien upon such transfer of possession. *The Eddy*, §§ 968-976.

§ 774. Where household goods are received by a carrier, with knowledge of the fact that a through contract for carrying them had been made, and that the owner had paid for the service, he cannot claim a lien on the goods for freight. *Marsh v. Union Pacific R'y Co.*, §§ 977-980.

§ 775. Trover lies for the value of household goods illegally withheld under a claim of lien for freight money. Rule of damages stated. *Ibid*.

§ 776. Delivery of goods and demand of freight involve concurrent duties. The consignee is not bound to pay until the goods are delivered, nor the master to deliver until the freight is paid. Libel for freight held to have been prematurely filed where the master had not completely discharged so as to give the consignee full opportunity to inspect, nor demanded freight upon a complete delivery. 1,365 Vitrified Pipes, §§ 981-983.

§ 777. A tender of the cargo to the consignee, though not formal, may be sufficient where the consignee refuses, unjustifiably, to receive it and a reasonable time is given him to accept. *O'Rourke v. 221 Tons of Coal*, § 824. And see *Bradstreet v. Heron*, § 802.

§ 778. If, after goods are delivered, the consignee finds they have been injured during transportation, he may recover against the carrier, notwithstanding he sells the damaged goods without previously notifying the carrier of the damage, and stating his claim. Such an act, however, is suspicious, and the proof should be clear. *The Elmira Shepherd*, §§ 984, 985.

§ 779. A consignee, who has accepted the cargo, cannot annul the contract on account of a deviation. A custom for ships from New Orleans, when short of freight, to stop and complete their cargoes at Havana, may also bind him. But for deviation in general the consignee may be allowed damages commensurate with his injury, notwithstanding his acceptance of the cargo. *Thatcher v. McCulloh*, §§ 986-989.

§ 780. Damages suffered by the consignee for negligent unloading may be recouped in the libel for freight brought *in personam*; but an affirmative decree will not be given in favor of the defendant, though the damage be proved to exceed the claim of freight. *Kennedy v. Dodge*, § 839.

§ 781. Where a voyage was abandoned and the vessel taken to an intermediate port, where the agent of the owners of the cargo sold the cargo to the master, *held*, that the owners of the cargo had no lien upon the vessel, having virtually assented to accept it at the intermediate port. *Winterport, etc., Co. v. Schooner Jasper*, §§ 990-992.

§ 782. A maritime lien requiring to be enforced by libel against the vessel should be asserted within a reasonable time. *Ibid*.

[NOTES.— See §§ 993-1121.]

HOWLAND v. GREENWAY.

(22 Howard, 491-503. 1859.)

APPEAL from U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.— This was a libel in the district court of the United States for the southern district of New York against the barque Griffin and her owners, on a contract of affreightment by the appellees. The libel stated that in November, 1852, at New York, there was shipped on that barque, of which the appellants are owners, one hundred and thirty-two boxes of chairs and furniture, to be delivered at the ship's tackles at the port of Rio de Janeiro, to the appellees, according to the terms of a bill of lading. That the regulations of the port of Rio de Janeiro require the owner or master of a vessel arriving there to submit to the officers of the customs a manifest of the cargo on board, and that cargo not mentioned in the manifest cannot be passed through the custom-house, but is liable to seizure and confiscation for that omission.

That the master of the barque omitted to enter the said consignment on the manifest rendered by him on his arrival, and in consequence the boxes were seized and confiscated, and so were lost to the consignees. The libelees answer that the goods referred to in the libel were discharged in accordance to the bill of lading, under the laws and regulations of the port, and under the order of the proper government officers, and went into the custom-house under the direction of the libelants, they paying the duties thereon. That after the delivery at the ship's tackles of the said shipment the consignees became responsible for their safety, and that they were not confiscated or forfeited to the government nor abandoned by the consignees to the owners of the ship. Upon the pleadings and proofs a decree was rendered against the libelees in the district court, which was affirmed in the circuit court on appeal.

It appears from the testimony that it is the duty of a master of a foreign vessel, upon her arrival at the port of Rio de Janeiro, to deliver to the proper officer (*guarda mor*), upon his visit to the vessel, his passport, manifest and list of passengers. He is required, "at the end of the manifest," to make such "dec-

larations or statement for his security by adding any packages that may be omitted or exceeded in his manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error." That "when it is proved that the vessel brought more goods than are specified or contained in the manifest and not declared by the master, such goods will be seized and divided among the seizers, the master also paying into the national treasury a fine of one-half their value, besides the customary duties thereon." It further appears that the Griffin reached the port of Rio de Janeiro in January, 1853, and that her master rendered her passport, manifest and list of passengers, and was required to make any statement or declaration in addition, and informed that no other opportunity would be afforded to him. The master answered that he had no addition to make or declaration to record. The goods were discharged, according to the custom of the port, under the direction and orders of the revenue officers, into the custom-house, and while there, and before the entry had been completed, they were seized and confiscated under the regulation before stated. In a petition by the master to the Brazilian government for a remission of the forfeiture and penalty he had incurred, he says: "That on the last voyage of the vessel a seizure was made of one hundred and thirty-two packages of furniture, more or less, on the ground that they were not entered in the manifest, and, although the petitioner acknowledges that the custom-house officers have acted according to the instructions of the department, still there are reasons of equity which render this seizure contrary to law."

These reasons were that the Brazilian consul at New York was a novice in his office and had failed to give him accurate information, and had approved of a manifest full of mistakes, and that the master had acted in good faith, and was obviously free from any suspicion of a design to defraud the revenue. This petition was referred to the director-general of the revenue, who returned for answer: "That taking into consideration the quantity of the packages seized (one hundred and thirty cases), and the quality of the goods therein contained (furniture), and more particularly the circumstances which occurred before the seizure thereof (the packages having been landed and the duties paid), there is no plausible reason to ascribe to fraud or bad faith the omissions of the said packages in the manifest of the vessel in which they were imported; but, on the other hand, the circumstances of the proof of fraud, or even of its presumption, is not essential in order to render the seizure a legal one in the present hypothesis. It is expressed in the case before mentioned, in the articles 155, 156, of the general regulations of the 22d June, 1836, that the simple fact of finding either more or less packages is punishable with the penalties therein decreed; and the seizure to which the petition refers, having been made and adjudged in conformity with the provisions of the said article 155, I am of opinion that the decision of the custom-house ought to be confirmed." The decree was entered accordingly. The testimony shows that the packages were sold by the inspector of the customs as forfeited, and that the consignees sustained a total loss. There is no testimony to show that they contributed to produce this result.

§ 783. *Master of vessel should know the revenue and navigation laws of the country with which he trades.*

It was the duty of the master of the barque to acquaint himself with the laws of the country with which he was trading, and to conform his conduct to those laws. He cannot defend himself under asserted ignorance or erroneous

information on the subject. It is the habit of every nation to construe and apply their revenue and navigation laws with exactness and without much consideration for the hardship of individual cases. The magnitude and variety of the interests depending upon their efficient administration compel to this, and every ship-master engaged in a foreign trade must take notice of them. *The Vixen*, 1 Dod., 145; *The Adams*, Edw. Adm., 310.

§ 784. — *ship-owners are liable for miscarriage through master's ignorance of such laws.*

In the case before us the master was informed of his duties upon his arrival at the port of destination by the officers of the customs, and his embarrassment and loss can be attributed to nothing but his inattention. The question arises whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils of the sea only excepted. Under such a contract, nothing will excuse them for a non-performance, except they have been prevented by some one of those perils, the act of the libelants, or the law of their country. No exception of a private nature, which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance. *Atkinson v. Ritchie*, 10 East, 533. In *Spence v. Chodwick*, 10 Q. B., 517, the defendants pleaded "that the ship, in the course of her voyage to London, called at Cadiz; and while there, the goods were lawfully taken out of the ship by the officers of the customs on a charge of being contraband under the laws of Spain, without default on the part of the officers of the ship. The court affirm the rule that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was for the libelees to furnish the evidence to discharge themselves for the failure to perform their contract.

§ 785. *Delivery to customs officer no discharge of the carrier.*

They insist that the delivery of the cargo into the custom-house under the order of the officers, and the payment of the duties by the consignees, was a right delivery, and that the consignees are responsible for their safety afterward. We do not concur in this opinion. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was a cause of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners.

The appellants complain that the proof does not support the decree in respect of the damage assessed. One witness testifies to the market value of the packages in Rio de Janeiro, and another approximates their cost in New York, and upon this testimony the assessment was made. It was competent to the appellants to introduce testimony in the circuit court or in this court, upon that subject, but none has been submitted.

We should not be justified in concluding the decree to be erroneous under the circumstances. Decree affirmed.

RICHARDSON v. GODDARD.

(23 Howard, 28-45. 1859.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The barque “Tangier, a foreign vessel in the port of Boston,” is charged in the libel with a failure to deliver certain bales of cotton, according to her contract of affreightment. The answer admits the contract, and alleges a full compliance with it, by a delivery of the cargo on the wharf; and that after such delivery a part of the cargo was consumed by fire before it was removed by the consignees. The libelants amended their libel, admitting the receipt of one hundred and sixty-three bales, and setting forth, as a reason for not receiving and taking away from the wharf that portion of the cargo which was unladen on Thursday, “that, by the appointment of the governor of Massachusetts, that day was kept and regarded by the citizens as ‘a day of fasting, humiliation and prayer,’ and that from time immemorial it has been the usage and custom to abstain from all secular work on that day;” and consequently, that the libelants were not bound to receive the cargo on that day; and that such a delivery, without their consent or agreement, is not a delivery or offer to deliver in compliance with the terms of the bill of lading.

§ 786. *Questions of law raised on the trial.*

Three questions of law were raised on the trial of this case below: 1. Whether the master is exempted from liability for a loss occasioned by accidental fire, after the goods are deposited on the wharf, by the act of congress of March 3, 1851. 2. Whether the master is liable under the circumstances of this case for the loss of the cotton, on the general principles of the maritime law, excluding the fact of fast-day. 3. If not, whether the right of the carrier to continue the discharge of his cargo is affected by the fact that the governor had appointed that day as a general fast-day.

§ 787. *Facts considered as to whether there was sufficient delivery.*

As our decision of the second and third of these points will dispose of this case, we do not think it necessary to express any opinion on the first. We will first inquire whether there was such a delivery of cargo in this case as should discharge the carrier under this contract of affreightment, irrespective of the peculiar character of the day. The facts in evidence, so far as they are material to the correct decision of this point, are briefly as follows:

The barque Tangier arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery wharf; but at the request of the consignees, and for their convenience, she “hailed up” at Lewis’ wharf. She commenced the discharge of her cargo on Monday, the 7th, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unloading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the consignees, and they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting three hundred and twenty-five bales, which remained on the wharf over night. On Thursday morning the wharf was so far cleared that the unloading was completed by one o’clock P. M. On that day the libelants took away about five bales and postponed taking the rest till the next day, giving as a reason that

it was fast-day. About three o'clock of this day, the cotton remaining on the wharf was consumed or damaged by an accidental fire.

§ 788. *Usage of trade affects the question of a sufficient delivery.*

The contract of the carrier in this case is "to deliver, in like good order and condition, at the port of Boston, unto Goddard & Pritchard." What constitutes a good delivery to satisfy the exigency of such a contract will depend on the known and established usages of the particular trade, and the well-known usages of the port in which the delivery is to be made. A carrier by wagon may be bound to deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

§ 789. *Carrier by water not bound to make personal delivery; delivery at wharf or out of ship sufficient.*

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions, must therefore be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody. Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian before the consignee had proper time and opportunity to take them into his possession and care, would not fulfil the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.

§ 790. *Delivery shown to be proper unless affected by unloading on a public fast-day.*

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them after full and fair notice. The goods were deposited for the consignees in proper order and condition, at mid-day, on a week day, in good weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

§ 791. *Delivery on a fast or public holiday, whether unlawful.*

II. This inquiry involves the right of the carrier to labor on that day, and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it he is not bound to await the convenience or accom-

moderate himself to the caprice or conscientious scruples of the consignee. The master of a ship usually has a certain number of lay-days. He is bound to expedite the unloading of his vessel, in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast-day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as insurer of his property, to suit his convenience or his conscience.

§ 792. *Lawfulness of work on fast-day under Massachusetts law.*

Let us inquire then, first, whether there is any law of the state of Massachusetts which forbids the transaction of business on the day in question; 2dly. If not, is there any general custom or usage engrafted into the commercial or maritime law, and making a part thereof, which forbids the unloading of vessels and a tender of freight to the consignee on the day set apart for a church festival, fast or holiday; and 3dly. If not, is there any special custom in the port of Boston which prohibits the carrier from unloading his vessel on such a day, and compels him to observe it as a holiday?

1. There is no statute of Massachusetts which forbids the citizen to labor and pursue his worldly business on any day of the week, except on the Lord's day, usually called Sunday. In the case of *Farnum v. Fowle*, 12 Mass., 94, it is said by Chief Justice Parker: "There are no fixed and established holidays in Massachusetts, in which all business is suspended," except Sunday.

§ 793. *General law on the subject of work on Sunday or holidays.*

2. The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by the Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church. Hence it is a maxim of the civil law, "*Diebus dominicis mercari, judicari vel jurari non debet.*" This day, with others soon after added by ecclesiastical authority (such as "*Dies natalis*," or Christmas, and "*Pascha*," or Easter), were called "*Dies festi*," or "*Feriae*," which we call festivals, saints' days, holy days, or holidays. In the thirteenth century the number of these festivals enjoined by the church was so increased that they exceeded the number of Sundays in the year. The multiplication of them by the church had its origin in a spirit of kindness and Christian philanthropy. Their policy was to alleviate the hardships and misery of predial slaves and the poor laborers on the soil who were compelled to labor for their feudal lords. But afterwards, when these vassals were enfranchised and tilled the earth for themselves, they complained that "they were ruined" by the number of church festivals or compulsory holidays. In 1695, the French king forbade the establishment of any new holidays, unless by royal authority; and the church went further, and suppressed a large number of them, or transferred their observance to the next Sunday. See Dalloz, vol. 29, tit. "*Jour ferie*," and 2d *Campeaux droit civil*, page 168. The same observance of these festivals was required by the ecclesiastical authorities as that which was due to Sunday. Men were forbidden to labor or to follow their usual business or employments. But to this rule there were many exceptions of persons and trades who were not subjected to such observance. Without enumerating all the exceptions, we may mention that, by the canon law, the observance of these days did not extend

"to those who sold provisions; to posts or public conveyances; to travelers; to carriers by land or water; to the lading and unlading of ships engaged in maritime commerce."

Thus we see that in those countries where these holidays had their origin and the sanction both of church and state, they were not allowed to interfere with the necessities of commerce, or to extend to ships or those who navigate them. And it would certainly present a strange anomaly if this country, in the nineteenth century, should be found re-establishing the superstitious observances of the dark ages with *increased rigor*, which both priest and sovereign in the seventeenth have been compelled to abolish as nuisances. In England and other Protestant countries, while a more strict observance of the Lord's day is enforced by statute, the other fasts and festivals enjoined by the church have never been treated as coming within the category of compulsory holidays. Every man is left free to follow the dictates of his conscience in regard to them. Formerly their courts sat even on Sunday; nor were contracts made on that day considered illegal or void till the statute of 29 Charles II., c. 27, was enacted, whereby "no person whatever is allowed to do or exercise any worldly labor or work of their callings on the Lord's day." But this prohibition was never extended, either by statute or usage, to other church fasts, festivals or holidays. It is true that there are three days in the year, to wit, "Candlemas, Ascension and St. John the Baptist," in which the courts do not sit and the officers are allowed a holiday. But there is no trace of any decision by their courts that worldly labor was prohibited on those days, or any usage that ships should not be unladen and freight delivered and received on such days. These saints' days and church fasts or festivals are treated as voluntary holidays, not as Sabbaths of compulsory rest.

In the case of *Figgins v. Willie*, 3 W. Black., 1186, where a public officer claimed a right of holiday on the feast day of St. Barnabas, Chief Justice De Gray says: "I by no means approve of these self-made holidays; the offices ought to be open." And in *Sparrow v. Cooper*, 2 W. Black., 1315, the same judge observes, in reference to the same day: "There is no prescriptive right to keep this as holiday. It is not established by any act of parliament. The boards of revenue, custom-house and excise may act as they please, and pay such compliment to their officers and servants as they shall judge expedient by remitting more frequently the hard labor of their clerks, but they are no examples for the court." And the Justices Gould and Blackstone severally observe: "My objection extends to all holidays as well as St. Barnabas day." It may be observed, in passing, that there, as well as here, the class of persons most anxious to multiply holidays were the public officers, apprentices, clerks and others receiving yearly salaries.

§ 794. *Holidays in American law are not compulsory.*

It is a matter of history that the state of Massachusetts was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience, and that while they enforced the most rigid observance of the Lord's day as a Sabbath, or day of ceremonial rest, they repudiated with abhorrence all saints' days and festivals observed by the churches of Rome or of England. They "did not desire to be again brought in bondage, to observe days and months, and times and years." And while they piously named a day in every year which they recommended that Christians should spend in fasting and prayer, they imposed it on no man's conscience to abstain from his worldly occupations on such day, much less did they anticipate that it would be per-

verted into an idle holiday. The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. In almost every state in the Union a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast-day that all labor should cease, and the day be observed as a Sabbath or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast-day.

§ 795. *Fast-day usage as to delivery at port of Boston.*

III. Does the testimony in this case show that from time immemorial there has been a well known usage, having the force and effect of law in Boston, which requires all men to cease from labor, and compels vessels engaged in foreign commerce to cease from discharging their cargoes, and hinders consignees from receiving them? We do not know this fact judicially, for (except in this case) there is no judicial decision, or course of decisions, in Massachusetts, which establishes the doctrine that carriers must cease to discharge cargoes on this day in the port of Boston, but rather the contrary. And after a careful examination of the testimony, we are compelled to say that we find no sufficient evidence of such a peculiar custom in Boston, differing from that of all other commercial cities in the world. The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half the day, and some not at all. Public officers, school-boys, apprentices, clerks and others who live on salaries, or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libelants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

§ 796. *Delivery on the wharf on fast-day held sufficient.*

On the whole, we are of opinion that the barque Tangier has made good delivery of her cargo to the consignees according to the exigency of her bill of lading, and that the decree of the circuit court should be reversed, and the libel dismissed with costs. (a)

PIERSON v. RICHARDSON.

(Circuit Court for Massachusetts: 1 Clifford, 383-387. 1860.)

STATEMENT OF FACTS.—Suit for non-delivery of cotton which was unloaded from a vessel on fast-day and was burned. Further facts are stated in the opinion of the court.

(a) This decision affirms that of WARE, J., in the district court, reported as *The Bark Tangier*, 8 Ware, 110.

Opinion by CLIFFORD, J

Notice was given to the libelants of the arrival of the vessel, and of the master's readiness to deliver the cotton, at the same time, and by the same messenger who notified the other consignees. Some twenty-seven bales or more of the libelants' cotton were discharged on Monday and Tuesday, before the work was suspended by the stevedore. After the notice was received by the libelants, they employed a truckman to attend to the business of removing the cotton from the wharf, and gave him directions in regard to the whole consignment. None of the cotton, however, was removed on Monday, and on Tuesday they were again notified and told that the cotton was out and ready, and that the stevedore had been obliged to suspend the work because the wharf was blocked up. Failing to get the cotton removed, the master went to their counting-room on Wednesday morning, and told one of the firm that the cotton was lying on the wharf. On that occasion the truckman was sent for, and the master was referred to him for the necessary explanations; and, as an excuse for his remissness, he said, in effect, that, being much pressed with business, he supposed that he could delay this work for a while. He was examined as a witness, and testified that he went to the wharf on Tuesday, but found none of the cotton, except two bales, which were not accessible, and that he went again on Wednesday, after the interview at the counting-room, and took away twenty-five bales, which were all he could find on the wharf. Near sunset of that day the master says he saw the truckman on the wharf, and that the truckman told him that he would come the next day and take the cotton away, if the stevedore would put it on the wharf. But the truckman expressly denies that he ever held any such conversation. Be that as it may, it is nevertheless clearly to be inferred, from all the circumstances, that he must have known that the work of discharging the vessel would be resumed as soon as the obstacles which had occasioned it to be suspended were removed. All of the other facts respecting the unloading of the vessel are substantially the same as those exhibited in the case appealed to the supreme court. Assuming that Thursday was a suitable day for the unlading of the bark and for the delivery of the consignment, it is quite obvious that the acts performed by the master were fully equivalent to an actual delivery of the goods, within the principles laid down in that case. He gave due and reasonable notice of the arrival of the vessel, and of his readiness to deliver the consignment. All the goods were properly discharged from the vessel, and duly landed on a suitable wharf and at a suitable time, and the consignment was properly separated from the others, and the goods so placed upon the wharf as to be conveniently accessible for the purpose of removal.

§ 797. *Where the master has commenced delivery of the cargo, he may continue and complete it on a fast-day.*

But it is insisted by the libelants that Thursday, being the annual fast of the state for that year, was not a suitable day for the performance of those acts; and that is the only remaining question to be considered. Much discrepancy exists in the testimony of the witnesses upon this point. Some affirm that the custom of the port is not to unlade, deliver or receive goods on that day. Others state the proposition either with many exceptions or with material qualifications. But the weight of the evidence fully sustains the conclusion that there is no such general custom to abstain from labor on that day as forbids the master of a merchant vessel, in a case where he has previously commenced to discharge his vessel, from completing the unlading on fast-day, and

delivering the consignment. On the contrary, the evidence taken as a whole clearly shows that the custom is not to suspend under such circumstances, but that the stevedores almost invariably continue the work, and when practicable complete it.

§ 798. *Fast-day regarded as a working day, in the absence of any statute or usage.*

Such being the state of the evidence, it is clear that the question is closed by the decision of the supreme court. *Richardson v. Goddard*, 23 How., 28 (§§ 786-796, *supra*). Whatever differences of opinion there may be as to the true interpretation of the judgment of the court in that case, all must agree that the master of a merchant vessel, within the principles there laid down, is fully authorized to continue and complete the discharge of the cargo and the delivery of the respective consignments on fast-day, in a case where he had commenced the work prior to the occurrence of that day. To that extent the decision clearly goes; and in the judgment of this court it goes much further, and fully justifies the position assumed by the counsel of the respondents, that, for the purpose of lading or unlading ships engaged in maritime commerce, fast-day, in the absence of any statute to the contrary or established general usage, must be considered as an ordinary working-day. Nothing less can be inferred from the language of the court when they say: "This inquiry involves the right of the carrier to labor on that day and discharge cargo, and not the right of the consignee to keep a voluntary holiday and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of the ship usually has a certain number of lay-days. He is bound to expedite the unlading of his vessel in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think proper to keep Saturday as his Sabbath, and to observe Friday as a fast-day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as an insurer of his property to suit his convenience or conscience." Other parts of the opinion are to the same effect, and even more decisive; as, for example, the court say: "The proclamation of the governor is but a recommendation. It had not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary and not of compulsion, and holiday is a privilege and not a duty. In almost every state in the Union a day of thanksgiving is appointed, in the fall of the year, by the governor, because there is no ecclesiastical authority which would be acknowledged by the different denominations. It is an excellent custom, but it binds no man's conscience, or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast-day, that all labor should cease, and the day be observed as a Sabbath or a holiday. It is not so treated by those who conscientiously observe every Friday as a fast-day." Having come to the conclusion that the question is controlled by the decision of the supreme court, it is unnecessary to enter into any further discussion upon the subject. It being understood that a new hearing was granted at the last term, the proper decree is, that the decree of the district court be affirmed, with costs.

BRADSTREET v. HERON.

(District Court for New York: Abbott's Admiralty, 209-214. 1848.)

Libel for balance of freight due on a cargo of cotton.

Opinion by BETTS, J.

STATEMENT OF FACTS.—Two objections in bar of this action were relied upon by the defendants. First, that the cotton was not delivered at the port of New York, in fulfilment of the shipping contract. Second, that the cotton, when delivered, was not in good order and well conditioned. The vessel arrived in the port of New York during the latter part of July, and under the laws of the state was subject to quarantine at Staten Island. The cotton was there discharged on board of lighters employed by the respondents, and was taken to Brooklyn, where it was received and stored by them. It was not only proved that vessels from New Orleans, at that period of the year, were prohibited by law from landing cotton in the city of New York, but also that it was the established usage for owners and consignees to receive their shipments at the quarantine, as being delivered pursuant to bills of lading engaging to make delivery in New York.

§ 799. *Delivery at the specified port is excused when sanitary or prohibitory laws intervene.*

In either point of view these facts defeat the obligation. The owners of the ship are excused from fulfilling their engagement to deliver their cargo in the city, by the interposition of sanitary or prohibitory laws, which control them in that respect, as the contract to deliver will be construed to be subject to all restraints of government, and that risk consequently falls upon the shipper. The case of *Morgan v. Insurance Co. of North America*, 4 Dal., 455, is an authority upon this point. In that case the cargo was shipped from Philadelphia for Surinam, August 7, 1799, at which time the colony of Surinam was in possession of the Dutch. The vessel arrived in the River Surinam the 17th of September following, but meantime the colony had been conquered by the British forces. Permission was obtained from the British commander for the vessel to go up the river to the town Paramanto, which she did, and lay in the harbor for a week; but the British officers absolutely refused permission to land any article of the cargo whatever, excepting the provisions, whereupon it was brought back to Philadelphia. The supreme court of Pennsylvania held that under these circumstances freight was earned. Chief Justice Stillman says: "The owner of the ship has been in no fault whatever. When he took the goods on freight, there was an open commerce between Philadelphia and Surinam; the goods were carried to the port of delivery; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it but the prohibition of the British government. It is not like the case of a vessel which is prevented from entering the port of delivery by a blockading squadron, for there the voyage is not performed, and it is impossible to say *certainly* that it would have been safely performed if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo should in this case be considered as the business of the consignee. That being established, it follows that the freight was earned."

§ 800. — *and a usage of consignees to receive at the quarantine during the quarantine season may be shown.*

But furthermore, it is proved in the case that it is the established usage of

this port for owners and consignees to receive delivery of their shipments made at the quarantine during the quarantine season, as being a compliance with the engagement in the bill of lading to make delivery in New York. Such a usage is valid, and the bill of lading should be construed in reference to it. *Gracie v. Marine Ins. Co. of Baltimore*, 8 Cranch, 75. Upon these grounds I am of opinion that, independently of the alleged acceptance of the goods by the respondents, their defense, so far as it rests upon the first point taken, cannot be maintained.

§ 801. *Whether the statement of the bill of lading as to condition of the cargo when shipped may be disproved as against bona fide assignees.*

But upon the second ground of defense, viz., that the cotton, when delivered, was not in good order, it seems to me that, as the case stands, the respondents are not made responsible for the freight. It was contended, on the part of the libelant, that the consignees were in fact the shippers of the cotton—it having been furnished to the vessel by their agent. This fact, if it had appeared in evidence, would have had a most important bearing; because, as between the original parties, the representation of the bill of lading as to the condition of the cotton at the time it was received might undoubtedly be explained or rectified (*Abbott on Shipp.*, 324), and so, in that aspect of the case, the libelant might have shown, as was attempted, that the damage to the goods was received before they were laden on board. But the suggestion that the respondents in fact shipped the cotton on board through agents is wholly unsupported by proof. They therefore cannot be regarded as the shippers or owners of the cotton, but must be treated as consignees; and they prove, by their book-keeper, that on the receipt of the bill of lading they made the shippers an advance of \$21,000 on the cotton, before its arrival in this port. The whole property became thereby, according to the mercantile law, pledged to them for the security of their advance, and they are entitled to demand it as described in the bill of lading, *in solido* or its equivalent, of the ship-owner; his lien for freight being first satisfied. Nor is it necessary to aver such advance in the answer in order to be entitled to prove it. The pleadings on both sides allege that they are consignees, and they have a right to show the extent of their privilege or lien on the consignment. The rule of law is clear, that the master and owner are concluded by the representations of the bill of lading, as between themselves and third persons entitled to the cargo as assignees upon a valuable consideration. *Portland Bank v. Stubbs*, 6 Mass., 422; *Abbott on Shipp.*, 323.

Nor can the court regard the suggestion that the cotton is amply sufficient to repay the respondents their advances, and also to satisfy the freight. I am furnished with no evidence showing the fact to be so. It is accordingly unnecessary to inquire what rule of law would govern if such a state of facts existed. There would be a serious difficulty in receiving testimony on the part of the libelant, in the present shape of the pleadings, showing that the cotton was injured by country damage, when laden on board, if the suit had been brought by the shipper. The libel avers that it was shipped *in good order and well conditioned*. The answer admits that fact. Accordingly, independent of the effect and operation of the bill of lading making the same assertions, it would be against the well-settled principles of admiralty proceedings to receive evidence contradictory to the averments and admissions of the pleadings on the same point. See *Davis v. Leslie*, Abb. Adm., 123. The libelant, under the pleadings and bill of lading, was bound to deliver the cargo of cotton to

the respondents in good order and well conditioned; and it being fully proved, on their part, that when delivered to them it was damaged by water and injured to an amount greater than the balance of freight unpaid, they are entitled to withhold that freight, either by way of recoupment of damage, or upon the ground that the libellant cannot maintain an action on the contract, without showing that its requisitions have been fully complied with on his own part. *The Ship Nathaniel Hooper*, 3 Sumn., 549; *Jordan v. Warren Ins. Co.*, 1 Story, 352; *The Schooner Good Catharine v. United States*, 7 Cranch, 349; *McAllister v. Reab*, 4 Wend., 483, affirmed, 8 Wend., 109.

§ 802. *A consignee is entitled to a reasonable time to ascertain whether the cargo arrives in good condition.*

The delivery to the respondents in lighters, to unlade the ship, cannot be regarded such an acceptance of the cotton, on their part, as to conclude them from showing that it did not conform to and fulfil the stipulations of the bill of lading. It is not the usage, nor in most instances would it be practicable, for consignees to inspect and examine shipments when delivered from the ship. A reasonable opportunity must be allowed, after packages and bales come into their possession, to ascertain whether they correspond in quantity and condition with the shipping documents, and the liability of the master and owner remains undischarged during that period. The damage complained of in this case was not external and exposed to view when the goods were landed, but to its chief extent was internal, and only discoverable by opening and separating the contents of the bales. The disbursements and charges on the part of the respondents in making such examination were \$261.40, which sum they insist they are entitled to retain from the freight. The libel admits payment of the residue of the freight, and only demands this balance. Under the facts in evidence I think that they cannot enforce the payment.

Decree for respondents, with costs. (a)

THE TYBEE.

(Circuit Court for Texas: 1 Woods, 358-363. 1870.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—On the 22d of August, 1868, a case of dry goods was shipped at New York by Cochran & Co. on board the steamer Tybee, bound for the port of Galveston, consigned to the libellants at the latter place. The bill of lading states that the package was in good order and well conditioned, and then states that the same “is to be delivered in like good order and condition at the aforesaid port of Galveston, the dangers of the seas, etc., excepted, unto Burkhardt & Shaper, or to their assigns, they paying freight for the said shipment, forty cents per foot, with five per cent. primage,” etc. The bill of lading then contains the following agreement: “It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and they shall be received by the consignee thereof, package by package, as so delivered; and, if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store, or permitted to lay where landed at the expense and risk of the aforesaid owner, shipper or consignee.” Besides this special contract, on which the respondents relied, evidence was given by them of a usage at the port of Gal-

(a) This decision was affirmed on appeal to the circuit court. See *Bradstreet v. Heran*, 2 Blatch., 115.

veston, by which, if goods were not taken from the wharf by the consignee by four o'clock P. M., the ship's agents put them into a warehouse (generally belonging to third parties), and charged the goods for the trouble of such removal in addition to the freight thereon; and also, in case of rain, covered them with tarpaulin or other covering, or removed them into a warehouse or under a shed for shelter and protection. In this case the steamer arrived at Galveston on the 1st of September, and, on the same day, published in the newspaper notice to consignees of her arrival, and that she was discharging cargo at New Wharf. The notice contained this clause: that "all goods remaining on the wharf after four o'clock, P. M., will be stored at the risk and expense of the consignees." It is proved that the libelants saw this notice on the day of its publication; and that they had previously received a copy of the bill of lading from New York.

It further appears by the weight of the evidence, as it seems to me, that the case of goods in question was discharged from the vessel upon the wharf on the morning of the 2d of September, and whilst lying there in a pile with other goods, a severe shower of rain came up, and the goods got wet and were damaged to the amount of \$180.30. The ship's people, it is true, covered the goods with sails and tarpaulins; but, from the defective character of the covering used, the damage was not averted. They endeavored to obtain a lodgment for them in an adjoining warehouse, but from some misunderstanding with the superintendent did not succeed. After the shower was over, the difficulty being removed, but at what precise time does not appear, the goods were put into the warehouse. The ship's agent testified that it was not their habit to do this till after four o'clock. On this occasion, in consequence of the difficulty which had occurred, and the injury the goods received, he directed them to be put into the warehouse without expense to the owners. The libelants did not send for their goods till afternoon — the clerk says between three and four o'clock. They were then shut up in the warehouse, and the delivery clerk refused to open it that day, as the different packages were all mingled together. The next day they sent for the goods and obtained them, but did not open them until the fourth, when they discovered the damage which they had sustained. Under this state of facts the respondents claim exemption from liability for the damage complained of.

§ 803. *When a carrier's liability ceases. A special usage may vary the rule. Special contract, how far permitted to control.*

The carrier's liability ceases, of course, when he has delivered the goods according to the bill of lading. The general rule with regard to delivery, as laid down in the books, is that, in the absence of a special contract, the goods are to be regarded as delivered, so far as the carrier's responsibility is concerned, when they are deposited on the proper wharf, at their place of destination, at a proper time, and notice has been given to the consignee. A usage or special custom prevailing at a particular place, and brought to the knowledge of the parties, may vary this rule. The *Richmond*, 1 Biss., 49, and note, p. 56 (§§ 826-830, *infra*). Some cases qualify the rule, as thus stated, by adding that the consignee must have reasonable time and opportunity to take and remove his goods before the carrier's liability is ended. Understanding this to mean reasonable time after receiving notice of the arrival of the goods, it is undoubtedly correct. In this case there is no question about sufficient notice having been given. The consignee was aware, on the 1st of September, that the cargo of the *Tybee* was discharging, or ready for discharge. He had sufficient notice

to be prepared to receive the goods on the morning of the 2d, when they were discharged on the wharf, before the shower occurred. The special contract contained in the bill of lading was a valid one, subject to the qualification that notice of the steamer's arrival and readiness to discharge should be given to the consignee, which, as we have seen, was given in this case. According to that contract, the goods were at the risk of the owner immediately after touching the wharf. But the usage of the port, and the actual practice of the ship's agents, may have imposed subsequent duties upon them outside of what is usually known as the carrier's liability. This, as we have seen, ceased by the contract when the goods were deposited on the wharf.

§ 804. *Goods not delivered should be protected; and the carrier becomes a bailee for hire and liable for negligence as to such goods.*

By the usage and practice referred to, the ship's agents do in fact keep goods in their possession after being landed on the wharf, take care of them, put them into a warehouse after delivery hours, and protect them in case of rain; and they make a separate charge for this service in addition to the freight. They are still bailees of the goods for some purpose, and although, by the terms of the contract, they might abandon them and leave them exposed on the wharf, yet that is not the usage, nor is it the practice of the respondents. Their interest, undoubtedly, requires that they should treat their customers with some degree of attention beyond what the terms of their contract require; and, indeed, by giving up possession of the goods, they would lose their lien for freight. What, then, are the duties which their continued possession of the goods, after their contract is determined, imposes? Under the usage, it cannot be said to be entirely a gratuitous bailment. My opinion is that they are analogous to those carriers who assume the duties of a warehouseman, when their duties as carriers are discharged, and that, under the circumstances of the case, they are bound to use ordinary diligence in taking care of the goods as long as they remain in their possession. They would not be liable for damage which might occur without their negligence, as by a fire accidentally consuming them, or by any other accident against which they could not, by ordinary diligence, provide. Then, did they use ordinary diligence in this case, or were they guilty of negligence? Why were not the goods placed in the warehouse on the approach of the shower? It is said that, from some difficulty or misunderstanding, the warehouseman would not permit them to be put therein. But it must be remembered that the ship agent had advertised that he had a warehouse at his disposal in which the goods would be put after four o'clock, and it seems that this difficulty or misunderstanding was not such that it could not be remedied. Mr. McMahan, the ship's agent, on coming to the wharf, soon succeeded in removing it, and seemed to feel that some consideration was due to the owners of the goods which had been left out exposed to the shower; for, having ordered them into the warehouse, he directed that their storage should be without expense to the owners. Still, if the goods had been properly cared for on the wharf, no negligence could be attributed to the employees of the ship. But the captain admitted to one of the witnesses that he had not proper coverings to protect the goods; that the tarpaulins had been condemned, or something to that effect, and were insufficient.

I think, therefore, that the agents and persons in charge of the ship are chargeable with negligence in not sufficiently providing for the safety of the goods, whilst they chose, according to the local usage, their own practice, and from motives of their own, to retain them in their possession. Hence, I shall

affirm the decree of the district court, and direct that a decree be entered for the libelants for the sum of \$180.30, with costs and the costs of the district court, against the claimants and their sureties.

THE SHIP GRAFTON.

(District Court for New York: Olcott, 43-54. 1844. Circuit Court: 1 Blatchford, 173-178. 1846.)

STATEMENT OF FACTS.—In this case a cargo of hemp was brought to the port of New York, on the 6th of June, and notice given that she would commence unloading on the 7th. After the unloading had commenced, libelants sent notice that they would not receive the hemp in the then state of the weather. A part of the hemp was removed, and that left upon the wharf was injured by the rain. Other material facts are stated in the opinion of the court.

Opinion by BETTS, J.

Upon a careful consideration of the very extended evidence and the circumstances of the case, I am satisfied that the unlading of the ship commenced between nine and ten A. M., and continued at a rate of discharge which would complete the delivery of the hemp on the wharf at about three P. M. Notice was given at the ship about noon, by the cartman, that the agents of the ship had agreed with the libelants to stop unlading at that time, and that they would receive no more hemp than was then upon the wharf. Two carts had been put to work by the libelants before noon, and another after one o'clock. The cartmen removed one hundred and sixty-three bales, one hundred and four of which were safely put under cover; the residue were injured by the rain after arriving at the warehouse, and before they were stored. The remaining part of the cargo was left on the wharf, where it was landed by the ship, and there received serious damage from the rain. Nothing was done by the officers or agents of the ship to protect the hemp after it was unladen.

§ 805. *Delivery on the wharf with notice to consignee discharges a carrier in the coasting trade.*

It is proved to be the established course and usage in the coasting trade at New York, to deliver goods on freight upon the wharf at the port of destination. Upon these facts, the question of law arises, whether the ship had fulfilled her contract of carriage by such delivery of this shipment to the consignees. This point will be considered upon the assumption that due notice was given the consignees by the ship of the time and place of unlading; for, without reasonable notice, it is clear the ship would not be discharged of her responsibility by placing the hemp on the wharf. *Gilbert v. Culver*, 17 Wend., 305; *Magill v. Potter*, 2 Johns., 37; *Smith's Mercantile Law*, 361; 2 Kent Com., 604.

§ 806. *Carrier by water must not abandon goods or leave them unprotected.*

A carrier by water cannot leave or abandon, in an unprotected state, goods under his charge, even though there be an inability or refusal of the consignee to receive them. 2 Kent Com., 605, 5th ed., and cases cited; *Ostrander v. Brown*, 15 Johns., 39; *Kohn v. Packard*, 3 La., 224. In a case of transportation of goods coastwise, when the master of the vessel had notice that the consignee was not the owner of them, the supreme court of this state decided that landing the cargo on a wharf at the port of destination was no delivery, nor would a tender of them to the consignee, without his acceptance, constitute a delivery—a delivery implying mutual and concurrent acts of the carrier and consignee, equivalent to tender and acceptance. *Ostrander v. Brown*, 15 Johns.,

39. In Massachusetts a distinction is recognized between the obligation of a consignee and owner ordering goods to a particular port, where he would be bound to make provision to receive them. In such case the rule is assumed to be, that the vessel is only under obligation to land the goods and give the owner notice of the time and place, to place them at his risk; but if addressed to a mere consignee, who refuses to receive them, the vessel is bound to see that the cargo is properly secured or taken care of. *Chickering v. Fowler*, 4 Pick., 371. There is nothing in this case in conflict with the doctrine declared in *Ostrander v. Brown*, above cited. The supreme court of Pennsylvania hold that, with respect to vessels in the foreign trade, a delivery of the cargo at the wharf, with notice to the consignee, acquits the vessel. No distinction is made between the rule governing foreign or coasting vessels, and it seems conceded that a well-established usage or custom of the trade or port may determine the law of the particular case.

§ 807. *Rule permitting landing on the wharf, with notice, extends by usage to coasting vessels.*

Without any usage to control the rule, the decision plainly implies that the law in respect to coasting vessels would be the same. In England great weight is given to the custom of the place or trade on a question of due delivery. It is allowed to control the construction of the bill of lading. Per Tindal, Ch. J., in *Gatliffe v. Bourne*, 4 Bing. N. C., 314. The like doctrine is recognized in the supreme court of this state, on a review of the English decisions. A deposit of goods by a carrier, conformably to the well-known usage in his line of business, is held to be equivalent to a personal delivery, and that without any actual notice to the party. *Gibson v. Culver*, 17 Wend., 305. In the case of *Kohn v. Packard*, 3 Ia., 224, Judge Porter, with his usual clearness and ability, discusses the doctrine of a constructive notice. He adverts to the rule as laid down by Chancellor Kent, that there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to or a substitute for it. The essence of the contract of affreightment is an engagement to deliver the goods to the consignee. A constructive delivery cannot be set up as a substitution for an actual one without proving a notice to the consignee, equivalent to direct information. If that is not furnished the carrier cannot be regarded as having performed his contract. It is not necessary now to inquire how far usage and custom may give notice. The law exacts no more than that notice be brought home to the party sought to be affected by it, and custom may be admitted as a guide to determine whether the acts done effect that end. In the early and strongly contested case of *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R., 394, upon a full consideration by the judges of the liability of common carriers, it was held that, by the general custom, their liability is at an end when the goods are landed at the usual wharf. I think that the result of the cases is that in a well-settled course of trade as it is in this port in relation to coasting vessels, a delivery of a cargo on the dock here, with notice to the owners of the time and place of unloading, places the goods at their risk and discharges the ship from its liability as a common carrier (2 Kent Com., and *Story on Bailm.*, before cited), although, in a case of a naked consignment, the ship might be under the further obligation to secure the property after it was unladen, if no consignee appeared, or if he refused to accept the goods. 15 Johns., 39, and 4 Pick., 374.

§ 808. *Proper method of landing hemp on the wharf stated.*

The unloading in the present case was made by the ship in the usual manner,

with only one set of falls or tackle. The hemp was deposited by itself on the wharf along-side the ship, at her mooring, disconnected from other goods, and perfectly accessible to the consignees. The ship was compelled to seek her berth a distance of one and a half miles from the warehouse of the libelants, and of all these facts they had knowledge. Had she moored at a wharf directly in their vicinity, the hemp would in that way have been discharged no faster than it could have been removed or stored with ordinary diligence. The great distance at which the ship lay from the store-house rendered that dispatch in receiving the cargo much more difficult, and probably impracticable in the use only of the drays or means of transportation ordinarily employed by merchants in removing a cargo. This, however, was in no way the fault of the ship. She would not be justified in precipitating a cargo ashore with extraordinary haste, by the application of unusual means, but she had a right, and it was her duty towards all her shippers, to employ all reasonable diligence in unloading, and, when such a course is adopted, it belongs to the consignees to make provision for receiving and securing the cargo as it is discharged. There might be a good deal of inconvenience in so doing, in the present case, but it is clear, upon the proofs, that it was in no respect impossible for the libelants to have saved the hemp in the vicinity of the ship, or, by the employment of additional drays, to have removed it to the libelant's warehouse as fast as it was discharged. It must be borne in mind that the master's responsibility as to the mode of delivery is essentially measured by the practice of the place. He is acquitted by landing his cargo at a proper wharf. After that the cargo is at the risk of the consignee. Independent of any special arrangement or agreement with the libelants in respect to the landing of the hemp, I consider the law justified the method pursued by the ship; and the question is then to be considered whether her condition was varied by act of the parties. I do not discuss the point debated at the hearing as to the liability of the ship if she discharges perishable goods in hazardous or improper weather, against the consent of the owners. The court of Pennsylvania intimates that such a circumstance might take a case out of the ordinary rule, and fasten the loss on the vessel. *Cope v. Cordova*, 1 Rawle, 203. The preponderance of evidence in this case shows that the day was one of good working weather after nine A. M.; that there were clear indications of rain about noon, and that the storm in the afternoon came on abruptly, with but a few minutes' previous warning.

§ 809. *The consignee's apprehension of a storm does not compel vessel to defer unloading; reasonable discretion justifies the master.*

A ship cannot be compelled to lay idle, when prepared to unload, because consignees apprehend there may be a storm in the course of the day. Sultry days in summer are liable to vary from extreme heat to showers within a period of a few hours. But a ship-master could not protect himself against shippers in retaining their goods and closing his hatches because some consignees, whose goods were first discharged, feared a change of weather, and were unwilling theirs should be removed, or refused to receive them until every chance of storm should be dispelled. It is enough if, in view of all the circumstances, reasonable discretion was exercised in unloading, and I cannot say, upon the proofs, that anything short of that was manifested on this occasion. Upon the allegation of an engagement by the agents of the ship not to unlade that day, the proof is, that they agreed before noon to stop discharging the hemp and to send notice to the ship so to do, provided the libelants would

receive what had then been discharged; and it is proved that more was taken away by the libelants than had been discharged at twelve o'clock. But the testimony is not so certain to this point as to enable the court to say that the libelants succeeded in securing in store as many bales as were on the dock at twelve o'clock.

§ 810. *Who are proper agents for the ship to arrange as to unloading the cargo.*

The argument for the claimant is, that the agents had no authority to bind the ship by such an agreement, if proved to have been made by them. The evidence does not disclose clearly what the exact character of the agency was. It appears, however, that the agents represented themselves to be, and acted as, the consignees of the ship; announced the time and place of her unloading; collected the freights, and assumed to direct in the delivery of the cargo. The owner had it in his power to show the limitation, if any there was, to the authority of the consignees; and, in the absence of evidence qualifying their powers, it must be assumed they stood in place of the owner, and clothed with the direct and incidental authority of a ship's husband in respect to the delivery of the cargo and collection of freights. A ship's husband is ordinarily a part owner (Abbott, 69); but there is nothing in the character of his duties, or the rules of the maritime law, limiting the office to an owner. Judge Story enumerates very fully the duties and authority ordinarily exercised by that species of agent. Story on Ag., § 35; Story on Partn., § 418, collects the American and foreign authorities bearing upon the subject. See Notes to § 35. Whatever may be the appropriate appellation of such agents, it is manifest, upon the authorities and the reason of the thing, that the party to whom a ship is consigned, for the purpose of her proper entry, unlivery and the collection of her freights, must have, as incident to the trust, the power of arranging with consignees of the cargo the time, place and manner of its delivery, and that accordingly his engagement to that end must be equally obligatory as if made by the owner himself.

§ 811. *The parties may mutually vary the stipulations of the bill of lading as to the method of delivery.*

The law only assumes to regulate the mode of delivery when it is not stipulated in the contract. Abbott on Shipp., 248; Syeds v. Hay, 4 Durn. & E., 260. It construes bills of lading, which engage a direct and personal delivery of goods, to mean that the delivery shall be according to the customs and usages of the trade or place. Jacobsen's Sea Laws, 17; Holt on Shipp., 359; 1 Rawle, 203; 2 Kent Com., 605; 3 La., 224. But it does not prevent the parties putting a different interpretation upon the obligation of affreightment by their own acts or engagements.

§ 812. *Consignees cannot recover for damages sustained by goods while being conveyed from wharf, which they received, notwithstanding a previous refusal.*

If, then, it was the right of the owner in this case to discharge the hemp at the ship's berth immediately on giving notice to the consignees of the time and place of unlivery, yet it was equally competent for him to engage not to unlade before a particular day, or not faster than it was convenient for the consignees to receive it, or to stop the discharge at any period of the day; and a delivery in contravention of such undertaking would leave the ship still liable on the original shipment; and the agreement of his agents is of the same efficacy as if made by the owner himself. It was the right, then, of the libelants, under the arrangement entered into with the agents of the ship, to refuse receiving more hemp than had been unladen at twelve o'clock; and if they seek to

enforce the agreement, it belongs to them to establish, by proof, what that quantity was. The bales were not counted; and, to determine the amount discharged on the dock, they rely upon the judgment and estimates of cartmen, who merely looked at the pile. The opinions are in contradiction with those of the mate and stevedores employed in discharging the ship. The former class of witnesses rate the quantity at not exceeding a hundred bales, whilst the latter assert that all the hemp, except about fifty bales, was then out of the ship and on the wharf. The collateral facts before adverted to in my judgment show that both estimates are wrong, and that there were probably a hundred and twenty-five or a hundred and fifty bales discharged at noon; and this is so near to the quantity actually removed, that the court would not, in the absence of evidence, which the libelants ought to have supplied, assume that any more had been discharged than was taken away. But if only a hundred bales were unladen at the time, the libelants could waive the stipulation releasing them from receiving more than that quantity, and in judgment of law they are to be regarded as accepting, as properly delivered, all they took from the wharf. They are not entitled to charge to the ship the surplus over the agreed quantity as received for her benefit. No such understanding existed between the parties; and I shall accordingly decide that the libelants have received, as duly delivered, all the hemp removed from the dock by their carts.

§ 813. — *but they may recover for damage to the portion not received, but left on the wharf.*

I further decide that the hemp damaged on the wharf was not delivered to the libelants so as to exonerate the ship, and that they are entitled to recover in this action its value. Testimony as to value was reserved at the hearing until the principles involved in the controversy should be settled. An order of reference to the clerk will be entered, when evidence can be adduced on both sides, on the questions of quantity and value of the hemp left on the wharf by the side of the ship.

DECISION IN THE CIRCUIT COURT ON APPEAL.

Opinion by NELSON, J.

This case involves two questions of fact: *First*. Whether the consignees of the ship agreed with the respondents to suspend any further discharge of hemp from the ship beyond the amount which had been discharged before noon. On the part of the libelants it is insisted that the proofs establish the agreement, and on the part of the claimant that the proofs fall short of this. Most of the damage was done to the hemp which was discharged after one o'clock, it having been drenched by a shower between three and four o'clock, P. M. The *second* question relates to the quantity of hemp discharged after the time when, as is alleged, the further discharge was, by the agreement, to cease. Both questions strike me as being exceedingly close upon the evidence, and are so nearly balanced that it would be wrong for an appellate court to interfere. According to the impression which the examination of the proofs has left upon my mind, I should not feel justified in disturbing the conclusions of the court below, whether for or against the appellant, in respect to either question, as I think different minds might very well arrive at different conclusions.

§ 814. *What will warrant a reversal in admiralty upon questions of fact.*

To warrant a reversal upon a mere question of fact, the preponderance of the evidence should be of a somewhat decided character; such as would justify the

granting of a new trial in a court of common law, on the ground that the verdict was against the weight of evidence. It seems to me that this principle should govern this court in reviewing a question of fact determined by the district court.

§ 815. *The consignees of a ship may arrange with the consignees of the cargo in respect to the time and manner of delivery.*

I cannot doubt that the consignees of the ship had authority to arrange with the owner or consignees of the cargo in respect to the time and manner of its delivery, and that the arrangement thus entered into for general convenience and the better security of the cargo was not a personal matter between the parties to the agreement. The consignees of the ship had the control of her for the purpose of delivering the cargo, and could modify and regulate such delivery in any way consistent with the rights of those interested in the cargo. The case does not stand upon an independent agreement, speaking in a technical sense, but upon an understanding between the parties in respect to the delivery, on which the respondents had a right to rely, and the breach of which occasioned the damage. The decree must be affirmed, with costs.

THE BOSTON.

(District Court for Massachusetts: 1 Lowell, 464-470. 1870.)

Libel for non-delivery of a cargo of coal brought by a coasting schooner. The material facts are stated in the opinion of the court.

§ 816. *Rule stated as to the master's duty to deliver at a suitable wharf.*

Opinion by LOWELL, J.

The claimants insist that the master might deliver his cargo at any suitable wharf, with notice to the consignee or his assignee, and thus fully meet the requirements of his contract; and that this was such a wharf. It is often said in the books that this is the master's whole duty, but I am of opinion that the proposition has been sometimes understood a good deal too broadly. The *dictum* of Mr. Justice Buller, in *Hyde v. Trent & Mersey Navigation Co.*, 5 Term R., 389, 397, is that a delivery on the usual wharf will discharge the carrier. And in *Chickering v. Fowler*, 4 Pick., 371, the case finds that the cargo was landed at a usual wharf, and it was held that it need not be landed at the wharf of the consignee. There are cases which recognize it to be usual at this port and at others for the master of a general ship to go to a suitable wharf and notify the consignees, who are then bound to take their goods from the wharf. The *Tangier*, 21 Law Rep., 8; *Cope v. Cordova*, 1 Rawle, 203. But these cases have not turned on the question what was a suitable or usual wharf. This would seem to be a question of fact, and one which may be answered very differently in different cases. The law, as I understand it, is, that the master is not in general bound to transport the goods on land, but his contract is fulfilled by delivery from his ship at a proper place within the port. Still, the question is always one of delivery in the particular case, and if he has not delivered to the consignee or shipper personally, he must justify his substituted delivery. *Gatliffe v. Bourne*, 4 Bing. N. C., 314; 3 Mann. & G., 642; 7 Mann. & G., 850; *Humphreys v. Reed*, 6 Whart., 435; *Hemphill v. Chenie*, 6 Watts & S., 62; *Ostrander v. Brown*, 15 Johns., 39. This he may do by showing that the delivery was in accordance with the terms of his contract, or with the usual course of trade at the port, or of the course of dealing between the same parties. Here I have not been shown any such usage.

§ 817. — *application of the rule to delivery of cargo of coal.*

There is no evidence of what is usual or suitable in respect to cargoes of coal; but considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case (*The E. H. Fittler*, 1 Low., 114; §§ 831-835, *infra*), that when there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, at least if he be duly and seasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that a charterer would have to say where the vessel shall discharge, it being, of course, a suitable place and within the limits of the port.

§ 818. *Demurrage clause in a bill of lading construed.*

This point is not of vital importance here, because this bill of lading contemplates that the consignee, and not the master, is to choose the place of delivery. I have more than once construed this new demurrage clause to mean that the owner of the coal is to have twenty-four hours after notice of the ship's arrival in which to find a berth for her discharge. This construction has not only been acquiesced in, but insisted on by the ship-owners.

§ 819. *Provision in bill of lading for increase of freight by each bridge.*

So the provision that the freight should be increased by each bridge that the vessel may pass through cannot mean that the master shall have the right to disregard the shipper's wishes and go to a distant wharf, through unnecessary bridges, and thus increase his freight while disobliging the other party; but that so many as the consignee or his assignee requires him to pass through shall be paid for. It was the duty, then, of the master to deliver at the wharf of Cook, Jordan & Morse, according to the order given him by the libelants within twenty-four hours after notice of his arrival, and, indeed, at the very time when, in accordance with his contract, he reported to them his arrival. If he had any doubt whether they were the proper persons to deal with it was removed by the orders and statements of the original consignees, and by the indorsement of the bill of lading. He says, in his answer, that he at one time offered to go to the required wharf if the libelants would pay the towage. This they were not bound to do under the circumstances of this case, because he should have gone there at once. Again, he says he at one time offered to go if they would pay him, in advance, his freight and demurrage. But they were not bound to pay freight until the goods were delivered, nor could any demurrage be due when the delay was wholly his fault. At the argument it was urged, in addition to these points, that the wharf of Cook, Jordan & Morse is not within the port of Boston. I was asked to limit the bounds of the port to the open harbor below the numerous bridges which surround the peninsula on several sides, and which are said to have changed the character of the navigation, and to have imposed new and unusual burdens upon ship-owners. In this case I need only say on this head that no evidence whatever of usage was introduced; that this is an old and well-known coal wharf within the most ancient limits of the town of Boston, and that the bill of lading provides for going through bridges.

It was said at the bar that, since the pleadings were made up, the libelants have taken the cargo, by a writ of replevin, out of the hands of the wharfinger,

with whom it was left by the claimant. This being so, I cannot fairly estimate the damages in this case until that suit is in some way disposed of.

Interlocutory decree for the libelants. Damages to be assessed.

DECISION ON MOTION FOR DAMAGES.

(It was shown that the replevin suit had resulted in favor of the libelants, with nominal damages; also that coal had fallen in value about \$1.25 per ton between the day on which it should have been delivered and the time of service of the writ of replevin.)

§ 820. *Estimation of damages.*

Opinion by LOWELL, J.

The able argument for the libelant has failed to convince me that, in an action of contract for not delivering goods in conformity with the bill of lading, the measure of damages is the value at the port of delivery, without deduction. I have used a different rule in two cases in which goods were injured by deviation and delay, namely, the value less the freight. This furnishes an indemnity, as we see in this case; for the libelants had sold the cargo in good faith, and would have realized the price, after paying the freight, if the master's contract had been fulfilled; and the exact loss which they have suffered is the price, deducting the freight. It is urged that the vessel never earned freight, and this is true; but the question here has nothing to do with that. I am not giving freight to the claimants, nor denying it to them, but ascertaining the loss to the libelants. They had the right to take their goods if they could find them, without paying freight, as indeed they have done; and by that means they would and must get more than an indemnity; but in an action for not delivering they are entitled to an exact indemnity. It was at one time much contested whether the damages in such a case should not be the value at the place of shipment, with interest, but it has been fully settled that it is the value at the port of destination. Some of the cases do not touch the question whether it shall be the gross or the net value, but all which do mention it say it is the net value after deducting expenses; for the reason that those expenses go to make up the value. Thus, in what may be fairly called the leading case of *Watkinson v. Laughton*, 8 Johns., 213, where goods were embezzled by the crew, it was held that the damages were their net value, deducting freight and other charges, not, of course, as actual charges, but as the true mode of finding the exact loss sustained. This rule has been followed in *Gillingham v. Dempsy*, 12 Serg. & R., 188; *The Cassius*, 2 Story, 81; *Nourse v. Snow*, 6 Greenl., 208; *The Joshua Barker*, Abb. Adm., 215 (§§ 1176-78, *infra*).

A wrong-doer may often be required to give up chattels without any allowance for what has been spent upon them, and a carrier could not, perhaps, set off nor recoup freight which he had never earned; but this is not such a case. This libel is not brought for the recovery of the goods or of their value, but for the breach of a maritime contract to carry and deliver them; and though the value of the goods is an element in the computation of damages, the real question is, what has the libelant lost? And the true answer is, what he would have had if the contract had been performed. Suppose the voyage had been from a foreign country, and the goods had been subject to duty, in estimating the damages duties would be deducted from the value in the market here, without any regard to whether the carrier had paid duties or not, because the

libelant would have been obliged to pay them to obtain the full market value of his goods, and they really go to make up that value.

It is admitted that the libelants must give credit for the net value of the coal replevied by them, but they contend that in estimating this value they may deduct the reasonable counsel fees of the replevin suit. None of the cases cited came up to this contention, and I am of opinion that they cannot be allowed. Counsel fees are sometimes considered in estimating the damages in salvage cases, even since the fee bill has prevented their being taxed as costs, and where one is bound by contract to warrant another's title, and has been duly notified to defend an action on the title and has failed to do so, these fees may be recovered. But here the suits were simply two actions for nearly the same cause, and were adversary, and probably if the claimant had required it the libelants might have been put to their election which they would maintain. Under these facts there is no more reason for allowing the counsel fees in this case than in the replevin suit itself. The theory of the judgment in that suit was that the taxable costs would indemnify the plaintiffs. They have recovered their coal and their costs, and after giving credit for its value when replevied there is no surplus left to be assessed in this action. As the present defense is in the nature of a plea *puis darrein continuance*, the libelants are entitled to nominal damages and costs.

Decree for the libelants for one dollar and costs.

O'ROURKE v. TWO HUNDRED AND TWENTY-ONE TONS OF COAL.

(District Court, Southern District of New York: 1 Federal Reporter, 619-624. 1890.)

Opinion by CHOAPE, J.

STATEMENT OF FACTS.—The libelant was the owner and master of the canal boat *Mary O'Rourke*. On the 12th day of December, 1877, he received on board of his canal boat two hundred and twenty-one tons of coal, shipped by the firm of A. Pardee & Co., at Perth Amboy, N. J., and signed and delivered a bill of lading therefor, acknowledging the shipment of the coal in good order and condition, and promising to deliver the same in like good order and condition "at the port of Hackensack (the dangers of the sea only excepted), unto J. H. T. Banta, or to his assigns, he or they paying freight at the rate of two and one-half cents per ton along-side; captain tending guy." The same day the libelant's boat, with the coal on board, was towed up the Hackensack river and moored along-side of a pier or dock on the west side of the river, a short distance below what is called the "village bridge." In that immediate vicinity, below the bridge, are three or more piers or docks, to which it is customary for steam-tugs coming up the river to bring canal boats. The libelant having arrived at this place reported his arrival to the consignee, Mr. Banta. The consignee directed the libelant to bring his boat up to his (the consignee's) wharf to discharge, and offered to send him two men to help him pole his boat up to that wharf, which was situated within what is known as the port of Hackensack, about a mile further up the river.

The libelant denied the consignee's right to require him to do this, claiming that he had come as far as his contract required him to bring his boat, but offered to go up if the consignee would insure his boat, which the consignee refused to do. The parties, having come to no adjustment of the difference between them, then agreed to meet the next day at the office of the shippers of the coal in New York. They met there, but never came to any agreement,

and after remaining at the wharf in Hackensack, where the tug left him, several days, and after notifying the consignor that he must take the coal away if the consignee did not receive it, the libelant had his boat towed down the river and brought the coal to Gowanus basin, Brooklyn; and while the cargo was there he libeled it for breach of the contract contained in the bill of lading. The question is whether the libelant had performed his agreement by bringing the boat along-side this wharf below the bridge and offering the coal to the consignee there. If he had done all that the bill of lading required it is clear that he can maintain this suit for damages. The claimants, however, insist that he was obliged to go to the consignee's wharf, if the consignee required it, as in fact he did.

§ 821. *Right of charterer or consignee to designate usual and proper place of discharge.*

I think the rule of law is that where the vessel is chartered, or the shipment is of the entire cargo to one consignee, by bill of lading, and no place of discharge within the port is named in the contract, the charterer or consignee has the right to designate the place of discharge within the port, provided that the place so designated is a usual and proper place. The Boston, 1 Low., 464 (§§ 816-820, *supra*); The E. H. Fittler, *id.*, 114 (§§ 831-835, *infra*); Davis v. Wallace, 3 Cl., 130; Sleeper v. Puig, Dist. Ct., S. Dist. N. Y., unreported; S. C., affirmed, 8 Reporter, 357. I think these cases recognize as a qualification of this right of this consignee to designate the place of discharge that it must be one not unreasonably inconvenient or inaccessible, or extra hazardous to the vessel. Whether or not it is so inconvenient, inaccessible or extra hazardous, must be determined by the circumstances of the particular case.

§ 822. *Wharf in this case considered not reasonable and proper.*

In the present case there were certainly some inconveniences and some hazards to the libelant's boat in complying with the consignee's request to take her to his wharf to discharge her cargo. At the wharf at which she stopped she could lie safely at all stages of the tide and discharge her cargo continuously. At the consignee's wharf she could lie and discharge at high tide, but when the tide was about two-thirds down, on account of the want of depth of water, she would have to be shoved out into the river or hauled away till the tide rose again sufficiently for her to be brought back to continue her discharge. The bottom was such that it would be unsafe for a loaded boat to lie there aground. The time required for the discharge of her cargo would thereby be prolonged certainly one day, and perhaps two. To reach the consignee's wharf the libelant's boat, which drew six feet and ten inches, could only cross the bar in the river above the bridge when the tide was at least half flood, and there was no practicable way of getting her up there except by poling her up on the flood-tide. Nor would it be safe to do this in the night-time. There was but one time in the day, of about three hours, when it could be safely attempted. It was late in the season, and that time of year, December 12th, the ice was liable to form in the river any night; and at the consignee's wharf, which was a mere bulk-head, lying along the bank of the river, the boat would, in case of ice forming while she was detained there, be in danger of being cut and sunk by the ice, and in danger of being frozen in. The delay that would be necessarily caused by the only method of discharge practicable there, as above described, might very possibly lead to the loss of libelant's boat from this cause. The place was not a safe one for the boat to winter. I think this necessary detention in discharging was, under the particular circum-

stances of the case, and considering the season of the year, not only a serious inconvenience to the vessel, but that it made that place extra hazardous. No doubt the vessel takes upon herself the usual perils of the port, and if she agrees to carry to a port, and there is not in the port any place of discharge at which she can safely lie for a continuous discharge of her cargo, she must submit to this inconvenience as being within the contract, but subject to all delays of this character necessarily incident to the port as a port. I doubt very much whether a vessel can be directed by the consignee to a place of discharge at which she cannot discharge continuously, if there are any places within the port, usually resorted to for the discharge of such cargoes, and where she can discharge her cargo, which are not open to this objection. Judge Lowell thus states the rule in the case of *The Boston*, 1 Low., 464 (§§ 816-820, *supra*):

"In the absence of evidence of usage, I lay down the rule of law that when there are two or more wharves in the port, *equally convenient to the carrier*, he is bound to deliver at that most convenient to the shipper, if he be duly and seasonably notified of such preference." In general, a vessel cannot be required to lie idle unless it is necessary. A continuous delivery of cargo after arrival, if practicable, is to be presumed to have been contemplated by the parties. But, however it may be in a case where this is the only inconvenience, it seems to me clear that where this necessary detention involves the vessel in a danger of loss or injury, beyond what mere delay usually does, a place subject to this objection is neither reasonably convenient nor safe within this rule of law. The poling of libellant's boat up the river to the consignee's wharf would also be a considerable inconvenience. I am not able to find on the evidence that it would be attended by any greater danger than ordinary navigation, if the men attempting it were accustomed to the work. The consignee offered the services of his men, to be paid by libellant. He did not offer to have her poled up at his own expense. It is unnecessary to determine the point made on the part of the libellant, that this inconvenience alone, and the fact that it would require libellant to put his boat in the power of strangers, would have excused him from going to the consignee's wharf. But, under all the circumstances, I hold that the place designated was not such a proper place as the consignee has the right to designate.

§ 823. *Private wharf may, under circumstances, be a proper wharf for making discharge.*

It is urged, however, that the wharf at which the boat lay, and all the wharves below the bridge, were private wharves, and that the consignee had no right to go there to receive the cargo; but he testified himself that he offered to discharge there if the libellant would pay the cartage to his dock. This shows that it was a wharf which parties other than the proprietor of the wharf could use for a compensation. This made it so far a public wharf as to be a proper place to discharge.

§ 824. *Tender and refusal of cargo held sufficient.*

It is also insisted that the libellant did not tender the cargo there. There may have been no formal tender, but it is evident, from the consignee's own testimony, that the libellant gave him to understand distinctly that he had arrived with his cargo at a place which he considered the end of his voyage. The only point made between the parties was whether he must, under his contract, go to the consignee's wharf, as the consignee claimed he should do. The consignee distinctly refused to receive the cargo where the boat lay, and, after waiting several days, the libellant took it away. No other tender was

necessary. Nor was the libelant bound to wait there any longer. He had the right to take his boat out of the river, where it was not safe for him to remain with her longer at that season of the year. The libelant appears to have been unduly alarmed at the risks of going up the river, and to have insisted that his boat could not safely be carried up, and to have overestimated the inconvenience and danger probably attending her lying at the consignee's wharf and discharging there; but these circumstances are immaterial.

§ 825. *Proof of prior conversations cannot vary bill of lading.*

The real question is whether, under the circumstances, his contract required him to go further. The rights of the parties are fixed by the bill of lading, and the evidence of conversations prior to the date of it cannot have any effect to vary its provisions. The facts that the consignee's wharf was an old wharf, and that many canal boats were towed or poled up there every year, and that the consignee generally received his coal there, have no bearing on the question. His wharf was not the customary place for landing cargoes of coal at the port of Hackensack. It was, at most, but one of several such customary places; and the particular contracts made in other cases are not shown. This libelant had the right to stand on his contract, even if other persons had yielded to the demand of this consignee, under similar contracts, to bring their boats to his wharf; and the consignee could have expressly contracted to have the boat brought to his wharf if he had seen fit.

The libelant is entitled to a decree for the damages sustained by him from the refusal of the consignee to receive the cargo. Decree for libelant, with costs, and a reference to compute damages.

THE RICHMOND.

(District Court for Illinois: 1 Bissell, 49-56. 1854.)

STATEMENT OF FACTS.—Proceeding to recover the value of fifty hogsheads of sugar, the part of a cargo of sugar which the captain of the schooner Richmond had contracted to deliver at Chicago. The libelant alleges the sugar in question to have been delivered at the dock and warehouse of Haddock, in Chicago, against his consent and request, and that said warehouse, together with the sugar therein stored, was totally destroyed by fire soon afterwards. The facts and circumstances connected with the delivery are set out in the opinion of the court.

§ 826. *General rule stated as to proper delivery by vessels from abroad. Whether the same rule applies to coasting trade considered.*

Opinion by DRUMMOND, J.

In the case of foreign vessels arriving in this country, it has been held that it is not necessary for the carrier to deliver the property shipped to the consignee personally; but to deliver it at the usual wharf, or at any proper place of landing, with reasonable notice to the consignee, will be sufficient. It is considered in such cases that the undertaking of the carrier is simply to convey from port to port. But this rule has been thought not to apply to the delivery in the coasting and internal trade of the country, but that, in the absence of a special contract or well known usage to the contrary, the carrier is obliged to make an actual delivery. It has, however, been decided by some respectable courts, that in the coasting trade it is sufficient to land the goods at any wharf or place generally used for that purpose, and give notice to the consignee, and that the carrier is not required to take them where the shipper may direct. It

is certain, however, there are many cases in England and in this country which make a distinction between the foreign and inland trade, and which have adopted a much more stringent rule as to the delivery of goods by the carrier in the latter trade.

§ 827. *Uniform and well known usage affects the contract as to mode of delivery.*

Without examining how far there may be any sound reason for this distinction on principle, there can be no doubt that the usage or custom of a particular place or particular trade may, to some extent at least, reconcile the cases, because that is always an important element in determining whether the carrier has discharged his duty in the delivery of the property. Long established, uniform, and well known usage, as to the mode of delivery, may be said to enter into the contract between the parties, and becomes the measure of their rights and liabilities. Hence, different rules have sprung up, which the courts have sanctioned between different kinds of carriage. Carriers by land are usually required to deliver the property to the owner personally or where he may direct. One class of carriers by land — railroads — do not generally send the property away from their depots. Carriers by water are not always required to make a personal delivery. The evidence clearly establishes this usage on the lakes and in the port of Chicago.

§ 828. *Where there is a consignment to a particular person the carrier may deliver the whole consignment at one place.*

Where there is a consignment of goods to a particular person, the owner or shipper cannot require the carrier to deliver the goods in different parcels — in other words, the carrier may insist upon delivering the whole consignment at one place. This seems to me to be a reasonable and proper usage, and one which the court ought to sustain. The testimony shows that in fact consignments have sometimes been divided by carriers, but most of these exceptional cases have stood upon some peculiar circumstances, and in all of them it appears to have been optional with the carrier. These cannot be said to affect the general custom. Whenever the shipper makes a special contract with the carrier as to the delivery of the goods, such contract would render the custom inoperative. In the absence of a special contract, I think it would require the clearest and most satisfactory proof of a well established and well known custom to divide consignments, to warrant the court in holding that it was the duty of the carrier to make such division on the claim of the shipper. It seems to me that if the carrier delivers or offers to deliver the goods to the consignee at one place, that is in law a good delivery, and discharges the carrier as carrier. There having been no bill of lading in this case, the rights and liabilities of the parties must depend upon the general principles of law applicable to such case. It is not necessary to determine in this case whether a delivery at the usual wharf of the carrier (the libellant having one of his own), with notice thereof, is sufficient even in case of a usage to that effect, because the carrier here declares that he was ready to deliver the sugar at any place pointed out by the shipper, and that in fact the delivery was at the wharf of Mr. Haddock, with the consent of the shipper.

§ 829. *After the carrier has divested himself of that character his further responsibility is only for ordinary care and diligence.*

There is a well known distinction between the liability of a common carrier, acting as such, and his liability after he has divested himself of that character, though he may still have the custody of the property. In the latter instance,

he is only held to the exercise of ordinary care and diligence. If the sugar were in the custody of the party, actually or constructively, as a common carrier, he would, upon well settled principles, be liable for the loss in this case, though produced by an accidental fire. The question to be determined, then, is whether the connection of the owner of the vessel as a common carrier of the property had ceased, or was there a delivery of the sugar to the libelant.

STATEMENT OF FACTS.—The libelant paid the freight to the carrier, but as the payment was made on the 22d of August, while the sugar was yet in the vessel, and it was made before it was due, and was so understood by both parties, it cannot influence the question. Let us now ascertain what are the facts touching the delivery, as established by the evidence. A witness in the employ of Mr. Dunham states that he was in the office of the libelant when the captain of the schooner came to ask where the sugar was to be delivered. The libelant said he wanted a part of the sugar—forty or fifty hogsheads—delivered at a store-room on the river adjoining his own warehouse. The remainder he wished to be delivered at a warehouse below, Spencer's, he thinks. The witness does not recollect that the captain made any reply or any objection. Another witness, who was in the employ of the libelant, declares that the libelant told him to go and say to the captain that he must deliver fifty or sixty hogsheads at his own dock. An officer of the schooner, whether captain or mate the witness did not know, refused to do it. The witness returned to the libelant, and the latter sent him back to forbid the captain to land the fifty or sixty hogsheads of sugar at Mr. Haddock's wharf, and to request him to bring them to his own dock. This the officer declined to do. The captain testifies that he went to the libelant to ascertain where the sugar was to be landed. He said he would have it landed at Mr. Spencer's, with the exception of twenty or twenty-five hogsheads, which he wanted at his own dock. The captain replied that he would land the sugar at any one dock, but he would not deliver it round in different parcels. At this time the schooner was in the river abreast of the libelant's dock, and the captain said to him that if he wanted all the sugar delivered there, he was ready to deliver it. The libelant told the captain "to haul down to Spencer's and he would see," and that the vessel would have to pay the drayage. After the schooner hauled down to Mr. Spencer's dock, it was ascertained that there was no room in his warehouse. The captain returned with the information to the libelant, who directed him to unload at the wharf of Mr. Haddock. This occurred on the morning of the day the sugar was landed. The captain had various interviews with the libelant, and in them all the latter objected to the unloading of the whole sugar at Haddock's, and insisted the vessel would have to pay the drayage on what he wanted at his own warehouse. There are several witnesses who confirm the captain's statement as to some facts touching the delivery. For instance, the libelant told different persons that he should require the vessel to pay the drayage on that part of the sugar which he wished landed at his warehouse, if it was unloaded at the warehouse of Mr. Haddock. Various reasons were given by the witnesses why the consignment could not be divided, but it is not necessary to advert to them. Mr. Dyer testifies that he was in Mr. Haddock's office when the libelant came in and requested Mr. Haddock to store some sugar for him. He thinks the quantity named was one hundred hogsheads or more—his impression is one hundred and twelve. The libelant left the office to ascertain where the sugar was to be stored. Mr. Haddock states he does not recollect the number of hogsheads which the libelant wished stored. While the

vessel was unloading, a few of the casks burst open, and the libelant removed the sugar which they contained to his own warehouse. There are a great many other details given by the witnesses connected with the delivery, but the foregoing may be said to be the pith of the testimony on that point, and I think there is great reason for saying that these facts make out a delivery of the goods at Mr. Haddock's dock, with the assent of the libelant; that notwithstanding he in words objected to landing a part of the sugar there, yet by his acts and conduct he acquiesced and accepted the whole, and that the controversy between the parties was narrowed down to a question as to who should pay for the drayage of the part the libelant desired to be delivered at his own wharf.

§ 830. *The carrier, having made a proper offer to deliver, which was refused, and having stored the goods, becomes a bailee for hire.*

But I do not consider it necessary to place the decision exclusively on this ground. I go further and hold, if the libelant had never acquiesced in the delivery at Mr. Haddock's, the party would nevertheless have been discharged from his responsibility as a common carrier. If the captain offered, within a reasonable time and in proper hours of business, to deliver all the sugar at the libelant's dock, or wherever else he should direct—and this fact cannot be successfully controverted under the evidence,—and the latter declined to receive it all there, or did not designate the place where it all was to be landed, then the carrier, in the absence of any uniform or well known usage to the contrary, upon landing the sugar at some suitable place, and giving notice to the consignee, was discharged from his extraordinary liability. In such case, if the consignee refuse to receive the property, the carrier can take charge of it himself, or store it with some proper person, and in either event the party becomes an ordinary bailee for the consignee or owner of the property, and is required to use only ordinary care and diligence concerning it—such care and diligence as a prudent man exercises over his own property. If, then, the libelant had done and said nothing to manifest an acquiescence in the delivery at the wharf of Mr. Haddock, but had resisted it to the utmost, and, in fact, had declined to receive the goods, still the captain, having made an offer, under reasonable circumstances, to deliver them according to the direction of the shipper, and that offer being declined or not accepted, and the property actually delivered to a proper person, in a proper place, in no aspect can it be considered in the custody of the party as a common carrier. If the sugar was not in the possession of the libelant or his agent, it was in the possession, actually or constructively, of the carrier as a common bailee, and he was responsible only for the exercise of ordinary care; and it being conceded the fire was accidental in this case, the carrier is consequently not liable for the loss of the sugar or any part of it.

The libel must be dismissed, with costs.

THE E. H. FITTLER.

(District Court for Massachusetts: 1 Lowell, 114-117. 1866.)

STATEMENT OF FACTS.—Libel in admiralty for damages for not landing libelant's goods at East Boston. The goods were shipped to Boston. The master landed the goods at the wharf of his own selection, and this suit was brought for damages and expenses occasioned thereby.

§ 831. *Rightful delivery by carrier; delivery at a wharf with notice.*

Opinion by LOWELL, J.

This case has been very carefully presented in evidence and argument. The question is, what are the respective rights and duties of the carrier and the consignees as to the wharf at which goods shall be landed by a general ship? The *dicta* of Mr. Justice Buller, and the other judges, in *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R., 389, 397, are cited in all succeeding books as the foundation of the law upon this subject. "A ship, trading from one port to another, has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." When the case came up for adjudication in England, however, it was decided in the common pleas, the exchequer chamber, and the house of lords, that the carrier is bound to deliver to the consignee; and, if he intends to rely on a substituted delivery, he must plead that his delivery was according to the practice and custom usually observed in the port or place of delivery. *Gatliffe v. Bourne*, 4 Bing. N. C., 314; 3 Mann. & G., 643; 7 Mann. & G., 850. And so is the weight of modern authority. *Abbott on Shipp.* (8 Eng. ed.), 378; *Humphreys v. Reed*, 6 Whart., 435; *Ostrander v. Brown*, 15 Johns., 39; *Hemphill v. Chenie*, 6 Watts & S., 62; *Wardell v. Mourillyan*, 2 Esp., 693; *Angell on Carriers*, § 298 *et seq.* It has been recognized as the usage of this and other ports, for the master of a general ship to go to a suitable wharf, and notify the consignees, who then take their goods from the wharf. *The Tangier*, 21 Law Rep., 8; *Cope v. Cordova*, 1 Rawle, 203. So that the general rule is now settled, and it would not require evidence in each case, that such a delivery is sufficient.

§ 832. *What is the suitable wharf of delivery and who shall determine it.*

But the precise point in this case, namely, what is the usual wharf, and who is to point it out, was not directly involved in these decisions or any others that I have seen. The libellant offers evidence that, by the usage of this port, the consignees have the right to order the master to go to any commodious or suitable wharf, and his witnesses concede that, excepting in some particular trades not now involved, if no such order is given, he may choose for himself. This concession avoids the effect of a considerable part of the claimant's evidence, which showed, as do some of the decisions incidentally, that the master of a general ship, with an assorted cargo for several consignees, does not usually, and cannot conveniently, stop to collect the votes of his consignees before proceeding to haul in. It appeared in evidence that there are many cases, as where the cargo is heavy or perishable, in which it is of the greatest consequence to the consignees whether their goods are landed at one place or another; and, that, generally speaking, it is a matter of no proper concern to the master. It appears that masters are in the habit of going to the wharf at which the best terms are offered them in "return wharfage," as it is called; but as the cargo pays the wharfage, any commission or percentage on its amount ought to belong to the owners of the cargo; and no court could consider this a valid reason for giving the choice of place to the master. A single consignee of a heavy cargo coming coastwise may find his cartage equal in amount to his whole freight. Take a cargo of iron rails, ordered by a railway company that has its wharf and track at the north end of the town, is it reasonable that the master should, for the sake of a petty percentage on what the company itself pays, land the cargo at South Boston, where ships may be scarce, and return wharfage high, against the known wish of the owners of the goods?

§ 833. *Where there is only one consignee, or the consignees are unanimous, carrier should deliver at wharf selected.*

This statement of the interests of the parties of itself exhibits their rights, at least where there is but one consignee, or where the consignees are unanimous; for it may be safely laid down as a proposition of law, that, as between two points within the port equally convenient for the carrier, he must deliver at that most convenient for the consignee, if seasonably asked to do so. It would be for the carrier to show a usage to the contrary, and then to establish its reasonableness. In the case of one consignee of the whole cargo, having his place of business at the port, and readily accessible, it might be worthy of serious consideration, if the case were now before me, whether the master must not consult with him at all events.

§ 834. — *where there are more consignees, usage that the majority shall select wharf is good.*

Where there are several consignees the case is different. The master cannot conveniently consult them, and is not bound to do so. Here the evidence shows the course of trade to be, that the majority, that is, those who together pay more than half the freight, have the right to choose the wharf. This is reasonable, because it is of no special moment to the minority whether the master or the majority choose a suitable wharf; and it is as convenient and just a mode of ascertaining the majority as any other. The merchants appear to be unanimous about it, that is, that the power of the majority is as great as that of the whole. Some ship-masters, and perhaps one or two merchants, know of no custom at all about the matter, though nearly all the witnesses say that, either by courtesy or by right, the choice in fact usually lies with the consignees of the cargo.

§ 835. — *but right to select wharf is waived in carrier's favor by delay.*

It being shown, however, that in the case of a general ship this right is often unimportant, and is waived, and is presumed to be waived unless notice is given; and this whether one person alone, or several together, constitute the majority, the consignees ought to be careful to give their notice in due season. This vessel had her agent in Boston, who, in good faith, engaged the berth at Union wharf, and the vessel was hauled in and made fast, and her tug was discharged. I cannot tell what inconvenience and damage might result to a ship in changing her berth after that period. The libellant should have found the agent or the master earlier. It is not reasonable to expect them to change their arrangements after they have gone so far. What is reasonable notice will depend on the facts of each case. Here it was too late. It is to be understood that the usage was not alleged to apply where any peculiar and important convenience to the ship would be promoted by her going to a particular wharf. No point of that sort was in controversy.

Libel dismissed.

KENNEDY. v. DODGE.

(District Court, Southern District of New York: 1 Benedict, 311-316. 1867.)

STATEMENT OF FACTS.— This was a libel *in personam* for freight money on a lot of tin and iron. The defense was that the goods were not delivered in good order, as stipulated in the bill of lading; that they were so piled upon the pier that it broke down and precipitated the goods, or a part of them, into the water. The injury done was to a greater amount than the freight bill, and the defendants asked judgment for the balance.

Opinion by SHIPMAN, J.

Before stating and applying the legal principles which must govern this case, it will be proper to state the facts which were developed on the trial. I find the following facts proved: 1. That the ship arrived at this port about the 11th of August, 1866, with a general cargo, including the tin plate and iron rods mentioned in the bill of lading, and also a considerable quantity of pig iron and other freight for other parties. 2. That, on the application of the ship, the harbor-master assigned her a berth at pier No. 45, East river, which she took, and proceeded to unload her cargo, which she continued to do for several days. 3. That the pier was a good one, with sufficient strength to have supported the cargo had it been properly placed thereon. 4. That as the cargo was discharged from time to time, the respondents had notice of the landing of that part of it which belonged to them, and took portions of it from time to time to their warehouses as was convenient. 5. That before they had removed it all, the ship had so overloaded the bridge of the dock with other cargo, and especially with the iron, that it gave way and precipitated a portion of the respondents' goods into the river. 6. That the goods were thereby damaged, and the respondents incurred expense in recovering them from the water. 7. That by a standing agreement between the ship, or her owners, and the respondents, when the latter had goods on the dock, landed from ships owned by the libelants, and such goods remained on the dock over night, the master or agent of the ship was to employ a night watchman to watch the goods, at the expense of the respondents, and that they did so in this case.

§ 836. *Under ordinary bills of lading, delivery on the dock, with notice to consignee, is a delivery.*

Now, it is insisted by the libelants that these goods were delivered to the respondents when they were placed on the dock, with notice to them, and were consequently at their risk thereafter. With regard to cargoes arriving at this port, under ordinary bills of lading from foreign countries, landing them at a proper time and upon a proper dock, with notice to the owners, is equivalent to a delivery. After such landing and notice, the owner takes all the risks arising from every other cause except that which proceeds from the ship itself. The parties to this suit evidently recognized this rule of law when the watchman was employed at the expense of the respondents to watch this tin during the night-time. Had this tin been stolen, or removed by other parties without the intervention of the officers or agents of the ship, or damaged by the elements, the ship could not have been made responsible.

§ 837. — *but the carrier is not relieved from liability for negligent discharge of the cargo so as to do injury.*

But this does not meet the question before the court. The clear proof is, that the pier was broken down by the weight of the iron placed upon it by direction of the master. He, and not the respondents, selected the dock, and he broke it down. The fact that the respondents did not instantly remove their goods on their being landed is no answer. The notice to them was not a notice against the wrongful and destructive acts of the ship in discharging the rest of her cargo, nor against a defective pier. The master had no more right to break the dock down and precipitate this tin into the water than he would have had to pile his iron on crates of crockery and crush them. I attribute to him no intention to injure the pier or the respondents' goods. I am speaking of the legal, and not the moral, quality of his acts. He doubtless thought the

dock would support the load he was placing upon it, but the result proved that he was mistaken. The consequences of that mistake are not to fall on the owners of the cargo when they had no agency in causing it.

§ 838. *The vessel is liable for injury caused by the master's negligent unloading in the scope of his employment by the vessel.*

The only doubt I have felt in the case is in relation to the responsibility of the ship for the damages. The master is clearly liable, for it was by his act that the goods were injured. There was a constructive delivery, and the question has arisen in my mind whether, after such constructive delivery, the wrongful act of the master in damaging the goods can be visited on the ship. But this wrongful act was not malicious or intentional on his part, but was one committed in the ordinary discharge of his duties as master, and within the scope of his powers as the agent of the owners. For this I think the ship is liable. Much stress was, during the hearing, laid on the fact that the master had no notice, nor any reason to suspect, that the pier was not perfectly safe and sufficiently strong to support the load he was placing upon it. There is, however, some evidence that he had doubts on this point. But whether he did or not is not material here. A ship is bound to deliver her cargo in a proper place — that is, a place proper for the amount that is to be landed, and which it is to support at any one time. The *Majestic*, Legal Obs., p. 100; Judge Ingersoll's Remarks, p. 105. This dock or place is selected by the ship, and it is for her and not for the owners of the cargo to see that it is sufficient to support the load that she places upon it, and that the weight of the cargo is properly distributed over the pier, so as to secure its safety.

§ 839. *Damages for injury to goods can be recouped against the claim for freight money.*

The only remaining question is whether the damages of the respondents, arising out of this accident, can be recouped against the claim for freight, and, if there is a balance in their favor, whether it can be recovered in this suit. That the damages suffered by the respondents can be recouped from the freight money which the libelants would otherwise recover appears to be settled upon authority. *Bearse v. Ropes*, 1 Spr., 331; *Snow v. Carruth*, id., 324; *Thatcher v. McCulloh, Olc.*, 365 (§§ 986-989, *infra*); *Bradstreet v. Heron*, Abb. Adm., 209 (§§ 799-802, *supra*); *Zerega v. Poppe*, id., 397. By way of recoupment, the respondents can, as the damages arise out of the same transaction, extinguish a portion or all the claim of the libelants.

§ 840. *In admiralty a plea of set-off cannot give defendant a judgment against the libelant.*

But they can go no further. The court cannot pronounce in their favor for any sum in which their damages may exceed the amount of the libelants' demand. In *Nichols v. Tremlett*, 1 Spr., 367, the court says: "The admiralty does not take cognizance of pleas in set-off, no statute having given it that authority, and it has been thought by some that a distinct claim by the respondent, founded upon the violation of the contract by the libelant, is in the nature of a set-off, and so not cognizable by this court. But I am of opinion that where the counterclaim is founded upon the same charter-party, the respondent may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libelant might recover. But in this case, if the damages sustained by the respondent should exceed the just claim of the libelant, the court can give no decree for the excess, the utmost effect being to diminish or extinguish the claim of the libelant; nor

could the respondent afterward maintain a suit for such excess. He cannot be permitted to split up his demand and litigate the same question twice. Having once voluntarily submitted his claim for damages to the court, he must be content with such relief as the tribunal may afford him."

I understand this to be a correct statement of the law both in the admiralty and common law courts. *Sickels v. Pattison*, 14 Wend., 257. And it follows that this court can render no judgment for the respondents to recover any excess beyond the libelants' just claim. Had the respondents filed a cross or independent libel they would have recovered their whole damages. But it is too late now. They must content themselves with the diminution or extinguishment of the libelants' just claim.

Let an order be entered referring the case to a commissioner to take the proofs, and report to this court the amount of freight which would be due to the libelants under the bill of lading, and the amount of damage which the respondents have suffered by the injury to their goods from the cause mentioned in the answer, together with the expense which they incurred in recovering it from the water. On the coming in of the report, a final decree will be entered in conformity with the rules laid down in this opinion.

VOSE *v.* ALLEN.

(Circuit Court for New York: 3 Blatchford, 299-292. 1855.)

Opinion by NELSON, J.

STATEMENT OF FACTS.—The iron in question in this case was shipped at Belfast, Ireland, by a house there, to this port, and consigned to the libelants. The ship was consigned to Edmiston Brothers, of this city, agents of the owner. The bill of lading was in the usual form, except a note on the margin, "iron to be discharged by consignees in five days after arrival of vessel at New York, or pay demurrage of \$25 per day after that time." But this clause is of no special importance in the view I have taken of the case. On the arrival of the vessel she was reported by the master to the consignees of the iron, with a request for advice as to the place of discharge. They expressed a wish that she should discharge at some dock between Washington market and the Battery, which was assented to, provided a vacant berth could be obtained. But, on inquiry, the nearest berth vacant to the place mentioned was pier No. 39, on the North river; which was accordingly assigned to the vessel by one of the harbor-masters. The consignees objected to the delivery at that place, and insisted that the vessel should postpone it till pier No. 8 or No. 9, lower down, should be vacated, which, it was understood, might be in the course of a few days. This was not assented to by the agents of the ship, and the master commenced discharging the cargo at pier No. 39. This pier is about eight hundred feet long; the outer end, for some forty feet, solid; the other part built on piles, called a bridge-pier. The iron was discharged on this part of the pier. The delivery was commenced on Thursday morning, June 24th, and continued during the day-time till eleven o'clock the next day, when the dock-master, having noticed the quantity of iron on the pier, and being apprehensive it would give way under the weight, forbade the master's discharging any more of the cargo. The hands engaged knocked off for a time; but in the afternoon they again commenced the delivery, and continued until, again attracting the notice of the dock-master, they were forbidden the second time. They then ceased; but the next morning, according to the weight of the proofs, they

again commenced discharging, and continued till about eleven o'clock A. M., when the pier broke down, precipitating some one hundred and fifty tons of the iron into the river, about fifty tons of which have been totally lost. There were only some seventy-five or eighty tons upon the pier when warning of the danger was first given to the master. The master at that time gave notice to the consignees of the iron of the warning of the dock-master, and requested that they would remove it from the pier, which they neglected or refused to do.

§ 841. *Duty of a master of a vessel to discharge cargo with care and skill at a customary wharf.*

The simple question in the case is, whether or not this discharge of the iron, under the circumstances stated, was in judgment of law a delivery to the consignees according to the requirements of the bill of lading. I think not. Assuming that the master was justified, under the general custom and usage of this port, in discharging the iron at pier No. 39, on the neglect or refusal of the consignees to procure a different one, more satisfactory to themselves within a reasonable time, the responsibility for a safe delivery at the place selected rested upon him. He was bound not only to select a customary dock or wharf for the delivery of such goods as his ship was freighted with, but the place selected must be fit and safe for the deposit of them, and the cargo must be discharged with all proper care and skill. A discharge of the cargo short of this would be an abuse of the right which the custom of the port extends to the owner or master in cases where the consignee refuses to accept or to participate in the delivery.

§ 842. *Where consignee objected to the wharf chosen by the master, notice of dangers by the latter does not operate.*

Nor did the master exempt himself from any portion of this responsibility by giving notice to the consignees of the danger from overloading the pier in the discharge of the iron. They had refused to have anything to do with the delivery at that place. The master, therefore, was left to discharge the iron there, if at all, at his peril without their assent or participation. If the pier was found insufficient for the discharge of the whole of the iron, a portion should have been delivered at some other place, and notice given to the consignees. This was an obvious suggestion after the dock-master had forbidden any further discharge upon the pier at which the vessel lay; or, what might have answered the same purpose, perhaps, the iron might have been distributed over a larger portion of the pier.

§ 843. *Jurisdiction and the right of consignees to sue sustained.*

An objection is taken to the right of the consignees to bring this suit, and also to the jurisdiction of the court below to entertain it. I am satisfied, however, that neither objection is well founded. The consignees were the proper parties to bring the suit, having made advances upon the consignment; and, as to the jurisdiction, it is the common case of a libel filed for the non-performance of a contract of affreightment. I think that the decree of the court below is right and should be affirmed.

SALMON FALLS MANUFACTURING COMPANY v. THE BARK TANGIER.

(Circuit Court for Massachusetts: 1 Clifford, 396-404. 1860.)

STATEMENT OF FACTS.—In this case the master gave due notice, and commenced unloading cotton, but the wharf becoming crowded the work was sus-

pended, and resumed again without further notice, and completed on fast-day. The cotton not being removed was burned on the wharf.

§ 844. *Where a vessel has commenced to discharge cargo, she may complete the unloading on fast-day.*

Opinion by CLIFFORD, J.

Beyond question, the decision of the supreme court in *Richardson v. Goddard*, 23 How., 28 (§§ 786-796, *supra*), has established the rule that a vessel lying in an America port, if she has commenced to discharge her cargo prior to the occurrence of the annual fast of the state in whose port she is at the time moored, may properly continue the work on that day, or in case the work of discharging the vessel had been suspended because the wharf was temporarily blocked up by the merchandise previously unladen, she may, if the obstacles are removed, resume and complete the work on that day as an ordinary working-day. Assuming that the day when the unlading was completed must now be considered, under the circumstances of this case, as an ordinary working-day, the counsel of the respondents insists that the evidence disclosed in the record fully establishes their defense. That proposition is denied by the libelants, and they insist that the present case is distinguishable from that decided by the supreme court in two particulars. First, they contend that there should have been a new notice to them prior to the resumption of the unlading on fast-day, after it had been suspended by reason of the blocking up of the wharf, and that no such new notice was given. Second, it is insisted by the libelants, that as the work of unlading was not completed until one o'clock, and as that was the usual dinner-hour of the truckmen, the unlading was not at a proper time so as to discharge the carrier from further liability, even if the notice was sufficient, and although all the other acts to constitute a legal substitute for an actual delivery were duly performed.

§ 845. *Temporary suspension of delivery of cargo does not require a new notice.*

That due notice was given of the arrival of the bark, and that the master was ready to deliver the consignment, has already appeared, and the evidence upon that point need not be repeated. No authority is cited to show that a second notice is ever required in a case like the present, and it is believed that none can be found to countenance such a requirement, where it appears, as in this case, that all of the officers of the vessel remained on board, and that the suspension of the work was only a temporary one, occasioned by the ordinary impediments and obstructions universally known to be incident to the nature of the business. Small wharves are liable to become blocked up upon the discharge of large cargoes, and when that is the case the obstruction itself furnishes to the experienced truckman or drayman the reason for the suspension of the work. Had the master truckman of the libelants gone to the wharf on Wednesday and found the vessel abandoned by her officers, and no one on the wharf engaged in removing the cotton, there would be much greater reason to support the views of the libelants; but it was not so. When the teamster went there, all of the officers were on board, and the truckmen of the delinquent consignees were employed in removing the cotton from the wharf, and some two hundred bales were removed during that day. Under these circumstances, the teamster could hardly fail to understand that the work of unlading would be resumed as soon as the obstacles which had caused it to be suspended were removed. Besides, while he was there he was told by the mate that want of room had occasioned the work to be suspended; and not a doubt is entertained from the

evidence that he well understood that it would be resumed as soon as a sufficient number of bales were taken away to afford room to discharge the residue. Carriers by water, acting under the usual bill of lading, are not required to transport their cargoes from the wharf to the storehouses of the merchant or consignee, but may lawfully unlade the same at the usual wharf; and all the decided cases, if rightly understood, admit that if the carrier, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel, and of his readiness to deliver the cargo, unlade the same on a suitable wharf, at a suitable time, and make it ready for delivery, as by separating each consignment from the others and placing it on the wharf, where it is conveniently accessible for the purposes of removal, that such acts, if performed in good faith, are equivalent to an actual delivery of the merchandise, and have the effect to discharge the carrier from all further liability in his capacity as carrier, and fully entitle him to the stipulated freight. Ships trading from one port to another have not the means of carrying the goods on land, and, according to the established course of trade, a delivery on a suitable wharf, at a suitable time after due notice of the arrival of the vessel, and of the master's readiness to deliver the goods, is equivalent to such a delivery as will discharge the carrier from his liability as such, provided the consignment in question is properly separated from others, and the goods so placed on the wharf as to be conveniently accessible for the purpose of removal. *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R., 389; *Story on Bailm.*, sec. 445; 2 *Kent's Com.* (9th ed.), 816; *Cope v. Cordova*, 1 Rawle, 203; *Kohn v. Packard*, 3 La., 225; *Harman v. Mant*, 4 Camp., 161; *Gould v. Chapin*, 10 Barb. (S. C.), 612; *Ang. on Car.*, sec. 313; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 271; *Fisk v. Newton*, 1 Denio, 45; *Thomas v. Boston & P. R. Co.*, 10 Metc., 472; *Casside v. The T. Nav.*, 4 Term R., 581; *Richardson v. Goddard*, 23 How., 28 (§§ 786-796, *supra*). Mr. Chitty says, where goods arrive by ship from a foreign country, they must be delivered by the master to the consignee or his assigns, according to the bill of lading, or at the usual wharf, according to the usages of the port of delivery with respect to such a voyage. *Chitt. & Temp. on Car.* (ed. 1857), 154; *Golden v. Manning*, 3 Wils., 429; S. C., 2 W. Black, 916. He cannot, however, at once discharge himself from all responsibility by immediately landing the goods, without any notice of the arrival of the vessel or of his readiness to make the delivery. But he must give such reasonable notice of those facts to the merchant or consignee as will enable him, in the usual course of business, to receive and take away the goods. *Add. on Con.* (2d Am. ed.), 480; *Gatliffe v. Bourne*, 4 Bing. N. C., 314; *Bourne v. Gatcliffe*, 11 Clark & F., 45; *Price v. Powell*, 3 Comst., 326. It is a mistake, however, to suppose that such notice cannot be given till after the unloading is completed and all the acts performed which are required to discharge the carrier. On the contrary, it is more usual, and equally effectual, to give the notice at the time the work of discharging the vessel is commenced; and, when so given, it is not in general necessary that it should be repeated, provided the unloading is prosecuted without unnecessary or unusual delay. Casual interruptions in the prosecution of the work for brief periods, by such impediments and obstructions as are necessarily incident to the nature of the business,—as by the blocking up of a small wharf by the vessel's own cargo,—are not unusual, and do not create any necessity whatever for a second notice. Such impediments are so common that they may be said to furnish their own explanations, and, being such as every truckman fit to be employed readily

comprehends, the interruptions in the work of lading occasioned thereby create no necessity to repeat the notice, because the interruptions are not of a character to mislead those who are usually employed to remove the goods from the wharf.

§ 846. *Delivery at a proper time on the carrier's part; what hours of unloading are suitable.*

Unlivery at a proper time as well as at a proper place is a part of the duty of the carrier, and is one of the necessary acts to be performed by him in order to discharge himself from liability in a case like the present. Where no actual delivery to the consignee had been made, to free himself from responsibility as a carrier he must show that he gave due and reasonable notice of the arrival of the vessel, and of his readiness to deliver the goods; that, pursuant to that notice, he discharged the consignment in question on a suitable wharf, at a suitable time, and that the goods were properly separated and so placed on the wharf as to be conveniently accessible for the purpose of removal. All this was done in this case, unless it be held, as is contended by the libelants, that the time was unsuitable, because the work was completed at one o'clock, which, it is said, is the usual dinner-hour at this port for the truckmen. Masters of vessels employed in the transportation of merchandise necessarily have to deliver goods to persons of different habits, and to those engaged in different pursuits; and to hold that they must suspend the work of discharging their vessels during the several hours when it is usual for those to whom the goods are to be delivered to go to their meals would be to subject them to great inconvenience and embarrassment. Such restriction upon the hours of labor would prove to be very inconvenient to those usually employed to discharge the cargo, and still more so to those belonging to the vessel. Meal-time, as usually understood by different persons in a commercial port, is exceedingly variable. Dinner-hour varies from twelve o'clock at noon to six o'clock in the afternoon, and breakfast-hour from sunrise to ten o'clock in the forenoon, or later. Take the case of a large cargo consigned to various consignees, and if indiscriminately stowed, it would be difficult to discharge it at all within the business hours of the day without violating this supposed rule. Truckmen, it is said, usually dine in this port at one o'clock, but the case shows that some of them dine at twelve, and, what is more, the case also shows that other persons besides regular truckmen were employed in taking away some portion of the cotton. Consignees are not obliged to employ truckmen to remove their goods from the wharf, but may go there in person, if they choose, and receive their own consignments; and, if the rule has any foundation in law, it is very clear that its benefits may be claimed by all who have any such dealings with the vessel. But the objections to the proposition, as applied to this case, do not consist alone in the uncertainty of the restriction as to the hours of labor, nor even in the fact that the rule would occasion great inconvenience and embarrassment. Still graver objections exist to it, arising from the assumed theory of law on which it is based. It assumes, in the first place, that the notice given by the master of the arrival of the vessel, and of his readiness to deliver the goods, imposed no duty upon the consignees until all the acts required of the master to discharge himself from his responsibility as a carrier had been performed; and then it also assumes, in the second place, that, after all those acts had been performed, he still continued to be the insurer of the goods for such a length of time as was reasonably necessary to enable the consignee to go to the wharf and take the cotton away. Suppose no notice had been given

of the arrival of the vessel, and of the master's readiness to deliver the goods, as in the case of *Gatliffe v. Bourne*, 4 Bing. N. C., 314, then the theory of law assumed by the libelants, that the mere unloading of the goods on a suitable wharf, at a suitable time, is not equivalent to an actual delivery, would be correct. When the only notice given of the arrival of the vessel, and of the master's readiness to deliver the goods, is subsequent to the performance of those acts, then it may be true that the consignee is entitled to a reasonable time thereafter in which to go or send to the wharf, receive the goods, and take them away.

§ 847. *Consignee, on receipt of notice of unloading, should seek to co-operate with carrier.*

But where he is duly notified in advance of the unloading, or at the time when it was commenced, he has no right to remain passive and indifferent until the unloading is completed, and all the other acts required of the master are fully performed, and then claim that the liability of the carrier shall continue for such an additional length of time as will enable him to do what he ought to have done while the cargo was being discharged and those other acts were being performed. Consignees and masters of vessels are expected to co-operate in the delivery of consignments; and, if they do so, it will seldom happen that any controversy will arise; and, when they do not do so, the delinquent party must abide the consequences. *The Grafton*, 1 Blatch., 173 (§§ 814, 815, *supra*); *Brittan v. Barnaby*, 21 How., 529 (§§ 923-927, *infra*). Such co-operation is for the interest of both parties, and it is for that reason that it is required. Masters need the co-operation of consignees to prevent the wharf from becoming blocked up, and the interest of consignees is promoted by such co-operation, because, without it, some of the acts otherwise required of the master cannot be performed. A new hearing was granted in this case at the last term, so that the case now stands the same as in an ordinary appeal. For the reasons already given the decree of the district court is affirmed.

THE CONVOY'S WHEAT.

(3 Wallace, 225-231. 1865.)

STATEMENT OF FACTS.—The master of the Convoy received wheat at Chicago, and gave bills of lading stating that it was to be carried to Port Colbourne, thence by rail and steam or sail to Oswego. Finding at Port Colbourne that he would be delayed some days waiting his turn to be unladen, he sailed to Buffalo, the nearest port, discharged his cargo, notified the consignees by telegraph, and libeled the wheat for freight and demurrage. The libel was dismissed by the district court for the northern district of New York, and an appeal taken to this court.

Opinion by MR. JUSTICE MILLER.

It is not necessary to determine whether the libellant in this case, who was owner of the ship, contracted to deliver the wheat to the consignees at Oswego or whether he contracted to deliver it at Port Colbourne. The bill of lading given by the master of the vessel shows that it was understood that from Chicago to Port Colbourne was only part of the voyage which the wheat was to make, and that from Port Colbourne it was to be forwarded by the Welland Railway on its further voyage.

§ 848. *Where course of trade at port requires delivery at an elevator, carrier has no right to disregard it.*

The testimony is clear that at Port Colbourne there is an elevator belonging to that railroad company, and that it is the only one, and that there is no other warehouse or receptacle in which the wheat could be stored. The course of the trade demands that wheat shipped to Port Colbourne must go through that elevator, and if the vessels making delivery are so numerous that it cannot relieve them promptly they must await their turn.

§ 849. — *to carry elsewhere at owner's expense held inexcusable.*

The master of the vessel must be held to have made his contract with a full knowledge of this course of trade and be governed by it. He had, therefore, no right, when he found there would be a delay of several days in delivering his cargo at the elevator, to carry it to Buffalo at the expense of the owner.

§ 850. — *and especially so when consignee might have been consulted.*

There is another matter in which the master failed in his duty. There was a telegraphic line in operation between Port Colbourne and Oswego, where the consignees resided, and he could, at any time during the three days he lay at Port Colbourne, have notified them of his difficulty and received their instructions. He did nothing of the kind, but, after waiting about half the time that would have been required to enable him to discharge his cargo, he sailed to Buffalo, deposited the wheat there subject to his own order, and then notified consignees by telegraph that he should libel it for freight and damage unless paid immediately.

Decree affirmed, with costs.

DIBBLE v. MORGAN.

Circuit Court for Texas: 1 Woods, 406-412. 1873.)

Opinion by Woods, J.

STATEMENT OF FACTS.—This suit was brought by the plaintiffs to recover of the defendant as a common carrier the value of certain merchandise shipped by them at New Orleans and Galveston, in July, 1866, in the steamship Harlan, to be delivered at Indianola, Texas. One of the bills of lading acknowledges the receipt of the goods in good order and condition, and provides that they are to be "delivered in like good order and condition at the end of the ship's tackles at the port of Indianola, the dangers of fire at sea or on shore, collisions and accidents from machinery, boilers, steam or any other accidents and dangers of the seas, rivers and steam navigation of whatever nature or kind soever excepted," and that "the landing of the goods upon the wharf should be considered a delivery to the consignee." The other bill of lading simply provides for the delivery of the goods therein mentioned in good order and condition at the port of Indianola (the dangers of the seas only excepted).

The plaintiffs allege that the goods were never delivered, and judgment is asked for their value. The defendant answers that the Harlan arrived at the port of Indianola on July 11, 1866, of which plaintiffs had immediate notice, and that the goods were delivered to them before noon on the same day.

The facts as developed by the testimony are as follows: There is but one wharf at Indianola where goods are usually delivered. It extends into the bay about one-eighth of a mile. The Harlan arrived at the head of this wharf a little before eight o'clock, A. M., of the 11th of July, 1866, and immediately

commenced discharging her cargo upon the wharf-head. At this time the weather was misty and there was drizzling rain, and before noon the weather became violent and stormy. The freight of the Harlan was all landed before twelve o'clock, M., upon the wharf-head, and the goods of the various consignees were piled up in one bulk and covered with tarpaulins. At least twice during the day, and once at least after all the freight was landed, application was made to the officer of the ship, who had charge of the cargo, by draymen and consignees, for leave to remove some of the goods from the wharf to the shore, but he would not permit it to be done, and said they were not ready to deliver. Early in the afternoon, the draymen, whose business it was to carry goods from the wharf-head to the shore, put up their horses and drays for the day, believing that no goods could be delivered on account of the violence of the weather. Some of them thought it unsafe to drive a horse and dray out to the wharf-head. During the afternoon the weather became more and more boisterous; the wind blew a gale. The weather was so bad that it was not considered suitable for the removal of goods. They were left under the tarpaulins in charge of a watchman employed by defendant. During the night the wind blew a hurricane. A sailing vessel, which was anchored to the windward of the wharf, broke from its moorings and was blown against the wharf, and gradually broke it down and was driven through it. In this way the goods were thrown into the bay and lost.

The first question presented by the pleadings and evidence is, Was there a delivery, actual or constructive, to the consignees, whereby the defendant was discharged from his liability as a common carrier? It is not disputed that the goods were landed at the right place, and where both parties expected them to be landed. They were landed at a proper time of day. The plaintiff says, however, that the weather was so bad when they were landed that he could not be expected to receive them, that he did not receive them, that he was not allowed to receive them, and that, therefore, there was no delivery. The evidence shows that as fast as the cargo of the Harlan, which comprised much merchandise, etc., besides the goods of the plaintiff, was landed, it was placed in bulk under the tarpaulins.

§ 851. *Duty of carrier by water as to delivery.*

By the general usages of the commercial and maritime law, it is settled that the carrier by water shall carry from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf. But to constitute a good delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods or put them under proper care and custody. *Richardson v. Goddard*, 23 How., 23 (§§ 786-796, *supra*). Delivery upon the wharf, in case of goods transported by ships, is sufficient, under our law, if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and conveniently accessible to the owners. *The Eldy*, 5 Wall., 481 (§§ 968-976, *infra*); *The Santee*, 2 Ben., 519 (§§ 877-879, *infra*). I am clear in the opinion that there was no delivery of the goods in this case, under the rules of law just cited.

§ 852. *An opportunity to inspect goods and remove them is necessary to constitute a good delivery.*

The goods of the various consignees were piled together in one bulk upon the wharf, under tarpaulins, during a rainy and stormy day, where they could

not be fairly said to be open to the inspection of the consignee, and a fair opportunity afforded him to remove his goods. An actual inspection of the goods by the consignee, and their removal by him, are not necessary to a delivery of the goods, but there can be no delivery unless the consignee has the opportunity to inspect and carry away. No one can say that, upon the testimony in this case, such opportunity was given the plaintiffs. The officer of the ship, who had charge of the landing of the cargo, declared, as the testimony shows, to one of the plaintiffs and to one of the draymen sent to carry goods from the wharf, that the goods were under tarpaulin, and that the ship was not delivering them, and refused to allow them to be disturbed.

§ 853. *Bill of lading as to manner of delivery explained; also as to "dangers of seas" and "act of God."*

Taking all of the facts of the case into consideration, I am satisfied that when the goods were landed upon the wharf they were not delivered, nor did the officer of the ship, in charge of the unloading of the ship, intend to deliver them by placing them upon the wharf. If I am correct in this view, it follows that the liability of the plaintiff, as a common carrier, continued after the landing of the goods. His obligation as such could not be discharged except by delivery, actual or constructive, to the consignee, unless the carrier was relieved by the act of God or through some exception in his bill of lading. The clause in one of the bills of lading, that the landing of the goods upon the wharf was to be considered a delivery to the consignee, cannot be construed to mean that any sort of a landing would be a delivery. The bill of lading must receive a reasonable construction. A landing in the night without notice, or a landing in the midst of a storm, whereby the goods are lost, could not be considered a delivery to the consignee.

This brings us to the next inquiry. Is the defendant relieved from his liability, as a common carrier, by the loss of the goods through the *vis major*, or is he exempt by reason of any exception in his bill of lading? One of the exceptions in the bill of lading is, "dangers of the seas." As long as his liability as a common carrier remained the defendant was protected by this exception. Do the facts of the case bring him within it? By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused unless they arise from the act of God. To ascertain whether the loss was by such "dangers," it must be inquired whether the accident arose through want of proper foresight and prudence, and to relieve the carrier from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Johnson v. Friar*, 4 Yerg., 48; *Whitesides v. Russell*, 8 Watts & S., 44. The evidence shows that the goods were allowed to remain upon the wharf after the master of the ship was satisfied that a hurricane was imminent, so that he considered it prudent to cast off from the wharf and anchor in the stream. The agent of the defendant left the wharf with the goods upon it, and went to his home and never returned until next morning, after the mischief had all been done. A watchman was left over the goods, who might have given warning of danger to them in time to have them removed to a place of security. But instead of this, he abandons his post, and, after daylight, his lantern is found burning upon the wharf. No agent of the defendant, either on ship or shore, after the landing of the goods, and after a hurricane was known to be imminent, took any pains to put the goods in a place of security. Even after the demolition of the wharf had commenced, it was so gradual, that, with alacrity and energy,

the goods might have been saved. It cannot, therefore, be said that the loss of the goods was the result of unavoidable accident which could not have been prevented by due diligence and proper skill. It was, therefore, not occasioned by the danger of the seas, and it does not fall within the exceptions of the bill of lading.

It follows, as a further inference from these facts, that the loss was not occasioned by the act of God; for to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 Kent's Com., 597. Any act of omission or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defense that the loss was occasioned by the act of God. The *Zenobia*, 1 Abb. Adm., 80 (§§ 1357-62, *infra*). It follows from these views that there never has been any delivery of the goods, and that defendant has not excused the want of delivery. He is, therefore, liable for the value of the goods, and judgment must be given therefor against him.

THE STEAMSHIP VILLE DE PARIS.

(District Court, Southern District of New York: 3 Benedict, 276-279. 1869.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This is a libel filed to recover the sum of \$4,500, as the value of a case of silks carried by the steamship *Ville de Paris* from Havre to New York, under a bill of lading wherein the libelants, Adolph Rusch and others, were named as the consignees of the case. The libel is founded on the non-delivery of the case under the bill of lading. It does not aver that the libelants were or are the owners of the goods. The only defense set up in the answer is, that the case was delivered to the libelants at New York. There is, in the answer, an allegation that the libelants are not entitled to recover anything from the vessel, but there is no averment in it that the libelants were not the owners of the merchandise, nor any exception in it to the libel, for want of an averment in the libel that the libelants are or were such owners. On the trial, the claimants took the point that they had a right to rebut the *prima facie* title which the libelants showed as consignees under the bill of lading (*Lawrence v. Minturn*, 17 How., 100, 107; §§ 463-470, *supra*), by showing that the libelants were not the owners of the merchandise in question, and therefore not entitled to bring the suit.

§ 854. *Where pleadings do not show averment or denial that the libelant is the owner of the goods not delivered, the point is to be considered as waived.*

I think, however, that on the above state of the pleadings the point must be regarded as having been waived by the claimants. But even if it were open to them, they gave no proof of non-ownership by the libelants, when the suit was brought. The only testimony they introduced bearing on the subject was the oath, made by one of the libelants, on the entry of the goods at the custom-house in New York, on the 24th of October, 1867, after the vessel arrived there, that the goods then belonged to a house in Switzerland. The libel was sworn to on the 27th of December, 1867, and filed on the same day, and no evidence was offered by the claimants to show that the libelants did not then own the goods.

§ 855. *Facts that do not establish a delivery of goods.*

The case in question was one numbered 170. The bill of lading covered two other cases, numbered 169 and 171. The libelants entered all three of the cases, and paid the duties on them, and obtained from the custom-house a permit, authorizing the delivery to them of the cases numbered 169 and 171, and requiring the case numbered 170 to be sent to the public store for appraisement. That permit was addressed to the inspector of the port, and was delivered to two customs inspectors who had charge of the discharging of the vessel, and transacted their business in a small movable house on the wharf at which the vessel was lying. The case numbered 170 was delivered over the ship's side by its employees, and placed from its tackles upon a hand-truck belonging to the ship, and was then wheeled by an employee of the ship to the door of the movable house referred to, which stood at a point between the ship's gangway and the inner end of the wharf. The employee stopped, with the truck having the case upon it, in front of the inspectors, who were at the door of the house, and submitted the case to their view. One of them placed upon it the letters "P. S.," with chalk, and it was then wheeled away on the same truck, by the same employee of the ship, further towards the inner end of the wharf, and further from the ship than the house. So far as appears, it has never been seen or heard of since. Its deposit upon the wharf from the truck is not shown. The letters "P. S." indicated that it was to be taken to a public store, and it was in course for the truckman to deposit it at a particular place on the wharf which the inspectors had previously designated as a place for the aggregation of such packages as were to be taken to a public store. It was not found at that place. Search was made for it about half an hour afterwards, but it could not be found. The other two cases, which came out of the ship at other times, and were wheeled separately on other trucks to the inspectors' house, and were there marked by them each with a cross, to denote that they were to be delivered to their consignees, were afterwards found at their proper place of deposit on the wharf, which was a different place from that where the case numbered 170 ought to have been deposited, and were received by the libelants. The wharf was exclusively occupied by the claimants, and was inclosed on the inner end of it by a fence, access through which was had by gates. These facts do not constitute any delivery of the case on the wharf, or any delivery of it to the custom-house authorities, so as to exonerate the vessel from her liability under the bill of lading. There must be a decree for the libelants, with costs, and a reference to compute the damages.

MANNING v. HOOVER.

(District Court for New York: Abbott's Admiralty, 188-195. 1848.)

STATEMENT OF FACTS.—Libel for non-performance of a contract of affreightment. A cargo of grain, carried from Brooklyn to New York, fell short at New York of the amount actually received on board by about five per cent.

Opinion by BETTS, J.

Assuming the subject-matter of this action to be within the cognizance of this court, the question upon the merits is whether the respondent is chargeable for the quantity of grain represented in the bill of measurement to have been delivered on board his vessel for transportation.

§ 856. *Method of weighing grain stated.*

The evidence shows that the respondent had no agency in measuring or

weighing the grain when put on board, or at its unlading and delivery. The libelant employed his own agents to transact that business at each end of the voyage. The owners of the store where the grain was on storage would not permit the measurer employed by the libelant to make the weight or measure of the corn; their clerk measured it and kept his own tally, and by his certificate or return of weight and measure it appeared that there was put on board the lighter the quantity in bushels claimed by the libelant. The statute of this state fixes the legal capacity of the bushel by measurement (1 Rev. Stats., 2d ed., 621, § 19), and the weight of corn, which shall constitute a bushel, at fifty-six pounds. *Id.*, § 40. The contract for the carriage of this cargo was by the bushel. No bill of lading appears to have been executed, but the certificate or account rendered by the warehouseman of the quantity of corn delivered to the vessel was accepted and acted upon as accurate by the parties, in paying and receiving the freight for its transportation. The method commonly pursued in this port by dealers in grain for ascertaining the quantity (and which was adopted substantially in this case) is to measure it in a half-bushel by tale, tallying at each count of five measures, and to weigh one measure out of ten tallies, or one bushel out of every hundred measured, or other assumed proportion. The multiplication of the sum of the tales by fifty-six is assumed to show the quantity of bushels contained in the mass. The warehouseman refused in this case to permit the corn to be measured and weighed by any person except his own weighers. The libelant employed a measurer of grain to attend for him at the warehouse where this grain was stored, and see to its delivery. He was present, and overlooked the tallies of the measures and weights as they were taken from the measurers and entered by the clerk of the warehouse, during the delivery of four or five hundred bushels, and saw that they were correctly stated by him. The residue of the delivery was made by the warehouseman alone.

The cargo was also unladen at New York, from the lighter, under the superintendence of the libelant's agents only. It is fully proved that this compound method of measurement never works out a perfect concurrence in the two results. There is invariably a difference between the quantity given by the tales of measurement and the product in weight so obtained, at times amounting to an important percentage, but more usually not exceeding about five per cent. The evidence discloses several cases of that difference. The grain is shoveled into the measure by laborers, and then a measurer strikes or evens the measure. When the grain is thrown in heavily by the shoveler or is shaken strongly or evened loosely by the measurer in striking, the weight of the full measure will be augmented, as will the measured dimension of the mass be diminished, and consequently the tale line of the return will be reduced, as it may be unduly increased by an opposite irregularity in filling the measure. A difference of but one pound weight to a bushel, by either mode of manipulation, would create a variance in the computation of eighteen hundred bushels, charged as delivered, of over thirty bushels in actual quantity, not participated in mutually by vendor and vendee, but operating exclusively to the advantage of one alone. These differences are usually made to harmonize by pound allowances or estimates, and that method may be fair enough where both parties have been present at the weighing and measuring; but it is governed by no rules or data capable of securing certainty, so as to constitute it a safe law to be enforced against a stranger to the process.

The enumeration of bushels in this case was obtained by compounding the

hand-measure in half bushels of the whole bulk with the weight of the several individual measures, and the sum in pounds, so produced, determined the quantity of bushels in the cargo. This method of determining the quantity was acted upon by both parties in fixing the amount of freight, but is not conclusive between them on the question whether the lighterman delivered to the shipper the whole quantity of grain received on board the vessel; for not only the circumstances stated necessarily lead to uncertainty and variations as to quantity in every measurement made, but moreover, a cargo loaded and discharged in the manner adopted in this case is subject to other causes of wastage and diminution.

After being weighed in the loft of the store, it was, on a windy day, run down to the hold of the sloop in an open pipe or trough exposed to the air. The evidence proves that by thus fanning out the chaff and light matter, a considerable diminution of bulk necessarily ensues, and by reason of this, and of the waste in shoveling and measuring adverted to, there would almost unavoidably be found on delivery a difference between the amount returned as taken on board and the one discharged, even when the same mode of ascertaining the quantity is employed in both instances, and that difference is augmented if the measure alone is used in one case and weight in the other. Some of the witnesses attempted to make out average computations of loss or gain on these heads; but it is obvious that estimates so formed can afford no satisfactory exactness in a given instance; it must be purely matter of conjecture whether under or over five per cent. would be lost.

§ 857. *Burden of proof as to deficiency is upon the libellant if he attended exclusively to loading and unloading.*

The respondent proved, by the two men in charge of his vessel, that one of them remained constantly on board the vessel while the grain was there, and that none of it was removed by them or with their knowledge, except by the libellant's agents; and they testify that they do not believe it would have been possible for any to have been taken out of the vessel without their knowledge. Conceding to the libellant the case in the strongest form in which he places it, that the respondent, as *lighterer*, stood in the character and assumed the liability of a common carrier, and was responsible for the whole quantity of grain put in his charge, the position must be taken also with the qualification that he must prove the quantity placed on board, and that less than that quantity was delivered out to him. Both the acts of lading and unlading were his own, to the exclusion of the respondent, and he must prove, beyond reasonable question, that he did not receive from the defendant all the grain delivered on board of his vessel. The evidence on his part may be *prima facie* sufficient to lay a foundation for the presumption that such is the fact, and that the deficiency arose either from loss in the transportation of the cargo, or from its embezzlement by those in charge of the vessel, or from its unlawful abstraction by others. For losses of that character the respondent would be liable. The testimony, however, which has been produced by the respondent removes all the essential grounds for either presumption, and places the case upon the question of the accuracy of the measurement in lading and unlading the cargo.

§ 858. — *variations may be shown to be of frequent occurrence by the mode of measurement adopted.*

The case then stands thus: On the supposed quantity of one thousand eight hundred and fifty-seven bushels of corn, charged against the respondent, the defendant has sustained a loss of about ninety-seven bushels, or over five per

cent. of deficiency. The measurer employed by the libelant supposes that ordinarily in loading grain by weight, and delivering it by measure, the difference in quantity found would be very slight, and if there were any, it would be ordinarily rather in favor of the carrier. The excess, he thinks, would be about five bushels to the thousand. But he says that shoveling by hand, for the purpose of measurement, will sometimes make a difference against the carrier of about four ounces to the bushel, which a little exceeds five per cent. In this case he found a difference, on delivery, of five bushels between weight and measure. Another witness, a weigher and measurer by occupation, supposes that one thousand eight hundred or one thousand nine hundred bushels of corn, shipped by weight, would usually deliver a less amount by thirty bushels, the quantity being determined in the same manner. If the grain is loaded in a high wind, the blowing out of chaff he thinks would lessen the measure considerably. He has never found the same quantity on remeasurement as on the first trial; there would always be some excess or deficiency. As a general rule, he should expect that one thousand bushels loaded by weight would deliver twelve bushels more by measure. According to his experience, the mode of shoveling may easily make a difference of one pound or more to the bushel. A third witness, Mr. Verplanck, proves that the amount put on board was determined by weighing it in lots of twenty-five bushels each. It was weighed by his clerk, without his personal superintendence. It also appears that freight was charged and paid, according to the statement of the quantity made by the weigher.

I think that, upon all the proofs, the inference is just as direct and satisfactory that less than the named amount of corn was laden on board the vessel as that the defendant delivered less than he actually received. In order to charge him with a supposed deficiency, the preponderance of evidence must be decidedly in favor of the libelant, that more grain was laden on his vessel than she delivered on her discharge. The amount of deficiency being only about five per cent., would hardly justify an inference of misconduct or negligence against the parties sought to be charged therewith, when it may be assumed, upon presumptions equally cogent, that the difference arose from mistakes in computation of weight or measure, in the combined operations of making up the calculation of quantity, or in actual wastage in the process of loading and discharging.

I shall dispose of the case upon this view of the facts, without reference to the question raised as to the jurisdiction of the court over the subject-matter. Admitting the jurisdiction of the court, there is not sufficient evidence, in my opinion, to charge the defendant with any loss of corn while on its carriage from Brooklyn to its delivery in New York, and the libel is accordingly dismissed. The libelant has shown a fair *prima facie* case on his proofs in the first instance, and I therefore impose no costs upon him.

Libel dismissed without costs to either party.

THE THAMES.

(14 Wallace, 98-109. 1871.)

APPEAL from U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Gilbert Van Pelt, of the firm of Bennett, Van Pelt & Co., of New York, bought the cotton in this case of Brady & Moses, of Savannah, Georgia. The cotton was shipped to New York, three bills of lad-

ing being drawn, each stating that the cotton was shipped by Gilbert Van Pelt, and to be delivered "unto order or to his or their assigns." Two of the bills were delivered to Gilbert Van Pelt. For the purpose of raising money to pay for the cotton, Van Pelt drew a draft on his firm, payable to the order of "Billopp Seaman, cashier." This draft and the two bills of lading were delivered to Brady & Moses, for the purpose of investment in bills on New York, and the draft was discounted for account of the Atlanta National Bank. The bills were indorsed "deliver B. Seaman, cashier, or order," signed by Van Pelt. The cargo was delivered to Bennett, Van Pelt & Co., who paid the freight. Seaman filed a libel against the Thames for non-delivery.

Opinion by MR. JUSTICE STRONG.

The engagement of the ship with the shipper was to deliver the cotton in New York to order. In regard to this there is no doubt. Such was the express stipulation of the bills of lading, which were given on the 28th of January, 1868, when the cotton was received on shipboard. On that day Gilbert Van Pelt purchased the cotton in Savannah from Brady & Moses, and settled for it by giving in payment his draft upon the firm of Bennett, Van Pelt & Co., in New York, of which firm he was a member. The draft was drawn at fifteen days' sight in favor of the libellant, Billopp Seaman, cashier, or order, and it was discounted by Brady & Moses with money of the Atlanta National Bank, which they had in hand for the purpose of purchasing bills on New York on the bank's account. The price of the cotton was thus, in substance, paid by money which Van Pelt obtained from the bank as the proceeds of his draft. At the time when he drew the draft he also indorsed upon the bills of lading which the ship had given for the cotton an order directing its delivery to Billopp Seaman, cashier, in whose favor the draft was drawn, and delivered them with the draft to Brady & Moses. They were made out in triplicate, as is usual, and, by them all, the ship undertook to deliver the cotton shipped *to order*. Two of them had been delivered to Van Pelt, the shipper, and the third was retained by the ship. That retained by the ship, it is true, when produced at the trial in the court below, was found to have, at its foot, the memorandum, "for Bennett, Van Pelt & Co.," which is not upon those delivered to the shipper. How that memorandum came there is not explained. No witness has testified in whose handwriting it is, but it is proved not to have been in that of any of the ship's agents at Savannah who signed the bills of lading and who made the contract for carriage. This, however, is of little importance. The contract between the ship and the shipper is that which is contained in the bills of lading delivered.

§ 859. *The bill of lading delivered to the shipper controls if different from that retained by the carrier.*

The ship's bill was designed only for its information and convenience; not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract. The proofs in the case leave no reasonable doubt that the bills of lading were indorsed to the libellant in order to transfer to him the cotton as a security for the payment of the draft at its maturity. Gilbert Van Pelt alone asserts the contrary. His testimony, it must be admitted, tends to show that they were indorsed and received as security for the acceptance only of the draft. But he is directly contradicted by Moses, by Brady and by Bruen, neither of whom has any interest in this controversy, and all of whom state that the bills of lading were indorsed to secure to Seaman the payment of the draft,

and not merely its acceptance. Besides, their testimony is in harmony with all the probabilities of the case. It is absurd to talk of security for the acceptance of the draft. No such security was needed. It might have been accepted before it was discounted. Gilbert Van Pelt was a member of the firm upon which it was drawn, and he was at hand when it was discounted. He might then have accepted it. In addition to this it is significant that the invoice of the sale from Brady & Moses to Van Pelt was made out and receipted as if paid in cash (the draft having been turned into cash by a deduction of discount and exchange), and the advances made upon the draft were at once charged to the Atlanta National Bank. In view of all this, it is incredible that the bills of lading were indorsed to Seaman merely to secure what the maker of the draft could have given on the instant. Nor ought the position of Gilbert Van Pelt to be overlooked. If the bills of lading were indorsed as security for payment of this draft, his firm has obtained from the ship delivery of the cotton through a fraudulent representation that they were the consignees, or entitled to the delivery of possession, and they sold it for cash on the day when it was thus wrongfully obtained. He is not, therefore, an unbiased witness. His testimony was given while he was under the influence of a temptation, not unnatural, to vindicate his firm from the guilt of fraudulently abstracting a large amount of property from its rightful owner. Standing as he does, in such a position, his statements are not to be credited when in conflict with the positive testimony of Brady, of Moses and of Bruen, and when inconsistent with the strong probabilities of the case.

§ 860. *Indorsee of bill of lading is entitled to delivery.*

It must be considered, then, that by the indorsement of the bills of lading the libellant became the owner of the cotton, and that by force of the contract with the ship it was deliverable at New York only to him or to his order. Reference to authorities to show that the effect of the indorsement was to vest such ownership in Seaman is quite unnecessary. We may, however, refer to a few. *Conard v. Atlantic Ins. Co.*, 1 Pet., 445; *Gibson v. Stevens*, 8 How., 334; *Thompson v. Dominy*, 14 Mees. & W., 403; *Caldwell v. Ball*, 1 Term R., 205; *Wright v. Campbell*, 4 Burr., 2051; 1 Ld. Raym., 271; *Walter v. Ross*, 2 Wash., 253. The ship arrived with the cotton at the port of New York on Sunday, the 2d day of February, 1868, late in the afternoon, and on the morning of the 3d delivered it to Bennett, Van Pelt & Co., on their demand, without the production of either of the bills of lading which had been given to the shipper, and without any order from Billopp Seaman, who was the indorsee of the bills, and to whom alone, or to whose order, it could rightfully be delivered. It does not appear that any notice of the ship's arrival was given to Seaman, or that the ship made any inquiry to ascertain to whom the cotton was deliverable. It would seem that assuming the mysterious memorandum on the bill of lading retained by the ship was equivalent to an order to deliver to Bennett, Van Pelt & Co., no demand was made for the presentation of such an order, and no further inquiry for the consignee was set on foot. The consequence was that Bennett, Van Pelt & Co., having obtained the property without any right to it, sold it for cash on the day it was delivered to them, and failed within a few days afterwards.

§ 861. *Delivery regardless of the holder of the bill of lading is wrongful.*

No argument is needed to show, what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound

to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship.

§ 862. — *nor does it excuse that the indorsee was unknown to the carrier.*

And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. *Fisk v. Newton*, 1 Denio, 45; *The Peytona*, 2 Curt., 21 (§§ 550-554, *supra*). And if, after inquiry, the consignee or the indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsibility. *Galloway v. Hughes*, 1 Bailey, 553; 1 Conklin's Adm., 196; *Fisk v. Newton*, *supra*. He has no right, under any circumstances, to deliver to a stranger.

§ 863. *Delay in presentment of bill of lading does not excuse a wrongful delivery.*

It is said, however, that the libelant delayed presenting the bills of lading which had been indorsed to him, and delayed making any demand for the cotton until after the 19th of February, when the draft had fallen due, and when it had been dishonored. But that delay cannot justify the ship's delivery of the cotton, on the day after its arrival, to persons who had no bill of lading and no authority whatever to receive it. Had the delay been instrumental in causing such a wrongful delivery, had it been active interposition to mislead the ship, a different case might possibly have been presented. But at most the laches of the libelant was mere inaction, and the wrong delivery was in no degree due to it. The delivery was, as we have stated, made on the morning after the ship's arrival in port, and the ship's order for delivery to Bennett, Van Pelt & Co. was issued before the libelant could have known of its arrival. We say this, notwithstanding the testimony of James Van Pelt, which is plainly in conflict with the proved and conceded facts of the case. And as the cotton was sold for cash on the 3d of February, the very day of its delivery, the failure of the libelant to claim it until some weeks afterwards wrought no injury or loss to the carrier, so far as it appears. We are, therefore, of opinion that the ship is clearly liable for the cotton to the libelant.

§ 864. *The cashier of a bank to whom bills of lading have been indorsed may libel in his own name for wrongful delivery.*

And we think that the libel was rightly filed in the name of Billopp Seaman. By the indorsement of the bills of lading the legal ownership of the cotton passed to him, as well as the right to control its delivery. It is a matter of no importance that the beneficial interest may have been in the bank of which he was cashier. *Fairfield v. Adams*, 16 Pick., 381. The holder of a legal right may always assert it by suit, though he may be accountable to another for what he may recover. A judgment in his favor may always be pleaded in bar against a suit by the beneficial owner. Besides, it is settled that the agent of absent owners may libel in admiralty, either in his own name or in that of his principals. *Houseman v. The Schooner North Carolina*, 15 Pet., 49; *McKinlay v. Morrish*, 21 How., 355 (§§ 1150-55, *infra*); *Lawrence v. Minturn*, 17 id., 100 (§§ 463-470, *supra*).

Decree affirmed. (a)

SOUTHERN EXPRESS COMPANY v. DICKSON.

(4 Otto, 549-553. 1876.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The case, in brief, is this: The agent of the plaintiff Dickson delivered to the express company at Greensboro', N. C., fifty-two boxes of tobacco, to be shipped to Columbia, S. C. The boxes were consigned to Trent & Rea at that place, and the delivery to the company for shipment was made by Trent, one of that firm, who at the time informed the company that the tobacco was the property of the plaintiff. A written receipt was given by the company in the usual form. The boxes never left Greensboro', but were, without authority of the owner, sold by Trent to one Mendenhall, to whom, by the order of Trent, they were delivered by the company at Greensboro'. The court charged the jury that, if they believed from the evidence that the tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that fact was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, S. C., the defendant was not authorized to deliver the same to the consignees, or either of them, or to any other person by the order of either of them, at Greensboro', N. C., the place of shipment; and such delivery at Greensboro, N. C., without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff. To which charge of the court the defendant then and there excepted. There was a verdict for the plaintiff, on which judgment was rendered, and the defendant sued out this writ of error.

§ 865. *Issue of law as to whether delivery was justifiable.*

By various requests to charge, the defendant presented the point in different forms, but the question of law is clearly indicated by the charge given. The express company is not liable in this action, if, upon the order of Trent, it was justified in delivering the property at the place of its intended shipment. If it was not so justified, but was bound to transport and deliver as agreed in its receipt, or to deliver to the owner, then it is liable, and the judgment should be affirmed.

§ 866. *Where consignor is known to be owner, carrier contracts with him only.*

We are not called upon to question the proposition that a consignee of goods is for many purposes deemed to be the owner of them, and may maintain an action for their non-delivery. 1 Pars. Ship., 269. In the case before us the proof was given, and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. The question is, rather, where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, can the carrier deliver the goods to such consignees or to their order at another place, or without starting them on their journey? We think the rule is, that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated.

§ 867. *Cases where shipper is mere agent distinguished.*

Where he is an agent merely, the rule is different. This is illustrated by the case of *Thompson v. Fargo*, 49 N. Y., 185. Thompson had, as the agent of White, collected certain moneys belonging to White, and, inclosing them in a package directed to White at Terre Haute, Ind., sent the package from Decatur, in the same state, by the express company. Various attempts were made to deliver the package to White, but he could not be found; and Thompson, the shipper, at length demanded the return to him of the package, and, on refusal, brought an action to recover its value. The court of appeals of New York held, that, if the case had been one of a sale by the consignor, with no directions from the consignee how to ship the goods, the former, as the title would remain in him, might maintain an action, but not when he was the mere agent, having no interest in the property, but acting pursuant to the orders of the owner in shipping it; that a delivery to him would be no defense to an action by the owner. The case of *Duff v. Budd*, 3 Brod. & B., 177, holds the same rule.

§ 868. *Cases where delivery to consignee is good against consignor distinguished.*

The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. In addition to those authorities, reference may be had to *Sweet v. Barney*, 23 N. Y., 325, where a bank in the interior of New York sent by express a package of money directed to "The People's Bank, 173 Canal Street, New York." The package was delivered to an agent of the People's Bank at the office of the express company, and was stolen from such agent. The bank in the interior brought its action against the express company, and the question was, whether the express company was authorized to deliver the package at any other place than 173 Canal street. The court held that, as there was no notice to the express company that the money was not the property of the People's Bank, in the city of New York, nor any circumstances to weaken the presumption that the money belonged to that bank, any delivery that was good as to that bank discharged the carrier. Of the character mentioned is the case of *London & Northwestern Railway Co. v. Bartlett*, 7 N. & H., 400, which is much relied on by the plaintiff in error. The consignee in that case was the purchaser of the wheat in question, and consequently any delivery to him, or his order, wherever it might be, would be a discharge to the carrier. The same fact existed in *Mitchell v. Ede*, 11 Ad. & Ell., 888. The plaintiff recovered the value of the sugars shipped from Jamaica, for the reason that, under the circumstances stated, he was held to be the owner of them. Upon the same principle is *Foster v. Frampton*, 6 Barn. & C., 107, where the goods were received from the carrier by the actual vendee, and it was held that the *transitus* was at an end. We do not perceive anything adverse to the principles we have stated in the learned opinion delivered by Chief Justice Shaw in *Blanchard v. Page*, 8 Gray (Mass.), 281, nor in *Lee v. Kimball*, 45 Me., 172, which holds that, where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended.

§ 869. *Bill of lading or receipt considered in present connection.*

We base our judgment upon the bill of lading and its legal results, adopting

the fifth point of the plaintiff in error, that any antecedent agreement or understanding was merged therein and extinguished thereby. The circumstances of the shipment, how and by whom made, and the knowledge of the ownership, were proved without objection. These circumstances, and the bill of lading adopted and claimed by the plaintiff, and the point raised by the exception to the charge of the judge, present the question we have discussed, and no other.

§ 870. *Point not taken by exception below cannot be raised here.*

The plaintiff in error now contends in his eleventh point that Dickson was not the owner of the tobacco. This point cannot be raised here. No request or exception was made which involves the question. The ownership was assumed throughout the trial, in the charge of the judge, not disputed in the requests to charge, and if a subject of doubt in any form, must be considered as settled by the verdict. The only suggestion of a denial of ownership is in the request to charge, that if the tobacco was in the possession of Trent, as agent of Dickson, or otherwise, then the delivery to him or his order was lawful. To hold this to be a denial of the ownership of Dickson, or a claim of ownership by Trent, would go far beyond any reasonable construction. We see no error in the rulings at the trial, and are of the opinion that the judgment should be affirmed. It is so ordered.

THE HUNTRESS.

(District Court for Maine: Daveis, 82-93. 1840.)

STATEMENT OF FACTS.—This was a libel *in personam* against the owners of the Huntress for goods shipped from Boston to Portland, misdelivered and lost. The libel charged carelessness and neglect on the part of the officers of the vessel. Further facts appear in the opinion of the court.

§ 871. *The owners of a steamboat carrying goods for hire are liable as common carriers.*

Opinion by WARE, D. J.

Upon the facts proved in this case, the libellant claims to recover of the owners of the boat the value of the merchandise he has lost, as he alleges, through the carelessness and misconduct of their agents. There can be no doubt that the owners of the boat are subject to all the liabilities of common carriers. It is proved that she was regularly employed in running between Portland and Boston, for the conveyance of passengers and merchandise. A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. 2 Kent Comm., 598; 1 Pick., 50, *Dwight v. Brewster*. Undertaking, as he does, to carry goods for all persons, he is considered as engaged in a public employment, and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal. Story, Bailm., § 502. The law, for strong reasons of public policy, holds him to a very rigorous responsibility. He is answerable not only for his own acts, but for those of his agents and servants.

§ 872. *Common carriers must at their peril deliver goods to the proper persons.*

Among the obligations which common carriers take upon themselves, as resulting from the nature of their employment, is that of delivering the goods,

when they are transported to the place of destination, to the proper person. If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner. *Golden v. Manning*, 3 Wils., 429; *Garnett v. Willan*, 5 Barn. & Ald., 52. And when the goods are lost or damaged, the *onus probandi* is upon the carrier to prove that the loss was occasioned by some cause for which the law will excuse him. *Story, Bailm.*, 529.

§ 873. *Facts as to delivery stated.*

It is in evidence that the box in question belonged to the libellant, that a part of its contents has been lost, and that the greater part of what remained has been materially damaged, and the burthen of showing that the loss and damage occurred under such circumstances as will exempt the owners from their responsibility is thrown upon them. The counsel for the respondents contends, in the first place, that the box had been delivered to Bonney, and that they were therefore discharged from all their liabilities. The facts, as they are stated by the libellant's witnesses, Watts, the keeper of the store-house, and Potter, the porter, are that the three boxes were landed and put into the respondents' store-house; that Bonney employed a porter to carry them to the tavern and had them put in his cart; that, after he had left the wharf, a claim being made by another passenger of one of the boxes, the mate came on shore with Adams, and they took the box, carried it again on board the boat, and delivered it to the woman who claimed it. Now, if it should be admitted that here was such a delivery as would discharge the owners from all further responsibility, had nothing more been done, although the box had not been actually removed from their store-house, it is quite as clear from this evidence that the delivery was revoked, not merely as to the box in question, but as to all of them. It is quite impossible to put any other construction upon the act of a mate, in taking all the boxes and replacing them on board the boat after Bonney had left the wharf, than that it was a revocation of the delivery. The goods were again in the possession of the respondents, by the act of their servants, and all their responsibilities as common carriers reattached. It was contended at the argument that, the goods having been once delivered, the retaking of them was the private and unauthorized act of the mate, for which the owners are not accountable; and if there is any responsibility it is only the private and personal responsibility of the mate or of the mate and Adams. But the mate did not interfere in the business as a stranger; he interposed in his quality, and with the authority of mate, and as a servant of the owners, having a right to retain the goods. It is the appropriate duty of the mate to superintend the loading and unloading of the goods taken on freight. It is true that, if a dispute arises between different persons claiming the same goods, the proper person to decide this dispute is the clerk, because he takes the account of the goods. But if the mate volunteers to decide the dispute and delivers them to a wrong person, the most that can be said is that he is acting beyond the line of his proper duty, and may be answerable to his employers; but they are responsible to the owner, for they are as much responsible for the acts of their servants as for their own.

The mate, in his deposition, gives a different account of the affair. He says that Adams informed him that a man had taken a wrong box on shore, and he then went ashore and took and carried it on board the *Thorn*. Afterwards, he adds that, upon reflection, he is satisfied that Adams went ashore and took the box on board the *Thorn* before speaking to him; that he then went on board the *Thorn*, examined the box, and found no mark upon it; that he asked the woman if it was hers, to which she replied that it was and had wearing

apparel in it. Without opening the box to verify her statement, he allowed her, upon her word alone, to retain the box, and she carried it with her to Hallowell. Now, in the first place, the testimony of the mate is objected to as that of an interested witness. He, with Adams, having taken the box from the porter and delivered it to a wrong person, without consulting and taking the direction of the clerk, it is argued, is answerable over to his employers for any damage which may be recovered against them, and has therefore a direct interest to prevent a recovery. And if it be conceded that he exculpates himself by his own statement, that is overcome by the plain, direct and positive testimony of two disinterested witnesses, by whom he is flatly contradicted. My opinion, upon the facts which have been proved, is that, if there had been a delivery, it was revoked by the same authority by which it was made, and that the respondents are not for that cause exonerated from their responsibilities as common carriers.

§ 874. *Whether the goods were properly delivered to the carrier.*

In the second place, it was contended at the argument that the owners of the boat are not responsible because no contract of affreightment for the carriage of the goods intervened between the parties, but that they were surreptitiously put on board by the libellant, or by his procurement, without the knowledge of the clerk of the boat, and without being properly marked so that it could be known to whom they belonged. No evidence was offered to show by whom or by what means the goods were brought on board. They were not brought to the notice of the clerk, and were not entered on the freight list. The contract of affreightment, or that for the transportation of goods by a common carrier, like all other contracts, requires for its completion the consent of parties, either express or implied. If goods, says Pothier, are put on board a vessel without the knowledge of the master, there is no contract, and consequently no obligation on one part or the other; and therefore the master who finds the merchandise in his vessel may put it ashore, and charge the expense of unloading to the owner. The French legislation has provided for this case by a special article. The master may discharge the goods found on board his vessel without being made known to him, or he may carry them and charge the highest freight paid for merchandise of the same quality. *Ordonnance de la Marine*, liv. 3, tit. 3, art. 7. Valin and Pothier teach us that, if he does not discover them until after he sails, provided the vessel is overloaded, he may discharge them at an intermediate port before the end of the voyage, leaving them in the hands of some solvent merchant, and giving the owner notice; but if the vessel is not overcharged he ought to carry them to the port of destination. 1 Valin, 647; Pothier, *Traité de Contrat de Charter Partie*, No. 10, 12. This obligation does not arise from the contract of the parties, because no contract has intervened, but results from the principles of natural law, the great law of social charity, which commands us on all occasions to promote the well-being of others, when it can be done without a sacrifice for ourselves, and not to do an act, though permitted by the positive law, which will be materially injurious to another, without any corresponding benefit to ourselves. The Code de Commerce adopts the morality of Pothier, and confines the right of the master to discharge the goods at the port where they are laden. No. 292, Boulay Paty; *Droit Maritime*, vol. 2, p. 373, tit. 2, sec. 5.

If these principles ought to govern in the case of a common freighting vessel, and they are recommended as well by public convenience as by their pure

and honorable morality, they apply with much greater force to cases like the present. The boat was, in the strictest sense of the word, a common carrier, making her trips daily between Portland and Boston. Her goods on freight were owned by a great variety of persons, were brought in small quantities, loaded in a hurry, ordinarily without the formality of a bill of lading, and often, as in this case, accompanied by their owners. The owners of the boat, by the nature of their employment, engaged, and were bound, to take the goods of all persons who offered them, without any special contract for that purpose. Holding themselves out generally as ready to carry freight or passengers, the public have a right to take them at their offer, and they are not at liberty to refuse, without good cause; and those who wish for a passage, or have goods to be transported, need not take the trouble to make a contract beforehand. They understand that the master is bound to allow them a passage, and to carry their merchandise, unless he has some valid excuse, and they go down to the boat prepared to go on board and take their goods with them. Now it appears to me, that, if the goods are put on board in the ordinary manner, a contract results from the fact itself. In the present case, the owners of the boat held themselves out as ready to carry freight for all persons generally, and if the libellant had his goods carried to the wharf, and they were taken on board in the usual course of the business, as other goods were, he accepted their offer, and it appears to me that the contract was complete; but if it was not, it was ratified and made perfect by the payment and acceptance of the freight. This was the decision of the Roman law. Whether the goods, says Ulpian, are shipped by a *bill of lading* or not (for this seems to be the meaning of *ei assignata*, translated into modern nautical phraseology), the contract is complete by the simple fact that they are laden on board; the carrier becomes responsible for their safety. Dig., 4, 9, 1, § 8.

§ 875. *The owner of goods shipped as freight ought to have them marked and entered.*

It is true, that if goods are furtively put on board by the owner, and there is an apparent desire to conceal them, a presumption would naturally arise that the owner intended to defraud the carrier of his compensation for his services. Such conduct might rebut the presumption of an implied contract, and a question might be made whether the acceptance of the freight was a waiver of the wrong, so as to subject the carrier to all the responsibilities which would result from a contract. But that question does not arise in this case, because there is no evidence tending to create any suspicion of that kind against the libellant. Regularly, without doubt, the clerk of the boat ought to be notified, and, for his own security, the shipper ought to see that his goods are entered on the freight list. But in the hurry and confusion in which the business is often done, it would be a harsh presumption to assume that fraud was intended from this neglect alone. It is certain, also, that the goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if, in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustains a loss or any inconvenience, he must impute this to his own fault. It is certain that the box had not such plain, intelligible marks upon it as would readily point out the owner. He probably thought, as he was in company with his goods, that this was of less importance. But it was a fault on his part, and the natural and necessary consequence of that fault he must bear.

§ 876. *The carrier is responsible for negligent misdelivery, although the owner of the goods had not marked them properly.*

But his fault will not excuse the fault of the carriers or their servants. They are not liberated from all care and responsibility because the shipper has not placed proper marks on his goods. Bonney took and paid the freight of the three boxes. They were landed, and he had them delivered to a porter, and ordered them to be carried to his lodgings. Here was abundant proof that he claimed them. But now, after Bonney had left the wharf, in the confidence that his goods would follow him, comes forward another claimant. She gave no better proof of title than Bonney. If the box was not marked for him, neither was it for her. Yet without any examination, without even taking the trouble to open the box and see whether it contained, as the woman alleged, her wearing apparel, and in the absence of Bonney, who had paid the freight to the mate himself, it was delivered over to her. No one can hesitate to say, upon the simple statement of the facts, that there was, in this, undue precipitancy and a want of due caution on the part of the mate. Nor will any man of ordinary prudence and caution pretend that this is the way in which opposing claims to property ought to be settled. The woman passenger had declared what the box contained, if it belonged to her. If Bonney had been sent for, and the question had been asked him, the adverse claims would have been satisfactorily settled on the spot. The delivery to one of the claimants in the absence of the other, without any further inquiry, was a gross fault on the part of the mate, and as the owners of the boat are responsible for the acts of their servants, it is imputable to them. My opinion, therefore, is, that the owners are liable. And as the respondents refused to make him any compensation for the loss and damage of his goods, he was justified in leaving them upon their hands and looking to them for their value.

Decree for libelant.

THE STEAMER SANTEE.

(District Court, Southern District of New York: 2 Benedict, 519-527. 1863.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This libel is filed against the steamer Santee, to recover the sum of \$5,000, as the value of thirteen bales of cotton shipped from Mobile to New York by that vessel. The libelants' claim is founded on two bills of lading, one dated January 19, 1866, for seventy-two bales, and the other dated January 24, 1866, for seventy bales. The shipment was by Baker, Robbins & Co., and each bill of lading specifies that the bales of cotton described in it (and the marks on which are given in the bills of lading) shall be delivered at the port of New York, the dangers of the seas, etc., excepted, to the libelants, Sawyer & Wallace, or their assigns. Each bill of lading also contains, following the foregoing delivery clause, these words: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination (the collector of the port being hereby authorized to grant a general order of discharge immediately after the entry of the ship), and they shall be received either at New York or Brooklyn, by the consignee thereof, package by package, as so delivered, and if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store or permitted to lay where landed at the expense and risk of

the aforesaid owner, shipper or consignee." The one hundred and forty-two bales were properly marked and numbered when they were shipped, with the same marks and numbers set forth in the bills of lading. The entire cargo was cotton, except that there was one bag of wool. There were, in all, on board, seven hundred and ten bales of cotton, shipped under bills of lading. On the arrival of the steamer at New York, the libelants paid the freight to the agents of the steamer, on the one hundred and forty-two bales of cotton, on the presentation of a bill therefor by such agents, and before any of the cotton was unladen from the vessel. Only one hundred and twenty-nine of the bales specified in the bills of lading came to the possession of the libelants. The whole one hundred and forty-two bales were unladen from the vessel at New York, and placed upon the wharf. After all the parties, except the libelants, who claimed cotton that was on board of the vessel, had removed from the wharf such cotton as they desired to remove, there remained on the wharf thirteen bales of cotton, but none of those bales corresponded, as to mark or number, with any of the bales consigned to the libelants, and it is clear, from the evidence, that no one of those thirteen bales was cotton consigned to the libelants. It is not denied by the claimant that the vessel was bound to deliver, under the bills of lading, the identical bales of cotton that were shipped. The claimant insists, however, that the responsibility of the vessel under the bills of lading was discharged by the unlading of the cotton specified in the bills of lading, from the vessel, and its deposit on the wharf, after notice to the libelants of the arrival of the vessel and of the place where the cotton would be discharged. In regard to this point, not only did the libelants know of the arrival of the vessel, and pay the freight on the cotton, but it is shown that the libelants sent cartmen with carts to the wharf where the vessel was lying, to receive the cotton, before the vessel commenced to discharge the cargo. The libelants claim that the vessel failed to comply with the bills of lading, in not delivering the thirteen bales to the libelants, and in wrongfully delivering them to some other party. No evidence is given to show what became of those thirteen bales. The libelants also claim that the special clause in the bills of lading does not relieve the vessel from liability; that the conditions contained in it are unreasonable and should not be enforced; that if the consignees were required under it to receive the cargo, package by package, then the entire cotton on board should have been assorted on the vessel, and the lot belonging to each consignee should have been delivered by itself and at one time; that as, in this case, no separation was attempted until after the cotton was landed on the wharf, the consignees were thereby absolved from the duty of receiving the cotton package by package; and that, notwithstanding such special clause, the general rule is applicable to this case, which requires that the different consignments in a cargo shall, when discharged, be separated by the vessel, so as to render them accessible to their respective consignees. It is shown that in this case the cargo of cotton was unladen, bale by bale, as it came to hand, without reference to what consignment it belonged to; that the mate of the vessel, who had charge of the unlading of her, tried to separate the various consignments of cotton, and, among others, the consignment of the libelants, after the bales were landed, and that receipts were required by the mate, and were given, for all the cotton that was removed from the wharf, before it was allowed by him to be removed. It is insisted by the libelants that this course of conduct shows that the vessel claimed, retained and exercised possession of the cotton after it was landed on the wharf; that, therefore, the mate, acting for the vessel, must

have made a wrong delivery of the thirteen bales of cotton; and that the case is thereby taken out of the operation of the special clause in the bill of lading.

§ 877. *A carrier is responsible, if he delivers goods to the wrong person, even by mistake.*

The special clause in question is, so far as my observation extends, one recently introduced into bills of lading, and I am not aware that any judicial construction has been given to it. The general law, in the case of an ordinary bill of lading, containing merely the usual clause for delivery to the consignee at the port named, is well established — that delivery on the wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided, also, the different consignments are properly separated so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods, but that the carrier is responsible for the value of the goods, if he delivers them to the wrong person, even though by mistake or imposition. The Eddy, 5 Wall., 481, 495 (§§ 968–976, *infra*); Story on Bailm., § 545 *b*; The Huntress, Dav., 82, 87 (§§ 871–876, *supra*). Under the ordinary bill of lading, the due and proper separation of the goods by the carrier for the use of the consignee is an indispensable prerequisite, in addition to notice to the consignee of the time and place of delivery, to relieve the carrier from responsibility. 3 Kent's Comm., 215; The Eddy, above cited; Partridge v. The Ben Adams, 2 Ben., 445.

§ 878. — *otherwise where the bill of lading stipulates for a transfer of risks as each package is placed upon the wharf.*

But I think the rule is different in regard to a bill of lading containing the special clause in question. That clause seems to have been introduced in view of the law as settled in regard to what is required to constitute a delivery under an ordinary bill of lading. It seems to have been framed expressly to relieve the vessel from the responsibility of separating the different consignments on the wharf after they are unladen. It provides, first, that the cotton shall be at the risk of the consignee as soon as it shall be "delivered from the tackles" of the vessel, at New York. If the case rested on this clause alone, there might be a question as to the meaning of the word "delivered," and, although the clause does not speak of a delivery to any person, but only of a delivery "from the tackles of the vessel," it might fairly be argued that the word "delivered" is here used in the same sense in which it is used in the earlier portion of the bill of lading, where provision is made for a delivery to the consignees — a sense the meaning of which is fixed as above explained. But the clause goes on to provide, secondly, that the cotton shall be received, either at New York or Brooklyn, by the consignee thereof, "package by package, as so delivered." The words "so delivered" mean as delivered from the tackles of the vessel; and this branch of the clause shows that the delivery from the tackles of the vessel is, in the view of the parties to the contract, something distinct, as an act, from the receipt of the article by the consignee. This second branch of the clause authorizes the vessel to deliver the cotton from her tackles package by package, that is, bale by bale, and requires the consignee to receive each bale as and when so delivered. But, even under this clause, it might perhaps be properly contended that the delivery from the tackles intended by it is a delivery to the consignee, and not a delivery to some other person. The third branch, however, of the clause provides that if the cotton, after it shall be so delivered from the tackles, shall not be taken away the same day by the consignee, it may, at the option of the agents of the

vessel, be "sent to store," or be "permitted to lay where landed" at the expense and risk of the consignee. This provision is not ambiguous, and plainly shows that the parties intended that a landing of the cotton on the wharf, at the place of destination, should be regarded as a delivery of it from the tackles of the vessel. All three branches of the clause must be construed together. When so construed, there is no room for doubt as to what the contract is. As each bale of the cotton is landed on the wharf from the tackles of the vessel, the responsibility of the vessel in regard to it ceases, and the risk of the consignee in regard to it commences. I agree that if the vessel discharges the cotton from her tackles upon the cart of some other person than the consignee she makes a wrong delivery of it, and her responsibility for it continues. But that is not the present case. As each bale of this cotton left the tackles of the vessel and was deposited on the wharf, the consignees, having had due previous notice, were bound to examine it and see whether it was or was not their cotton. Any custody or control of the cotton, which the mate of the vessel assumed to exercise after the cotton was landed on the wharf, was in violation of the terms of the bills of lading, and was wholly unauthorized. After it was placed on the wharf from the tackles of the vessel, the mate had no right to require from the consignees a receipt for it, and they had the right to take it without giving a receipt for it. Under the special clause, the consignees undertook the entire obligation of seeing to the removal of their cotton from the wharf, and the responsibility of the vessel, in regard to the cotton, ceased as soon as it was landed on the wharf from her tackles. The vessel was not bound to separate the libelants' cotton, either on the vessel or on the wharf, from the cotton of other parties, except by landing it, bale by bale, on the wharf. By landing the libelants' cotton on the wharf, the vessel afforded to them all the opportunity to remove the cotton from the wharf which she was bound by her contract to afford, and made all the designation and separation of the cotton which she was bound to make. Such landing on the wharf, after due previous notice, was a delivery to the right person, the freight having been paid, even though the wrong person afterwards obtained possession of the cotton.

§ 879. *Question of lien under such circumstances considered.*

It is argued, on the part of the claimant, that this interpretation of the bills of lading is inconsistent with the doctrine that the vessel's lien on the cargo for freight continues after the landing or unloading of the cargo, and that the vessel may, after such landing of the cargo, refuse to deliver it to the consignee till the freight is paid. Certain Logs of Mahogany, 2 Sumn., 589, 601. No such question arises in this case, as the freight was paid in advance of the unloading. But I do not perceive the inconsistency suggested. Under the bills of lading in question here, the cotton was at the risk of the consignee as soon as it was landed on the wharf, but, if the freight had not been previously paid, the vessel would have had a right to retain possession of the cotton so on the wharf, and her lien for freight on it would have continued. The consignee could not have claimed that such landing was such a delivery to him as to destroy the vessel's lien on it for the freight, while, at the same time, the clauses in the bills of lading, in regard to the risk of the consignee, would have operated in full force. In the case of 151 Tons of Coal, 4 Blatch., 368, it was held that the mere manual delivery of an article by a carrier to the consignee does not, of itself, operate necessarily to discharge the carrier's lien for the freight, but the delivery must be made with the intent of parting with the

lien. I perceive nothing unreasonable in the conditions of these bills of lading, and nothing that a court should hesitate to maintain. The contract is a plain one, deliberately entered into by intelligent commercial men, and the libelants had it entirely in their power to comply with its terms by stationing a proper person to watch for their cotton as it left the tackles of the vessel for the wharf.

The libel must be dismissed, with costs. (a)

THE IDAHO.

(3 Otto, 575-586. 1876.)

APPEAL from U. S. Circuit Court, Eastern District of New York.

§ 880. *Whether carrier can show, as against bill of lading, a delivery upon demand to the true owner.*

Opinion by MR. JUSTICE STRONG.

In determining the merits of the defense set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for non-delivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law, and some contrariety of decision. In Rolle's Abr., 606, tit. "Detinue," it is said, "If the bailee of goods deliver them to him who has the right to them, he is, notwithstanding, chargeable to the bailor, who in truth has no right;" and for this, 9 Henry VI., 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (id., 607), for which 7 Henry VI., 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held that when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery, according to the directions of the bailor. *Bliven v. Hudson River R. Co.*, 36 N. Y., 403. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defense against the claim of the bailor. The decisions are numerous to this effect. *King v. Richards*, 6 Whart., 418; *Bates v. Stanton*, 1 Duer, 79; *Hardman v. Wilcock*, 9 Bing., 382; *Biddle v. Bond*, 6 Best & S., 225. If it be said that by accepting the bailment the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed — to restore it, or to account for it. *Cheeseman v. Exall*, 6 Exch., 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *Biddle v. Bond*, *supra*.

§ 881. *It is not essential that the goods be taken from the carrier by legal process, or that the shipper be guilty of fraud.*

Nor can it be maintained, as has been argued in the present case, that a car-

(a) Affirmed on appeal. *The Santee*,* 7 Blatch., 186.

rier can excuse himself for failure to deliver to the order of the shipper only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that in some of the cases fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion.

§ 882. *The shipper cannot by fraud or mistake exclude the true owner's rights.*

No matter whether the shipper has obtained the possession he gives to the carrier by fraud practiced upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of *Biddle v. Bond*, *supra*, decided in 1865, it was so decided; and Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstances that there was no evidence to show the plaintiff, though a wrong-doer, did not honestly believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them. In *Western Transportation Co. v. Barber*, 56 N. Y., 544, the court of appeals of New York unanimously asserted the same doctrine, saying, "The best decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defense to an action brought by a bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud; and we think no such distinction can be made.

§ 883. *Bailee cannot set up paramount title where he has not yielded to it.*

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretense of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees.

STATEMENT OF FACTS.—Recurring, then, to the inquiry whether Porter & Co.—to whose order the steamer delivered the one hundred and sixty-five bales of cotton—were the true owners of the cotton, a brief statement of the evidence on which their title rests is necessary. It originated as follows: On the 1st of April, 1869, one J. C. Forbes obtained from the master of the brig "Colson," then lying at New Orleans, a bill of lading for one hundred and thirty-nine bales of cotton, described by specified marks. The bill was in-

dorsed, and forwarded by Forbes to Porter & Co.; and drafts against it to a large amount were drawn upon them, which they accepted, credited, and paid on or before the 7th of the month. In fact, however, when the bill of lading was given, no such cotton had been received by the brig; but on the 5th of April the agent of Forbes bought one hundred and forty bales, then at the shipper's press, and directed them to be sent to the "Colson," marked substantially as described in the bill of lading. These bales were accordingly delivered from the press to the brig on the 8th of April, and the first and second mate receipted for them. They were not actually taken on board, but they were deposited on the pier, at the usual and ordinary place for the receipt of freight by the "Colson," and an additional bill of lading for one bale only was taken by Forbes, and by him indorsed and transmitted to Porter & Co., together with an invoice of the one hundred and forty bales corresponding with the bills of lading. The marks and numbers on the bales were the same as those mentioned in the bills of lading, excepting only that thirty-five were marked L instead of thirty-six, and sixteen marked S instead of fifteen. There was also a small difference in the aggregate weight. That the cotton thus delivered to the "Colson" was intended to fill the bills of lading, one of which had been previously given, is incontrovertible. They were so intended by the shipper. If not, why were they thus marked? And why was a bill of lading taken for one bale only, instead of for one hundred and forty; and why was the invoice of the whole number sent? Such, also, was plainly the understanding of the ship. The receipts of the mates, and the fact that the master gave a bill of lading for one bale marked S, when there were sixteen bales thus marked, leave this beyond reasonable doubt. What, then? Why, the one hundred and forty bales thus shipped became from the moment of shipment the property of Porter & Co., to whom the bills of lading were indorsed.

§ 884. *Subsequent delivery of goods intended to meet bill of lading makes bill operative.*

It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. Thus, in *Rowley v. Bigelow*, 12 Pick., 307, it is said a bill of lading operates by way of estoppel against the master, and also against the shipper and indorser. "The bill acknowledges the goods to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipper's own warehouse, . . . and afterwards they are placed on board as and for the goods embraced in the bill of lading, as against the shipper and master the bill will operate on those goods by way of relation and estoppel." Such is also the doctrine asserted in *Halliday v. Hamilton*, 11 Wall., 565, and it is in harmony with the general rules that regulate the transfer of personal property. We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on the pier for the "Colson," and received by the mates of the brig, became, there-

fore, at the instant of its delivery, the property of Porter & Co., who were then the indorsees of the bills of lading. Its subsequent removal by Forbes to the "Ladona," either with or without the consent of the brig's officers, could not divert that ownership.

§ 885. *The statutes of Louisiana as to bills of lading considered.*

There is nothing in the statutes of Louisiana which requires a different conclusion. Those statutes prohibit the issue of bills of lading before the receipt of the goods, but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged. The statutes are designed to prevent fraud. They are not to be construed in aid of fraud, as they would be if held to make a delivery of goods to fill a fraudulent bill of lading inoperative for the purpose. The title of Porter & Co. to the one hundred and forty bales must, therefore, as we have said, be held to have been perfected when they were delivered to the "Colson" on the 8th of April. No right in any other person intervened between the issue of the bill of lading and the brig's receipt of the cotton to fill it. It was after the title of Porter & Co. had thus become complete that Forbes removed the one hundred and forty bales from the custody of the "Colson" and shipped it for New York on the "Ladona," together with twenty-five other bales, re-marking it, and drawing drafts against this second shipment upon Schaefer & Co. After carefully examining the evidence, we cannot doubt that the one hundred and forty bales thus withdrawn from the "Colson" were shipped on the "Ladona," and that they came to the possession of Schaefer & Co., in New York, by whom they were transferred, together with the other twenty-five bales, to Mann, under whom the plaintiffs claim. The one hundred and sixty-five bales, then, are the identical bales that were included in the shipment on the "Idaho," and for which the bill of lading was given to Mann. Of these, one hundred and forty were the property of Porter & Co., fraudulently withdrawn from their possession. It is hardly necessary to say that the title of the true owner of personal property cannot be impaired by the unauthorized acts of one not the owner. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not authorized to sell. It must, therefore, be concluded that Porter & Co. were the owners of at least one hundred and forty of the bales shipped by Mann on the "Idaho," and covered by the bill of lading to enforce which this libel was filed.

§ 886. *Facts stated showing a wrongful intermingling of goods.*

All that remains to be determined is whether Porter & Co. had a right to the possession of the additional twenty-five bales shipped with the one hundred and forty from New Orleans on the "Ladona," and shipped also on the "Idaho" for Liverpool, together with the thirty-five bales delivered there to Finlay & Co. When the one hundred and forty bales were removed from the custody of the "Colson" and taken to the "Ladona," twenty-five other bales were mingled with them. On the pier opposite that vessel they were re-marked, and all shipped as one lot, under one bill of lading. When they reached New York they came into the possession of Schaefer, the indorsee of the bill of lading given by the "Ladona," who knew, when he received them, that the "Colson" was short eight hundred or one thousand bales. The newspapers had contained articles about the fraud. He himself was a sufferer. He held some of

the fraudulent bills of lading of the "Colson," and he had heard that Porter was in the same condition. So he has testified. With this knowledge he set to work to guard against the possibility of tracing the cotton. He caused the "Colson" marks to be removed from the one hundred and forty bales, and the "Ladona" marks to be removed from both the one hundred and forty and the twenty-five bales. He then had the whole re-marked, making no distinction between the lot of one hundred and forty and that of twenty-five, thus practically making the bales undistinguishable. In addition to this, by an arrangement between himself and Mann, his clerk, in the form of a sale, the cotton was shipped *en masse* by the "Idaho." It is impossible for us to close our eyes upon the nature and purpose of this transaction. It was a perfect confusion of the one hundred and forty bales that belonged to Porter with the other twenty-five; and it was not accidental. It was purposely made, with an intent to embarrass or hinder the owner, and prevent him from recovering his original property. There is no conceivable motive for Schaefer's obliterating the marks, both of the "Colson" and "Ladona" shipment, in so much haste (ordering it done on Sunday), and substituting new marks, except to destroy the evidence of title in any other person. That such was Schaefer's purpose may also be inferred from his conduct in selling the same to Mann; from Mann's sale on the same day to the libelants, telling them he did not wish them to ask whether the cotton was really Schaefer's, stating, also, that he had bought from Schaefer, and that Schaefer guaranteed the transaction; from Mann's turning over the libelant's note immediately to Schaefer, and Schaefer's giving a guaranty before its payment that the maker should be held harmless. The whole arrangement was manifestly a scheme of Schaefer to obscure the title to the cotton, to prevent its being traced by the true owner,—a scheme in the execution of which he was aided by Mann and the libelants.

§ 887. *Rule as to confusion of goods stated.*

Now, what must be the legal effect of all this? What the effect of intermingling the twenty-five bales with the one hundred and forty that belonged to Porter, in such a manner that they could not be distinguished, and so completely that it is impossible for either party to identify any one of the one hundred and sixty-five bales as a part of the lot of twenty-five, or of the larger lot of one hundred and forty, shipped on the "Colson?" We can come to no other conclusion than this: the right of possession of the whole was in Porter, and neither he who caused the confusion, nor any one claiming under him, is entitled to any bale which he cannot identify as one of the lot of twenty-five. It is admitted the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in *Ryder v. Hathaway*, 21 Pick., 306. Such is the present case. The confusion of the

bales of cotton was not accidental. It was purposely made. The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was, therefore, wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrong-doer to reclaim his own, if he can identify it, or to demand his proportional part. *Stephenson v. Little*, 10 Mich., 447. The libelants have made no attempt to identify any part. See, upon this subject of confusion of goods, 2 Kent's Com. (11th ed.), 364, 365; *Hart v. Ten Eyck*, 2 Johns. Ch., 62, 108; *Weil v. Silverston*, 6 Bush (Ky.), 698; *Hesseltine v. Stockwell*, 30 Me., 370.

It follows from all we have said that the delivery by the "Idaho" of the one hundred and sixty-five bales, to the order of Porter & Co., was justifiable, and that the libelants have sustained no legal injury.

Decree affirmed. (a)

ROWE v. THE STEAMER CITY OF DUBLIN.

(District Court, Eastern District of New York: 1 Benedict, 46-57. 1866.)

STATEMENT OF FACTS.—This was an action to recover damages for undue delay in delivering goods consigned to libelant. The case of goods should have been delivered by the 27th or 29th September, but was not delivered until the 5th October, by which time the market value of the goods, as was alleged, was diminished one-half.

§ 888. *Where the marks on a package are negligently lost while it is in custody of the carrier he is responsible.*

Opinion by BENEDICT, J.

Upon the facts in this case, the libelant insists that the delay in the delivery of the package was caused by the neglect of the carrier; while the respondents insist that the delay arose, in the first instance, from the neglect of the freighter in not having marks put upon the box itself as well as upon the covering, in which case it would have been delivered instead of having been sent to public store; and that, as soon as the case was known to be missing, it was traced and delivered without undue delay or neglect on the part of the vessel. The proofs introduced by the respective parties lead me to the conclusion that the delay in the delivery of this case must be held to have arisen from the neglect of the carrier. The case, as the bill of lading shows, was plainly marked upon its covering when it was shipped, and it was also described by measurement. Cases of this kind, the dock agent of the vessel thinks, are usually marked upon the box as well as upon the covering; but the weight of evidence is that marking the covering is the more usual, and a proper, method of marking such merchandise. There is no evidence that the covering was insufficient for the ordinary wear and tear of such a voyage, and no evidence going to show how it came to be removed, as it was, while in custody of the vessel. It does appear in evidence that, while the vessel was being discharged, a loose covering was seen by the delivery clerk on the dock, lying about the vessel, but no examination was made of it to ascertain what marks it bore; and it also appears that the case in question was the only case of merchandise found to be without marks. An ex-

(a) *The Idaho*,* 11 Blatch., 218, which is here affirmed on appeal, discusses the main points here considered, reaching similar conclusions. And see *The Idaho*,* 5 Ben., 230; 14 Int. Rev. Rec., 131.

amination of the loose covering would doubtless have insured a delivery of this case with the rest of the cargo. Furthermore, the delivery clerk of the steamer says that the returns of the discharge of the vessel, made to him three or four days after her arrival, disclosed to him the fact that a case of merchandise had been sent to the public store as without marks, and that, when application was made on behalf of the libelant for the case in question, he was satisfied that it was the one returned as sent to the public store. This, on the clerk's own statement, was within seven days after the arrival of the vessel, and yet he did not inform the libelant of the whereabouts of his case until some ten or twelve days after that. It seems to me that the interests of both merchants and ship-owners require greater attention to missing cargo than is here shown. The evidence is that the case could have been found, examined and identified, and delivered within a day or two, by prompt attention, and such attention the ship-owner was bound to give. Upon this branch of the case my conclusion, therefore, is that there was such neglect on the part of the carrier in regard to this shipment as to make the vessel responsible for any damages caused by the undue delay. This conclusion in no way conflicts with the doctrine laid down by the New York court of appeals in the case relied upon by the respondents. *Wibert v. New York & Erie R. Co.*, 12 N. Y., 245. That was a case of failure to transport within the ordinary time of running a freight train, and the cause of the delay was that the amount of merchandise offering for transportation at the time was beyond the capacity of the road to transport as fast as received, and the court held that the carrier, having provided all the trains that could with safety be run upon the road, and having used all possible exertion to forward the merchandise, was not chargeable with neglect. Here the delay did not arise in the course of the transportation. That was duly accomplished. But after the merchandise had arrived at the place of delivery, and when there remained upon the carrier only the obligation to land and deliver, and when ordinary care on the part of the carrier would have insured the successful performance of his contract, the merchandise was sent to public store and allowed to remain there some twenty days before notice of its whereabouts was given to the consignee. No law laid down by the court of appeals in the case cited by the respondent would serve to excuse the carrier in a case like the present.

§ 889. *Damages resulting immediately from the carrier's negligent delay in delivering the goods are allowable.*

There remains the question whether it has been made to appear by the libelant that he has sustained any loss which can be recovered as damages caused by the undue delay. The respondent insists that the loss in value occasioned by the closing of the season, if proved, is remote, and cannot be recovered as a damage caused by the failure of the carrier to deliver promptly, and to sustain this view the opinion of the supreme court of the state of New York in the case of *Jones v. New York & Erie R. Co.*, 29 Barb., 633, is cited, while, in support of his demand, the libelant cites the opinion of the supreme court of New York in the case of *Kent v. Hudson River R. Co.*, 22 Barb., 288. I do not consider it necessary, however, in the present posture of this cause, to pass upon the question which was raised and decided in these two conflicting cases, and which was also passed upon by the learned Judge Betts, in the case of *The Lexington*, where, in a similar action, the district court of the United States gave a decree for the difference in the market price of some seed which had been stored by a carrier without notice of arrival to the consignee, and so not received until a delay of some days had arisen from what

the court, in that case, held to be a neglect of the carrier, for the evidence offered here presents a different question. The libelant in this case has not attempted to prove any variation of that market price proved in the cases above referred to, which would be dependent upon the quantity of the article in the market, the prospect of the crops, the price of gold, possibly even upon the changing phases of political and national questions, and various other contingencies which in a commercial center go to change from day to day the selling price of many, if not most, commodities. His proof here does not show that there was any such change of market price of the article in question during the period of detention; but he proves that when the season ended, and not before, there was a diminution of value of over fifty per cent., the natural and ordinary trade in the article having ceased when the season terminated. In the cases above referred to the market value of the butter, sheep and seed in controversy there upon the day of arrival was dependent upon many contingencies which do not present themselves in the present case. In those cases the market value proved might have been affected by the arrival or non-arrival of the very parcels in question; the price might have gone up in spite of the delay, and so the detention been productive of benefit instead of loss to the freighter. In this case no possible advantage could accrue to the libelant by the delay. The arrival or non-arrival of this merchandise would not prevent the termination of the season, and with it the end of that demand of the trade, to supply which the article was imported. What the libelant claims here is not a loss of profit, but that he lost the opportunity to dispose of his goods at all in the manner and for the purposes for which they were imported. The only circumstance which caused this loss was the lapse of time, extending beyond the season. Up to October 5th there was no diminution of value. After that the article had no exchangeable value in the ordinary course of trade, as an article required for the manufacture of ladies' hats, but was only valuable as an article to be held over to the next season, or to await the chance of finding an out-of-season customer. This diminution of value was a certain result of such delay in regard to an article like this; and I can discover no element mingled with the delay as a cause of the loss. It arose from the delay, and from nothing else, and was its natural and immediate result. A case very like the present is reported in 99 Eng. Com. Law, p. 641. *Nelson v. Lancashire & Yorkshire R. Co.*, 9 J. Scott, N. S., 632. There the action was for undue delay in delivering a quantity of cloth, ordered by a manufacturer of caps, which failed to arrive in time to be made up so as to fill the orders of the season which his travelers had obtained; and the court, while they disallowed all profit which would have arisen from the sale of the caps had they been made, allowed to the plaintiff the diminution of exchangeable value of the cloth caused by failure to arrive in time to be made up for the season. The case put by Williams, J., of an order of ribbons intended to be sold at a fashionable watering place, which should be delayed until the watering season was over, so that the opportunity of their sale is lost, and as their novelty and fashion are gone, they remain on hand materially diminished in value, seems to be on all-fours with the case presented by the libelant. The case before me, therefore, as it now stands, I consider to be free from the objections raised by the respondents, and to disclose a positive loss to this libelant, which can be recovered in an action like the present as the immediate result of the carrier's neglect. The decree must be for the libelant, with an order of reference to ascertain the amount of damage sustained. I do not consider that either party is concluded by the evidence

given on the hearing from introducing before the commissioner any evidence pertinent to the question of damages, and intend now to do nothing more than declare the rule of damages applicable to the evidence produced before me.

THE HYPERION'S CARGO.

(District Court for Massachusetts: 2 Lowell, 93-96. 1871.)

§ 890. *Whether the cargo is subject to a lien for demurrage where no express contract was made.*

Opinion by LOWELL, J.

The libelants' right to freight is not contested; but it is said that there can be no recovery for demurrage, because no express contract was made concerning it, and the law will not imply one against a consignee. *Gage v. Morse*, 12 Allen, 410, is cited as conclusive on this point. That case decided that a consignee, merely as such, does not, by accepting the goods, make an engagement with the master that he will receive them at any particular time, unless there is something on the face of the bill of lading fixing the time. Judge Betts came to the opposite conclusion in a case in which the consignee was the owner of the cargo. *Sprague v. West*, Abb. Adm., 548 (§§ 895-897, *infra*). The case at bar resembles in its circumstances that before the court in New York; for I understand the title to this coal to have been in the claimants from the time it was loaded on board the *Hyperion*, if not before. But I am not concerned here with the question whether the claimants are personally responsible for demurrage, but with the liability of the cargo to such a demand. There is no doubt that the shipper of goods by an ordinary bill of lading impliedly agrees that they shall be received at the port of destination within a reasonable time after the arrival of the vessel, according to the usual course of the trade. By the common law the master has no lien upon the goods as security for this obligation.

§ 891. — *such a lien or privilege may be asserted in admiralty.*

In my opinion he has such a lien, or, more strictly speaking, such a privilege, by the maritime law, and that it may be enforced in the admiralty. It is a maxim of the general law merchant that the ship is bound to the merchandise, and the merchandise to the ship. *Pardessus*, *Droit Com.*, arts. 709, 961; *Valin*, *Comment.*, book 3, tit. 1, arts. 11, 24; *Boucher*, *Droit Marit.*, §§ 926-934. This reciprocal privilege appears to extend to all claims which may arise on the one side or the other out of the contract of affreightment. Thus article 308 of the French Code de Commerce declares that the captain is privileged before all creditors for the payment of his freight and the averages (*avaries*) that are due him. The word *avaries* I understand to include all damages which the master may lawfully demand in the premises. Indeed, the distinction between liquidated and unliquidated damages is unimportant in those jurisdictions in which the master's lien is a privilege to be enforced by the courts, and not a mere right of retainer; for the courts can deal as readily with the one kind of damages as with the other. I have found no exception of any class of charges or damages; and though the term *avaries* is the most common, yet "debts" and "expenses" and some other expressions are used, showing that "averages" has no technical signification. See *Pardessus*, n. 6 to art. 24 of the Laws of Oleron, 3 *Pard. Collect.*, 345; *id.*, Code of Charles XI. of Sweden, 3 *Pard. Collect.*, 158. Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he

has his privilege for the freight even against the true owner of the goods, though they had been stolen (Pard. Droit Com., art. 961); and Valin says that the contrary opinion is absurd. Valin, *ubi supra*. I quote this example to show that the privilege does not depend on any doctrine of agency, as well as to fortify my opinion that the merchandise is liable for whatever the shipper is liable for.

When the common law of England was modified by the introduction of many rules from the law merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the goods, and had succeeded in repressing the only court that had the requisite modes of action; and was, therefore, obliged to say that it could not recognize the maxim, even when embodied in express contract, as it usually is in English charter-parties. *Birley v. Gladstone*, 3 Maule & S., 205; *Gladstone v. Birley*, 2 Meriv., 401. From the time of those decisions to that of *Gray v. Carr*, L. R., 6 Q. B., 522, the history of this question in the courts of common law in England has been that of a struggle between ship-owners to create liens by stipulation, especially liens for demurrage, and of the courts to narrow the stipulations by construction. See *Phillips v. Rodie*, 15 East, 547; *Faith v. East India Co.*, 4 Barn. & Ald., 630; *How v. Kirchner*, 11 Moore, P. C., 21; *Tindall v. Taylor*, 4 Ell. & Bl., 219; *Bishop v. Ware*, 3 Camp., 360. In nearly all those cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege, by whichever party this action may be invoked. *Dupont de Nemours v. Vance*, 19 How., 162; *The Belfast*, 7 Wall., 624; *The Maggie Hammond*, 9 id., 450 (§§ 424-437, *supra*). Cases in which the cargo has been libeled for freight are numerous (*The Volunteer*, 1 Sumn., 551; *Certain Logs of Mahogany*, 2 id., 589; *The Spartan*, 1 Ware, 134; *The Salem's Cargo*, 1 Spr., 389; *The Eliza's Cargo*, 1 Low., 83); and so of a contribution for general average and other demands. *Cargo of the George, Olc.*, 89; *In re Certain Bags of Linseed*, 1 Black, 108 (§§ 955-958, *infra*); *The Convoy's Wheat*, 3 Wall., 225 (§§ 848-850, *supra*). The only question of any difficulty is whether the privilege extends to demurrage not expressly stipulated for in the bill of lading. Upon this point the cases at common law do not afford much aid, because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which, they say, cannot be conveniently exercised in support of a demand for unliquidated damages,—a point of no consequence in the admiralty. *Sprague v. West*, Abb. Adm., 548 (§§ 895-897, *infra*). Nearly all salvage claims against cargo are unliquidated. We uphold libels against the ship every day in behalf of the merchant for unliquidated damages to his goods; and there is no reason for not doing so, on the other side, for damages in not receiving the goods in due season. My own conviction is that the privilege of the ship-owner in the admiralty is not limited by the master's lien at common law, but depends on the law merchant, and that by the law merchant the privilege extends to all charges, damages and expenses arising out of the affreightment.

STATEMENT OF FACTS.—The evidence in this case is plenary that the cause of the delay at the wharf was the lack of cars to take away the coal; that it might easily have been taken out and received at the rate of one hundred tons a day, which is the rate usually agreed on in the trade, but that the consignees wished to receive it in the cars. They refused to receive it in any other way, and said they would pay the freight when it should all be out, but

no demurrage. The master was justly angry at this language, and brought his libel. I am much inclined to think his action for the freight was premature; though not for demurrage, which accrues from day to day; but as the claimants admit a liability for the freight, and the libelants admit that part of the demurrage they now ask for was not due when the libel was filed, it seems to me just to give to the libelants their whole damages, but without costs.

§ 892. *A libel will not be dismissed as premature, if substantial justice can be done.*

A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it. The Salem's Cargo, 1 Spr., 392; The Isaac Newton, Abb. Adm., 11; The Magoun, Olc., 55. Here, as in the case before Judge Sprague, the cargo is now beyond the reach of process, and therefore the libel ought to be retained. A specification of the libelants' damages, which was used at the trial, shows that they ask for twelve days' demurrage. Upon the evidence, it seems to me that the vessel was delayed at least that length of time by the want of cars, and I shall give damages at thirty dollars a day for the twelve days.

Decree for libelants.

DONALDSON v. McDOWELL.

(Circuit Court for Massachusetts: 1 Holmes, 290-293. 1873.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—This appeal from the decree of the district court in admiralty presents the question whether the ship has a privilege against the cargo for damage, in the nature of demurrage, when the cargo has not been received within a reasonable time, through the fault of the consignee. The consignees in this case, although not nominally in the bill of lading, yet, in fact, were the shippers of the cargo. Appellants contend that as the bill of lading contains no express contract concerning demurrage, the law will not imply one against the consignee.

§ 893. *No demurrage is allowable when bill of lading is silent. Exceptions stated.*

When the bill of lading contains no provision for the payment of demurrage, courts of common law have generally held that the consignee, or his assignee, is not liable for demurrage, even after receipt of the goods. *Smith v. Sieveking*, 5 Ell. & Bl., 589; *Young v. Moeller*, 5 El. & Bl., 755; *Gage v. Morse*, 12 Allen, 410. But when the bill of lading has contained a stipulation for demurrage, either expressly or by reference to the charter-party, the acceptance of the goods has been held to be evidence of an agreement by the consignee to pay demurrage as well as freight. Chief Justice Mansfield said, in *Jesson v. Solly*, 4 Taunt, 52, "If the consignee will take the goods, he adopts the contract." The reason given in the cases first cited is, that as the consignee is not a party to the contract in the bill of lading, and is only liable upon the contract, which may be implied upon the actual delivery of the cargo and waiver of his lien by the master, he is not bound to accept the cargo at any particular time, and incurs no responsibility by a refusal or delay in accepting it; and that the contract implied from its acceptance can extend no further than the conditions upon which its delivery is made dependent by the bill of lading. This enables the consignee unreasonably to refuse or delay to receive the goods when the master tenders delivery, and thus subject the ship to expense and delay; while

the consignee may subsequently claim the goods on payment of the stipulated freight, and receive them without any liability to pay the damages occasioned by his own neglect or refusal. The reasoning in these cases is not very satisfactory, and the result is to exempt the consignee from liability to an action at law for the consequences of his own neglect. Since the decision in the English courts relied upon in support of this doctrine, the English bills of lading act, 18 and 19 Vict., cap. CXI, I, provides that "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of the goods therein mentioned shall pass, upon and by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." Under this statute the assignee who receives the cargo has all the rights and bears all the liabilities of a contracting party. See *Smurthwaite v. Wilkins*, 11 C. B. (N. S.), 842. Independent of the bills of lading act, the English and American courts have held that, where the consignee is the *freighter*, he is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject. *Sprague v. West*, Abb. Adm., 548 (§§ 895-897, *infra*); *Holt on Shipp.*, part 3, chap. 1, sec. 25.

In *Horn v. Bensusan*, 9 Carr. & P., 709, it was admitted that the ship-owner, on a special count in the declaration for not loading or unloading in a reasonable time, could recover damages for detention of the ship against the consignee. In the case before the court, it clearly appears that the title of the coal was in the claimants, and that they were in fact the freighters of the coal. The master testifies that he received his order for the coal from the claimants in New York; that he delivered that order to the Scranton Coal Company, and they gave him orders to take to Elizabethport, to the Scranton Coal Dock. Upon this state of facts, the consignees being also the shippers of the cargo, I see no reason why the ship-owner could not recover by a libel *in personam*, against the consignee, demurrage occasioned by his neglect in the unlivery of cargo. Under such circumstances, in the case of *Crerar v. Montreal Ocean Steamship Co.* (not yet reported), Judge Fox awarded damages for demurrage of the ship, occasioned by the delay of the defendants as consignees to take delivery seasonably of a cargo of coal which the ship-owner was ready and offered to deliver; and the decision was affirmed on appeal to the circuit court by Mr. Justice Clifford.

§ 894. *The cargo is liable in admiralty for delay improperly caused by those owning it.*

Whatever the personal liability of the consignee, simply as consignee receiving the cargo, may be in a court of common law, there can be no reasonable doubt of the liability of the cargo in a proceeding *in rem* in the admiralty for demurrage, when the delay is occasioned by the freighters of that cargo, or the consignees who receive that cargo. Demurrage is only an extended freight, or reward to the vessel, in compensation for the earnings she is improperly caused to lose. Every improper detention of a vessel may be considered a demurrage, and compensation under that name be obtained for it. 2 Hagg. Adm., 317. It is a maxim of the general maritime law, that the ship is bound to the merchandise, and the merchandise to the ship. Valin, Comm., book 3, tit. 1, art. 11, tit. 3, art. 24; Pardessus, Droit Com., arts. 709, 961. The law merchant considers that the master contracts rather with the merchandise than the shipper, and it necessarily follows from this, that the merchandise is liable for whatever the

shipper is liable. As in this country courts of admiralty have frequently exercised their jurisdiction to enforce the privilege where the cargo has been libeled for freight, general average, and other charges, there seems to be no just ground for making an exception, and refusing a remedy for a violation of duty and right in the case of demurrage, which, under circumstances like those in the present case, is as much a charge or damage which the master may lawfully demand, and for which he has a privilege against the cargo, as the freight itself, of which demurrage is only an extension.

Decree of district court affirmed, with interest and costs.

SPRAGUE v. WEST.

(District Court for New York: Abbott's Admiralty, 548-553. 1849.)

Libel *in personam* for damages for detention of a vessel.

Opinion by BETTS, J.

STATEMENT OF FACTS.—A cargo of one hundred and ninety-four tons of coal belonging to the defendant was shipped at Philadelphia on board the libellant's vessel. The master signed a bill of lading to deliver the same to the respondent at Forty-second street, New York, for ninety cents per ton freight. The vessel arrived at the place designated on the 19th of December last, and the respondent, not being able to receive the coal at that place, ordered the master to moor at Twenty-ninth street and unload there. The vessel took her berth at that place the same day, and the next morning was ready to commence discharging, of which a verbal notice, and afterwards a written one, was given the respondent, with further notice that demurrage would be claimed of him for any unnecessary detention of the vessel. The written notice was sent the 21st. The respondent failed supplying the carts necessary to remove the coal, and the vessel was not fully discharged of her cargo until the 4th of January following. Although the weather was at times stormy and the roads bad, yet, on the proofs, neither of these circumstances prevented unloading the vessel and removing the cargo at once; and it is well established by the proofs that with ordinary diligence the cargo could have been delivered in three days. The libel alleges that four days was amply sufficient.

§ 895. *Liability of respective parties for bad weather affecting the delivery.*

The libellants undoubtedly took the hazard of working weather. The evidence to that point is satisfactory that coal was constantly unladen and carted from North river piers during those days; and a vessel of the burden of this one, coming to her dock the same day, and having one hundred and fifty tons on board, was completely discharged and sailed again within three days. The state of the weather, therefore, did not prevent the work being done. The respondent was bound to take the risk of roads and means of transportation from the dock. He was to take the coal as delivered him at the vessel's side, and to supply means of removing it as fast as the vessel could be reasonably discharged. This is the general rule of maritime law (*The Grafton, Olc.*, 43, §§ 805-813, *supra*, November, 1844), and the evidence in the present case shows it the established custom of the coal trade at this port. The respondent had, then, the 20th, 21st, 22d and 23d days of December, when the weather was suitable and the vessel in readiness to discharge, which could have afforded him time to take away the whole cargo. But, giving him four full days, including the 21st, and deducting Sunday, the 24th, and Christmas, the vessel should have been dis-

charged the 26th, and her detention beyond that period was unnecessary, and caused by the fault and delinquency of the respondent.

§ 896. *Liability for demurrage in absence of express stipulation considered; a freighter is thus liable.*

The position is taken by the respondent, in objection to the claim of demurrage, that it is only recoverable on an express stipulation to pay it, and that the bill of lading being an ordinary one in this case, the libelants have no remedy against the consignees, beyond the freight stipulated to be paid. It is not to be denied that the practice would be more prudent, and liable to cause less disturbance to navigation and trade, if the parties, as suggested in some of the English cases, would note in the bill of lading or charter-party the time allowed for lading or unlading the vessel at her ports of affreightment or discharge, and also the consequences of overrunning that period. And probably, upon the more modern authorities (Abbott on Shipp., 304; 3 Johns., 342), a *consignee* cannot be made liable on an implied obligation for demurrage, no express agreement or stipulation being made in the charter-party or bill of lading in respect to it or to lay-days. But the doctrine is different in regard to the *freighter*. He is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject. Holt on Shipp., pt. 3, c. 1, § 25. To the same effect are the ancient ordinances and the rules of other maritime countries. 1 Valin, 649, 650. And the English courts, though hesitating somewhat at terming the compensation *demurrage*, hold that the freighter or consignee who improperly detains a vessel is liable to a special action on the case for the damage resulting from such detention. 9 Carr. & P., 709. Courts of admiralty act upon the rights arising out of maritime transactions, without regard to modes or names of actions, and independent of all points of form. The suggestion that demurrage can be claimed upon the footing of express contract alone is undoubtedly giving too narrow an effect to the term. Every improper detention of a vessel may be considered a demurrage, and compensation in that name be obtained for it. 2 Hagg. Adm. R., 317; 9 Wheat., 362; 6 N. Y. Leg. Obs., 303. Demurrage is only an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose. Holt on Shipp., pt. 3, c. 1. The jurisdiction of the court over sea freights and demurrage resulting from such voyages, it appears to me, is indisputable, and the branch of the defense resting on exceptions to the jurisdiction is overruled. I shall accordingly decree against the respondent, as owner of the cargo, damages by way of demurrage for the unnecessary detention of the vessel from the 26th of December to the 4th of January.

§ 897. *As to the method of computing demurrage.*

Various methods of computing these damages are referred to and adopted by the courts. The *Anna Catharina*, 6 Rob., 10; Holt on Shipp., 338, § 23; Abbott on Shipp., 304; 6 N. Y. Leg. Obs., 303. The usual earnings of the vessel in her regular course of employ is, perhaps, a method not less entitled to adoption than others frequently approved and acted upon. It is in proof that upon average voyages of from fifteen to eighteen days, this vessel was earning at that period about \$10 per day. No doubt that is a low valuation of her worth to the owners, but it may be as safe a criterion to guide the judgment of the court in estimating the loss they incurred by being deprived of her services that period, as the opinion of witnesses to her charter value in herself by the month or day. It belongs to the libelants to give satisfactory proof to this point, and to supply a method of computation by which the court can

ascertain the damages with reasonable precision. Assuming that as the basis of computation, the detention of the vessel would deprive her of earning, as she was then fitted out, manned and provisioned, from \$10 to \$12 per day. I shall allow for the nine days' detention \$100.

Decree accordingly.

THE M. S. BACON v. ERIE & WESTERN TRANSPORTATION COMPANY.

(Circuit Court for Pennsylvania: 3 Federal Reporter, 844-847. 1890.)

§ 898. *An express stipulation is not needful for compensation for unreasonable delay in unloading.*

Opinion by McKENNAN, J.

An express stipulation for demurrage, in a contract of affreightment, is not necessary to entitle the owner of a vessel to compensation for her unnecessary or improper detention in loading or unloading. Reasonable promptitude in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty implied in such contracts, and for a violation of it damages in the nature of demurrage are recoverable. This is too well settled, both in England and in this country, to need discussion or authority.

§ 899. — *this rule applies as against a consignee who is also the shipper.*

Whether the consignee of a cargo, who is not its owner, is chargeable with such damage, it is unnecessary to consider, because the respondent is admitted to have been the shipper of the cargo, and hence, as a party to the contract of affreightment, is accountable for any breach of an obligation imputed by it. *The Hyperion*, 7 Am. L. Rev., 457.

STATEMENT OF FACTS.— Was the vessel here subjected to unwarrantable delay in discharging her cargo? This is the decisive question in the case. On the 20th of October, 1876, the respondent shipped in the libellant vessel at Chicago a cargo of corn, consigned to itself at Erie, Pennsylvania. The vessel reached Erie on the 26th of October, and her master promptly reported to the respondent's agent, and was told that "we would unload him as soon as it came his turn; that there were four vessels ahead of him." The respondent has the control and possession of the only two elevators at Erie, and as soon as the vessels arriving before the Bacon were unladen, the discharge of her cargo was commenced, viz., October 30th, about two o'clock P. M., and was finished in the forenoon of the 31st. The libellant claims damages for four days' alleged improper detention. That it was the right of the respondent to require the cargo of the vessel to be unloaded at the Erie elevators is unquestionable, and that the facility and dispatch of such method of discharge were advantageous to the vessel is obvious. If other vessels, with the same consignment, arrived in port before her, and were awaiting the discharge of their cargoes, she was entitled to a berth at the elevators only in her turn, and her necessary detention for a reasonable time, under these circumstances, is not imputable to the respondent as a wrong. This is the result of the proofs as to the prevailing custom at the ports on the lakes, and especially at the port of Erie, and of accepted decisions by English and American courts.

Upon this point the master of the Bacon testifies: "I don't know that it is the custom at all the lake ports for the first vessel at the elevators to be unloaded first. Of course the first vessel at the elevator is unloaded first." William Christie, another witness for the libellant, is more explicit: "It is customary for vessels loaded with grain to wait their turn to un-

load in the order of their arrival at the elevators; in fact, you have got to wait your turn wherever you go." And, again, J. C. Van Scoter says: "It is the usage and custom throughout the lakes for grain-bearing vessels consigned to the same elevators to wait their turns to be unloaded in the order of their arrival. Of course, where an elevator is disabled, the consignee has more time." All the testimony, on both sides, is concurrent with this; and in view of so well established and so reasonable a custom, it is not within the province of ship-owners, by notice to a consignee, to define an arbitrary period within which his cargo must be discharged. If he must unload in his turn, he must await it for a reasonable time, to be measured by the ordinary volume and exigencies of trade at the place of discharge, and it would be a solecism to affirm that the consequent necessary delay can be treated as a wrong upon which to found a claim for damages.

The subject is fully discussed, and the result of the cases touching it is clearly stated, by Chief Justice Denio, in *Cross v. Beard*, 26 N. Y., 85, 89, 91. After speaking of the effect of an agreement for demurrage in a charter-party, he says: "But the rule is somewhat different when no period of delay is fixed by the contract. There a reasonable time is implied, and this is to be determined upon by a regard to all the circumstances legitimately bearing upon the case, and it is a question for the jury. . . . If it be conceded that the defendant had a right to require that the coals should be delivered upon his own dock, he was guilty of no fault or breach of contract in delaying the plaintiff's vessel until she could come up to the dock by taking her turn among the other vessels, which were also waiting to be discharged, unless he was guilty of some fault in suffering such an accumulation of craft, laden with cargo for himself, for the same wharf, at the same time." See, also, *Rogers v. Forrester*, 2 Camp., 483, and *Burmester v. Hodgson*, id., 488.

§ 900. *Custom of awaiting turn to unload at elevator approved as to grain-bearing vessel on the lakes.*

The only question, then, is, was there a culpable detention of the vessel for an unreasonable time? She reported to the consignee in the afternoon of October 26th, and the discharge of her cargo was completed in the forenoon of the 31st. Four vessels had precedence of the Bacon. There is nothing to indicate that this number of vessels consigned to the respondent, in port at the same time, was extraordinary, especially so near the period of closing navigation, nor that the delay in unloading the Bacon was at all unreasonable. On the contrary, all practicable dispatch seems to have been afforded her, and the respondent was not, therefore, in default.

And now, August 20, 1880, this cause having been heard upon the pleadings and proofs, and having been argued by the proctors of the parties, respectively, it is here adjudged and decreed that the decree of the district court be reversed; that the libel be dismissed, and the libelants and their stipulators pay the respondent its costs in the district court, as well as in this court, to be taxed by the clerk.

STAFFORD v. WATSON.

(Circuit Court for Illinois: 1 Bissell, 437-439. 1864.)

Opinion by DAVIS, J.

STATEMENT OF FACTS.—This is a suit, *in personam*, brought to recover damages, in the nature of demurrage, on account of the alleged detention of the brig Banner, owned by libelant, at Port Colborne. The cargo of the brig was

corn, which was shipped on the 1st of May, 1863, at Chicago, by the respondents, as agents and forwarders, and consigned to H. Stearns, Montreal, in care of the Welland Railway Company, at Port Colborne, and was to be delivered at Port Colborne at the agreed rate of seven and a half cents per bushel. Outside of the terms of the bills of lading, there is proof that the respondents had no interest whatever in the corn, having purchased it for the consignee for a small commission. The brig arrived at Port Colborne in due course of navigation, and was detained there some eleven days, because the railway company could not receive the cargo. The vessel, on her arrival at her place of destination, could have been unloaded in twenty-four hours if the usual and proper facilities had been furnished, and when the master ascertained that he would be detained unreasonably, he telegraphed the fact to the libellant, who called on the respondents, and wished them to consent that the destination of the brig should be changed to Buffalo, or some other port where she could be unloaded with dispatch. They replied that they had no power to authorize such a change; that they had purchased the grain for their correspondent in Montreal, and had no interest in it; but were, nevertheless, willing to write to Montreal for instructions. It does not appear in proof that such a correspondence was opened, or that the libellant wished it done.

§ 901. *Rule of lien on goods for demurrage stated.*

The vessel, after a detention of over eleven days, voluntarily delivered her cargo, getting pay for freight, but not for demurrage. Time is often of great importance in commercial transactions, and, during the season of navigation, the owner of a vessel suffers damage for every day that she is unreasonably detained. The owner of the cargo is bound to furnish all reasonable facilities for unloading, when the port of delivery is reached, and, for a non-performance of this obligation, the injured party has his remedy under the name of demurrage.

§ 902. *Carrier cannot abandon his lien for demurrage and charge a person who has no control over the goods.*

If demurrage was due at all there was a lien on the property, and the master could well have refused to deliver it without payment for his detention. But this lien, if one existed, was abandoned. No attempt has been made to fasten liability on the owner, but it is sought in this action to charge the respondents in person. This cannot be done. The bill of lading disclosed that the shippers were agents, and had no concern with the property. The fair interpretation of the contract is, that the owner was to be held responsible for all defaults, and not the shipper.

If the owner was a foreigner, yet the vessel had the remedy in its own hands. To hold that an agent who buys produce and ships it for another, having no concern with it afterwards, is responsible for the damages growing out of a failure of the owner to cause delivery within a reasonable time, without an express stipulation, would be effectually to end all purchases on commission. With such a liability hanging over him, no one, in view of the limited compensation received, would engage in the business. There is always more or less detention at Port Colborne, and it is very easy for carriers, if they wish to contract for the personal liability of the shippers, beyond the lien on the cargo, to provide for it by express stipulation in the bill of lading. In this case the carrier not only had a lien on the property for his freight, but for the delay in procuring a delivery of the property; and, having voluntarily chosen to abandon this lien, he cannot now seek to charge a party who had no interest in it and no control over it. The judgment below is affirmed.

HENLEY v. BROOKLYN ICE COMPANY.

(Circuit Court for New York: 14 Blatchford, 522-524. 1878.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—In the summer of 1874 the respondent was engaged in the business of shipping ice from Dresden, Maine, to Brooklyn, New York, for sale to consumers. It had no store-houses in Brooklyn, but occupied a wharf in Wallabout Basin for the purpose of unloading vessels. Its course of business was to send out from three to six vessels a week from Dresden, according to the demand in Brooklyn, and, upon the arrival of a vessel at Brooklyn, as sales were made to consumers, unload into carts upon the dock for delivery. All the work of unloading was done between sunrise and sunset, and the business was the most active in the morning and evening, but little being usually done at midday. The usual time for the discharge of a cargo of two hundred and thirty-five tons was three days. On September 10, 1874, the schooner *Marcus Hunter*, of which the libelant was master, took on at Dresden a cargo of two hundred and thirty-five and five hundred and five one-thousandths tons, and sailed for Brooklyn. Her bill of lading stipulated that the ice and dunnage should be discharged by the respondent, with the assistance of the crew, but made no provision for demurrage or detention. The vessel was detained unusually long upon her voyage, by calm weather, fog, head winds and the usual accidents of navigation, and did not arrive in Brooklyn until about the 27th of September. The usual voyage was four or five days. While she was on her way, twelve or fourteen other vessels were out. All these vessels arrived about the same time. Five or six came in before she did, and the rest during the next three days. Upon his arrival, the libelant reported to the respondent, and asked to be unloaded. The vessels arriving before the *Hunter* were given the preference, and, owing to the difficulty of disposing of their cargoes in the usual way, as well as the unusual accumulation of arrivals, she was detained with her load on board until October 9th. The respondent then made sale of six or seven cargoes, including that of the *Hunter*, at a great sacrifice, to the Washington Ice Company, which had storage houses, and at once sent her to that company to unload. This was completed the next day, and she was then ready to leave. The freight due upon the ice was not all paid before the libel was filed in this case, but although, at first, objection was made against paying unless all claim for demurrage was released, before the libel was filed, this objection was waived, and an agreement made to pay, leaving the libelant to enforce his claim for detention as he might see fit. The most of the freight was paid before the libel was filed, and the balance, upon demand, a few days thereafter.

§ 903. *Cargo must be unloaded within a reasonable time; reasonable time depends upon circumstances.*

There being no special agreement, in this case, as to the time within which the vessel should be unloaded, the law implies that it was to be done within a reasonable time after her arrival. What is reasonable in a particular case depends upon the special circumstances of that case. The libelant is presumed to have known the course of dealing by the respondent with its shipments upon their arrival in Brooklyn, and to have assumed the risks of delay in discharging which were necessarily incident to such a mode of doing business. He might have protected himself against extraordinary detention by a stipulation to that effect in his bill of lading. Having failed to do this, all he can require of the

respondent is to use proper diligence in taking off his cargo in the customary way. Under the application of this rule the respondent is not in fault. While there was delay in unloading, it happened through no neglect of the respondent. The unusual accumulation of vessels at Brooklyn, caused by the accidents of navigation, necessarily occasioned delay in unloading them in the customary way. This was one of the risks of the business in which the libellant accepted employment, and against which he should have made provision by special contract, if he desired to throw the loss upon the respondent. The respondent used all the diligence which could properly be required of it, under the circumstances, to unload the vessel, after her arrival.

As the respondent had consented to pay the freight before the libel was filed, and the whole litigation has been in respect to the claim of damages for the detention, the respondent, having in fact paid the freight in full, is entitled to costs. The libel is dismissed, with costs, in both courts. (a)

WEAVER v. WALTON.

(District Court, Northern District of Ohio: 1 Flippin, 441-444; S. C., 1 Brown, 166. 1875.)

Opinion by SHERMAN, J.

STATEMENT OF FACTS.—The libel in this case was filed to compel the payment of demurrage by the consignee, Thomas Walton, for seven days' detention of the schooner Glover, in unloading a cargo of barley in the port of Cleveland. The bill of lading was in the usual form, but did not provide for "lay" days nor for compensation for detention. It was general in its form, such as is customary on these lakes. From the proof, it appears that the vessel arrived at ten o'clock A. M., on Wednesday, October 4th, and was forthwith reported to Thomas Walton, the consignee; that, upon inquiry, both by Walton and the captain, no elevator could be found in the port that would agree to unload her before the next Friday; that on Friday, the 6th, the vessel was at the Erie elevator and commenced unloading, but the cargo of barley was found to be wet, caused by leaking through the hatches, and they therefore ceased unloading; that by the next Tuesday the barley, by throwing open the hatches and by other means, became dry enough to commence unloading; that about one-half was unloaded, when some of the machinery of the elevator broke, and that the barley was not entirely unloaded until Thursday. It was also established by the proof that it was a general and uniform custom along the lakes, including this port, that the consignee should have twenty-four hours after the arrival of a vessel at the docks, to provide a place and prepare for its unloading; that all grain should be unloaded by means of an elevator, and that in unloading at an elevator every vessel should take its turn in the order of its arrival. Under this state of facts the libellants, on the one hand, claim to recover damages for the detention of the vessel at the rate of \$75 per day, the agreed value, and, on the other hand, the claimant and consignee claims that he is not liable for such detention, as it was not caused by his fault or neglect.

§ 904. *Liability of consignee recognized, independently of a stipulation, for detention through his fault or neglect, but not otherwise.*

The liability of the consignee in this action turns upon the question whether the law imposes upon him the payment of damage when the detention was not caused by his actual fault or neglect. Originally it was held that damage could only be recovered when it was expressly stipulated for in the contract

(a) Affirming *Henley v. Brooklyn Ice Co.*, * 8 Ben., 471.

for affreightment or bill of lading; but of late years it is established that it may also be recovered when there is a breach of an implied covenant or duty on the part of the consignee. In former times, all charter-parties and bills of lading stipulated, on behalf of the freightors or consignees, that a certain number of days should be allowed for unloading, and that after their expiration an agreed price per day should be paid for demurrage. The courts before whom such contracts came uniformly held that the consignee was liable for such demurrage, no matter for what reason or whose fault caused the detention. They so held because it was the contract of the parties, but chiefly because it was a contract mutually entered into, and the consignee could have provided for a large number of days, or could have stipulated against a liability for delay caused by means and occurrences over which he had no control. 2 Camp., 352; 12 East, 179; Parsons on Shipp., 314. In other cases, where, according to modern usage, there is no stipulation for "lay days" or demurrage in the charter-party or bill of lading, the courts uniformly, both in England and America, hold that where there is no express stipulation as to the time of unloading, a consignee is not liable for delays occurring without his fault or a failure on his part to comply with some of the obligations imposed on him by law, or a custom of the port as to unloading. 2 Camp., 483; id., 488. Chief Justice Mansfield, in the last case, said: "Here the law could only raise an implied promise to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in her turn into the bonded warehouses." The same doctrine is fully sustained in Abbott on Shipp., 311, 312, 313. Also in 1 Ben., 105, and 2 Ben., 14; 5 Cush., 18. In *Strong v. A Quantity of Wheat*, in the United States district court, northern district of New York, in manuscript, Judge Hall held that a master of a vessel was bound to know the custom of a port to which he conveyed a load of grain, and if the custom prevailed at the port that all grain should be unloaded at an elevator, and that the vessel should wait its turn, that the custom entered into, and became part of, the contract, and that the master was bound by that custom.

§ 905. — *bills of lading with express stipulation distinguished in this respect from those without stipulation.*

This distinction between the liability of consignees, when "lay" days and demurrage are provided for in bills of lading, and their liability where they are not mentioned and provided for, is fully recognized in all the reported cases. It is not recognized in rather a popular elementary work because of the well known carelessness and want of research by its reputed author, and hence has grown up an extended misapprehension of the law on this subject. Bearing in mind this distinction, and the fact that this bill of lading was a general one, with no provision for "lay" days or demurrage, the question arises, did Walton, by his neglect or fault, cause detention of this vessel?

§ 906. *Detention of lake vessel at an elevator is not presumed to inculcate the consignee.*

The detention from Wednesday to Friday, in waiting its turn to get to the elevator, was, according to the above authorities, and especially that from Judge Hall, of the northern district of New York, a part of the contract, was in compliance with the custom of the port, and Walton, the consignee, was not liable. On Friday, after the elevator commenced to take in the cargo, finding the barley was wet, its managers refused taking it in until it was dried. The libellant claims that the elevator stopped taking it in because of the orders of Walton,

who wanted to consult the insurance company. The captain of the vessel so swears. Walton swears the contrary, and states positively that the elevator people refused to take it because of its condition. The burden of the proof of the fact is on the libellant, but the testimony is balanced, and I must assume that Walton did not order as claimed. If so, then the detention of the vessel from Friday to the next Tuesday was not Walton's fault, but rather the fault of the master of the vessel, who permitted his cargo to become wet by the defective state of his hatches. Nor was it Walton's fault that the vessel was further delayed until the next Thursday in consequence of the breaking of the machinery of the elevator while it was engaged in taking in the barley. The master was aware of well known and uniform custom in all the ports of the lakes that grain is only unloaded from a vessel by and through an elevator, and that such was contemplated when he made his contract, and therefore he takes upon himself all the risks and accidents incident to such a method of unloading.

I am of opinion, therefore, that Walton, the consignee, is not liable in this action. The libel will be dismissed, with costs.

FULTON v. BLAKE.

(District Court, Northern District of Illinois: 5 Bissell, 871-877. 1873.)

Proceeding *in personam* against respondents for damages in the nature of demurrage.

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—The essential facts, as I find them from the pleadings and proofs, are: That in the latter part of September, 1871, the firm of C. A. Blake & Co., of Buffalo, N. Y., loaded on board said schooner, Kate Hinchman, four hundred and twenty-six tons Lehigh coal, consigned to Blake, Whitehouse & Co., of Chicago, at a freight of fifty cents per ton. The schooner sailed with her cargo on the 29th of September, and arrived in the port of Chicago on the evening of the 16th of October with her cargo on board, and on the morning of the 17th the consignees were notified of her arrival and readiness to discharge cargo. The bill of lading contained no stipulation in regard to demurrage. The consignees were engaged in the coal business in this city, occupying two docks—one on the north branch of Chicago river, near Indiana street, capable of accommodating two vessels at a time, and the other near Eighteenth street, on the south branch, capable of unloading only one vessel at a time. Their dock at Indiana street was injured by the great fire of October 9th, and nearly all the employees at that dock were burned out, and no efficient help to unload at said dock was obtainable for many days after the fire. When the Hinchman arrived the Indiana-street dock was occupied by other vessels unloading coal, and she was directed to proceed to the Eighteenth-street dock, her towage bill being paid by respondents. This dock was occupied by the schooner King, which had arrived two days before the Hinchman, although she had sailed from Buffalo eight days after, and the Hinchman did not get alongside the dock so as to commence unloading until the afternoon of the 21st, and completed unloading on the 23d of October.

§ 907. *The custom of Chicago as to time allowed consignee of a vessel for providing dock room stated.*

The respondents' business was such that they expected to receive and unload at their docks during the months of September and October of that year about

four cargoes per week, and they had ample facilities for unloading that number. The respondents unloaded vessels consigned to them in the order in which they arrived and reported themselves ready to unload. The great fire considerably deranged respondents' business, and deprived them of the use of their largest dock for several days. The usual time at that season of the year, for a voyage from Buffalo to Chicago, was twelve days. It is admitted that by a general usage and custom in Chicago, the consignee of a vessel is allowed one day after notice of her arrival in which to provide a dock or place for unloading her. And it appears from the proof that the respondents had machinery at their docks by which they were able to unload coal from a vessel at the rate of ten tons per hour from each hatch, which was much more rapidly than it could be done at any other dock. The amount involved in this suit is not of much consequence to either party, but the principle is important to all freighters, consignees and vessel owners.

§ 908. *Duty of consignee of goods on being notified of vessel's arrival.*

It is objected that a suit will not lie for damages against the consignee unless there is an express stipulation for demurrage in the charter-party or bill of lading, and, technically speaking, the respondents' counsel may be correct; but when the consignee of goods is notified by the carrier of his readiness to deliver the goods, it is the duty of the consignee to either refuse to receive the goods which, under certain circumstances not necessary now to mention, he may do, or to provide a place for the reception of the goods within a reasonable time, and what shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the usage of this port one day is allowed the consignee of a vessel, after notice of her arrival, in which to provide a dock at which she can unload, and this usage, unless rendered unreasonable by controlling circumstances, should undoubtedly be considered as part of the contract.

§ 909. *Duty of the consignee of a large number of vessels in furnishing them with dock-room.*

It is also the duty of a person who is engaged in such business as to require him to expect or anticipate the arrival of vessels with cargoes consigned to him, to provide or arrange for sufficient dock-room to unload vessels as they arrive in port under ordinary circumstances within one day after arrival. That is to say, persons to whom vessels are consigned must provide such reasonable dock-room as their business ordinarily requires. If a man's business is such that he would naturally receive two or three cargoes a week, he should provide dock-room for that number as they arrive in the order of sailing; but if, by reason of baffling winds or other delays, over which the consignee has no control, all of those vessels should arrive at once, instead of arriving in order of sailing, as he had reason to expect them, the consignee who has provided dock-room to accommodate three or four or a half-dozen vessels a week as they may successively arrive from day to day, is certainly not at fault if, from the poor sailing quality of some, or head-winds, or other causes over which he has no control, they all arrive on the same day, when he had a right to expect them on successive days in the order of sailing. And if, by reason of any such unexpected occurrence, several vessels arrive together, he is not obliged to procure other docks, but the vessels must respectively await their turns at the consignee's docks. This rule is more specially applicable to sailing vessels, which from their mode of propulsion are more uncertain in their times of arrival than vessels propelled by steam. All persons engaged in dealing with ships, whether

master, crew or consignee, are bound to give them dispatch, and whoever causes any unreasonable delay is answerable in damages.

§ 910. *Action for damages in the nature of demurrage will lie against consignee without express stipulation.*

A consignee to whom the cargo of a vessel is consigned should, within the time prescribed by the usage of the port, after notice of the arrival of the vessel, furnish a suitable place for unloading, or he shall pay damages for detention, whether demurrage be noted on the bill of lading or not. It may not be what is technically called demurrage in the books, but it is damages for unreasonable detention, unless the vessel has arrived so far out of her expected time as to make such prompt dispatch unreasonable, in which case he must give her such dispatch as is reasonable under the circumstances.

§ 911. — *but where ample dock-room is provided for vessels in their order, a vessel arriving out of time must take its turn.*

And probably as safe a general rule as can be laid down is that if the consignee had provided ample docks for the accommodation of the vessels consigned to him in their order, vessels arriving out of the time when they ought reasonably to have been expected must await their turn at the docks. Although this rule may have its exceptions and should never be vexatiously or unnecessarily enforced to the delay and damage of a vessel, the interests of commerce—and that term as used by the courts means the interest of the public—requires that ships should be kept moving. "Ships," says one author, "were made to plough the sea, and not to lie rotting at the wharves." Tested by these general principles, I am clearly of the opinion that the libellant has not made out a case entitling him to relief. The respondents had provided ample dock-room for unloading the vessels consigned to them if they arrived in the order in which they might reasonably be expected. By reason of slow sailing qualities or bad management on the part of her master or crew, the Hinchman did not arrive till at least six days after she was reasonably due, and respondents were not bound to keep a dock waiting for her all that time, or have one ready just one day after her arrival. They are only bound to furnish her a dock in a reasonable time after her arrival, and under the evidence of this case I do not think the delay from the 17th to the 21st unreasonable.

§ 912. *A calamity like the Chicago fire excuses delay in providing dock-room.*

The city had, only seven days before the arrival of this vessel, been visited by one of the most destructive fires ever known, destroying nearly half of its docks, two-thirds of its stores and warehouses, and rendering one-third of its inhabitants homeless. I deem this alone such an intervention of unforeseen circumstances as excused the delay which occurred. Admitting that under ordinary circumstances the respondents would have been bound to furnish the vessel with a dock within one day after notice, there were extraordinary circumstances controlling all persons doing business in this city at that time, to such extent, at least, as absolve respondents from the consequences of the delay charged in this libel. Libel dismissed at libellant's costs.

PHILADELPHIA & READING RAILROAD COMPANY v. NORTHAM.

(District Court, Southern District of New York: 2 Benedict, 1-5. 1867.)

STATEMENT OF FACTS.—Libel to recover freight and demurrage on two cargoes of coal shipped from Philadelphia to New York on canal boats owned by libellants, one of which boats was No. 58, and the other No. 75.

Opinion by BLATCHFORD, J.

In regard to No. 58, she was bound by the contract to go to Catharine street. She went there, and was then ordered by the respondent to go to Dover street, and she then went there. Undoubtedly, the respondent ordered her to the place where he thought she could be most quickly discharged. But, by the contract, the whole duty of the libelants was discharged in taking the cargo to Catharine street, and notifying the respondent of its arrival, and awaiting his orders. This was done. The plain interpretation of the provision of the contract, "demurrage \$10 per day, after four days," is demurrage \$10 per day, after four days from the time the vessel arrives at Catharine street with the cargo, and her captain notifies the respondent of his arrival. So, too, No. 75 was bound to go to the place where she should receive instructions at New Brunswick to go, and it being shown that she was at New Brunswick instructed to go to Dover street, the contract stands as if Dover street had been originally inserted in it as the place of destination. Her arrival at Dover street having been notified by her captain, the same observations apply as in the case of No. 58.

§ 913. *Proof of usage to vary the words, "after four lay-days," held insufficient.*

The proof as to a custom or usage, that the words, "after four days," and "after four lay-days," mean, "after four lay-days from and after the time when the boat gets a berth, so that she can commence discharging her cargo," does not establish any such custom or usage. The burden of proving such a custom is on the respondent, and he has failed to make out any such custom. Besides, I do not think the evidence as to such a custom has any reference to bills of lading like those in this case, where, by the terms of the contract, the cargo is to be delivered at a particular place. It might, perhaps, apply to a contract where the cargo was deliverable generally at New York. The usage, if made out and applied to bills of lading like those in this case, would throw on the owner of the vessel the loss by delay in getting a berth, when he had no discretion as to the selection of one, but was bound to deliver at a particular dock. This would be unreasonable. Where the contract is for delivery generally at New York, there ought to be a propriety in throwing on the owner of the vessel the burden of finding a place to discharge the cargo, and in holding that the days allowed to discharge it, by the contract, did not begin to run till the place had been found, so that the consignee could actually receive the cargo, and in allowing evidence of a custom to that effect. But, where the consignee of the cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place, with which the vessel cannot be shown to be directly chargeable, and no usage ought to be allowed to vary a plain contract to that effect.

In the present case, it is shown, in regard to No. 58, that the respondent was notified, two days before the boat arrived at Catharine street, that it would be impossible for her to discharge there, because of the condition of the dock, and that there was then abundant time for him to have sent instructions to the boat at New Brunswick, ordering her to go to Dover street, and that, if he had done so at that time, instead of waiting until she arrived at Catharine street, she would have got a berth at Dover street several days sooner than she did, and probably, on the evidence, soon enough to have caused no delay beyond the four days after her arrival at Dover street, and thus there would have been no claim for demurrage. Therefore, in any aspect of the case, the respondent

would be chargeable with the delay in discharging No. 58. The libelants are entitled to a decree for \$90 demurrage on No. 58, being for nine days, at \$10 per day, and for \$120 demurrage on No. 75, being for twelve days, at \$10 per day, with interest thereon from the date when a demand was made for it.

HALL v. EASTWICK.

(District Court for Massachusetts: 1 Lowell, 456-458. 1870.)

§ 914. *Contract construed as to demurrage where vessel was not ready to discharge within the time stated.*

Opinion by LOWELL, J.

The contract gives four days from notice of arrival for discharging the cargo, and ten had elapsed before the delivery was complete. The libelant contends that this fact establishes his right to recover six days' demurrage, unless bad faith on his part is proved, because the contract in this respect, as he contends, merely establishes a mode of computing freight or compensation in the nature of freight for the use of his vessel during the period of detention, whatever may have been the cause of the delay. His voyage was completed, he says, at the expiration of twenty-four hours after notice of his arrival in the port, and the lay-days ended three days thereafter. It seems to me to be the fair construction of this contract as applied to the coal trade of this port, that the twenty-four hours is intended for the reasonable time in which the consignee is to notify the master where to go to discharge, and for the master to get to that place, and that if the vessel fails without good excuse to obey the order to go to the wharf, the lay-days will not begin to run until her arrival at the wharf. The notice of arrival implies a readiness to deliver the cargo, and if the vessel is not in a situation to do this, the days of her unreadiness cannot be counted in her favor. On this ground three days must be added to the four which the bill of lading allows for discharging.

The respondent goes further, and contends that I must assume, in the absence of evidence to the contrary, that if the vessel had been moved on the first order, the berths would have been free, and no delay at all would have occurred. I think it is dangerous to undertake to conjecture what might have happened in a state of circumstances different from what actually occurred. The bill of lading evidently intends to throw a loss of time which may arise from a want of berths on the consignee, and not on the vessel, and there was such a loss here. The vessel was at the prescribed wharf, and ready to unload on Friday afternoon, and her cargo was all out on the following Thursday. It is impossible to say whether this delay would have occurred if the libelant had moved his schooner on Wednesday, and equally impossible to say what would have happened if the wharf had been designated within twenty-four hours after arrival, as the bill of lading contemplates. The true rule appears to be to compute the days for unloading, without including those during which the schooner was lying useless by the fault of her own people; or, which in this case amounts to the same thing, to begin to count the lay-days from the arrival of the schooner at the wharf. This computation gives two days' demurrage besides the freight.

Decree for freight, \$648; demurrage, \$46.08; interest at six per cent. from 16th September, 1869, \$34.36; total, \$728.44, and costs.

AYLWARD v. SMITH.

(District Court for Massachusetts: 2 Lowell, 192-195. 1872.)

STATEMENT OF FACTS.—A bill of lading in the usual form agreed for demurrage “after three days.” The schooner did not reach the wharf, but was frozen up thirty-five feet from the wharf, so that delivery was long delayed. A libel for demurrage was brought on behalf of the vessel. Other facts appear in the opinion of the court.

Opinion by LOWELL, J.

It does not appear to me that the unfortunate delay in discharging this schooner arose from any fault on either side. I cannot agree that the defendant is responsible for the position which the master took up for his vessel while waiting his turn to unload. There was no hidden danger at that place of which warning should be given to strangers; and no notice was given by the master of his purpose to put the vessel there; no questions were asked or answered about depth of water, draft, or anything else. The schooner lay in a place to which a tug master, well acquainted with the navigation, had taken her, and where she might well enough have awaited her turn at the dock if the accidental change of tides, caused by a change of wind, had not come on the next day, and if extreme cold weather had not set in at the same time.

§ 915. *Wharf owner does not warrant a safe approach to vessels carefully navigated.*

It seems to be thought that a person who has a wharf with only enough water at ordinary times, and liable to be deficient on extraordinary occasions, or a wharf to which navigation is somewhat difficult or intricate, ought to be held to warrant the safe approach of all vessels that are navigated with ordinary care and skill; but I know of no such law. There was, as I have already observed, nothing said about the draft of the schooner, no deception, nothing to raise an inference that either party had any thought on this subject. The contract was to carry the cargo to Cambridgeport; and both parties treated this as meaning the defendant's wharf in that port, as no doubt it did; but there was no absolute engagement on either part that the schooner should be able to reach the wharf in any particular time. The defendant did not engage, either expressly or by implication, that a berth should be always open for the libellant whenever he should arrive. Any such implication would be most unreasonable, considering the uncertainties and delays that attend the navigation of sailing vessels. And the bill of lading, in giving three days to clear the vessel, when the actual delivery of the cargo would take about half that time, appears intended to make allowance for some possible detention of this kind. Nor is there any ground for saying that the defendant could have taken out any more coal than the deck load in the mode in which that was taken, or that the master asked him to do so.

§ 916. *Rule as to demurrage where voyage is not ended.*

Neither party being in fault, the loss must fall on the plaintiff if his voyage was not ended and the lay-days begun; otherwise, on the defendant. A voyage of this kind is usually considered to be ended, as between the ship-owner and the freighter, when the ship has arrived at the place of discharge, such as the public dock, although not able to get a berth immediately. *Brown v. Johnson*, 10 Mees. & W., 331. It is upon this rule that the plaintiff relies. He says that he arrived at the wharf on the 20th of December, reported to the defendant, and ended his voyage. This argument is specious; but it as-

sumes that the vessel had arrived at the dock or wharf, when, in truth, she had only very nearly arrived. It has been held in two English cases, concerning cargoes of coals shipped under contracts almost identical with this, that delays within the port for a considerable time, owing to a want of sufficient water at the place of delivery, would not require the freighter to receive the coals at another place, or cause the lay-days to begin, though the contract had the clause that the ship was to go only so near to the place as she could safely get. It was held that, although she could not safely go up while the tides were neap, yet that was one of the accidents of navigation which a vessel contracting to go to a tidal harbor ran the risk of. *Parker v. Winlow*, 7 Ellis & B., 942; *Bastifell v. Lloyd*, 1 Hurlst. & C., 388. The distance at which the ship is kept from her berth by the low water is immaterial if it be so far that the delivery of the cargo is prevented. Upon this point, which is chiefly one of fact, I hold that the vessel had not arrived.

§ 917. *To earn demurrage vessel should be ready to deliver her cargo.*

Then, if the vessel is to earn demurrage, she must not only arrive, but be ready to deliver her cargo; and that readiness must continue at least during the three days which the contract gives to the consignee. If the acts of the master on the first day are looked upon as a sort of tender of his cargo, it is one of the essential qualities of a tender that it should be continuing. Thus, where freight was to be paid in three days after arrival, "and before delivering of any part of the cargo," and the vessel arrived, and on the next day the cargo was destroyed by fire and water, it was held that the freight was not earned, because it was implied in the contract that the vessel should be able to deliver the cargo at any time during the three days. *Duthie v. Hilton*, 38 L. J. (C. P.), 93; S. C., L. R., 4 C. P., 138. I have seen no American case so nearly analogous to this as those which I have cited from the English reports, though I have no doubt the law is the same in both countries. Upon the whole, I find that the libellant has not made out that his lay-days had begun when this delay occurred, nor that it was caused by any default of the respondent. The result is that the libel must be dismissed, with costs.

Libel dismissed. (a)

CHOATE v. MEREDITH.

(Circuit Court for Massachusetts: 1 Holmes, 500, 501. 1875.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—The libellant was master of the schooner *E. I. Heraty*, which brought from Philadelphia to Lynn a cargo of two hundred and forty tons of coal, consigned to appellants. The bill of lading undertook to deliver the coal to appellants at Lynn, for the agreed freight, and was in terms made subject to the conditions of the bill of lading adopted by "Vessel-owners' and Captains' Association." The reference was to the following clause for demurrage: "And twenty-four hours after arrival at the above-named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every hundred tons thereof; after which the cargo, consignee, or assignee, shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo as per this bill of lading, for each and every day's detention, and *pro rata* for parts and portions of a day, beyond

(a) Affirmed in the circuit court. 1 Holmes, 500.

the days above specified, until the cargo is fully discharged." The schooner arrived at Lynn, and reported to appellants on the morning of Saturday, January 11th, and was fully discharged Thursday, February 13th, making twenty-seven days beyond the stipulated time. When the schooner arrived at Lynn, the harbor was much obstructed by ice. By reason of the ice, and because the schooner drew more water than was to be found at appellants' wharf, excepting during a high course of tides, such as occurred twice a month, the appellants' wharf was inaccessible. During the delay, libellant took a steam-tug and broke through the ice, and carried his vessel to a coal-wharf in Lynn, known as Lamper's Wharf, where he offered to deliver the coal, which offer was not accepted. Without waiving their rights, however, the appellants did take out about sixty tons of coal at Lamper's Wharf, and the schooner was moved towards the appellants' wharf, but grounded, and was frozen in.

§ 918. *Demurrage clause construed; and demurrage allowed where consignee's wharf was inaccessible, and master arrived and gave notice elsewhere.*

In the case of *Aylward v. Smith*, decided in this court at the October term, 1873, affirming the decree of the district court, it was held, in the case of a bill of lading in the old and usual form, with an agreement for demurrage "after three days," that the lay-days did not begin until after the arrival at the wharf; and as in that case the schooner was frozen up thirty-five feet from the wharf, which was too far for safe delivery of the cargo, that the voyage was not completed, and the lay-days had not begun. In this case, as the contract stipulates that the lay-days shall commence "twenty-four hours after arrival at the port, and notice thereof to the consignee," and as the vessel arrived at the port, and gave the notice to the consignee, and there were suitable wharves accessible, to which the consignee could have ordered the vessel, although his own wharf was obstructed, the time commenced to run twenty-four hours after the arrival and notice to the consignee. The new form of bill of lading seems to have been adopted to secure the ship-owner against the delay consequent upon an obstruction of the consignee's wharf by other vessels or from other causes, and against being compelled to await his turn to unlade at the consignee's wharf. Under this form of bill of lading, if the consignee desires to exercise the right of requiring the master to unlade at the consignee's wharf, he must pay for the detention consequent upon that wharf's being inaccessible, if there are other suitable and convenient wharves accessible after the arrival of the vessel in port, at which the vessel may be unladen.

Decree of district court affirmed, with interest and costs.

BROADWELL v. BUTLER.

(District Court for Ohio: 6 McLean, 298-302; Newberry, 171. 1854.)

Opinion by LEAVITT, J.

STATEMENT OF FACTS.—As the questions in these cases arise on nearly the same facts, and depend on the same principles, they will be considered together. They are suits in admiralty, brought by the libellant as master, for the owners of the steamboat *Princess No. 3*, to recover freight alleged to be due for the transportation, in the first named case, of a large quantity of molasses, and in the other of sugar from New Orleans to Cincinnati. The facts necessary to be noticed in the decision of the points presented are that, on the 19th of February, 1853, the agents of the said Butler & Co. shipped, on the *Princess No. 3*, at New

Orleans, four hundred barrels of molasses, and the agents of Keys, Maltby & Co., at the same time and place, shipped on said boat one hundred and eighty-nine hogsheads of sugar, consigned to those houses respectively at Cincinnati. Bills of lading were signed by the libellant, in both cases, as master, in the usual form, undertaking for the delivery of said property to the consignees at Cincinnati; the dangers of the navigation and of fire only excepted, at a rate of compensation stated in the bills. To both the bills of lading were attached the words "*privilege of reshipping.*"

Within a day or two after the date of the bills of lading the boat proceeded up the river, and arrived at the foot of the falls of the Ohio river, without accident or detention, on the 5th of March. It is admitted by the answers of the respondents that their agents, at the time of the shipments, were apprised of the fact that, from the size of the steamboat, it could not pass through the locks of the canal around the falls, and consequently that the cargo could not reach its destination, on that boat, in any other way than by passing over the falls. It is also an admitted fact that, on the arrival of the boat at the falls, the river had fallen so low that there was not depth of water sufficient to permit its passage over them, and that it continued in that stage for about one month. At the expiration of that time there was a swell in the river, which enabled the boat to proceed up; and on the 10th of April it arrived at Cincinnati, and the cargo was delivered to the consignees. It is satisfactorily proved that the time usually occupied in making the trip from New Orleans to Cincinnati, in favorable weather, and no accident occurring, is from ten to twelve days. There was, therefore, a detention of the boat, at the falls, of upwards of thirty days. It is clearly established by the evidence in these cases that during the period of the detention of the boat there was a decline in the price of molasses, at Cincinnati, of from two to five cents the gallon, and in sugar, from one-eighth to three-eighths of a cent in the pound. The respondents respectively allege that they are entitled to a set-off against the claim for freight, equal to the decline in the market value of the articles shipped, occurring while the boat was delayed at the falls. And this is the principal question arising in these cases.

The respondents insist that the libellant failed to deliver the property shipped according to the obligation of the bills of lading, and that the owners of the boat are, therefore, liable for any loss sustained by reason of such failure. They insist that, by the terms of the bills of lading, the carrier was bound to deliver the cargo, with all practicable diligence, and that if, by reason of low water at the falls, the boat could not pass up, he was bound to reship, or by some other means insure the prompt delivery of the property to the consignees. On the other hand, the libellant contends that the molasses and sugar were shipped by the agents of the respondents, with a knowledge that the falls of the Ohio might present an obstruction to the upward passage of the boat, and that his contract, by a fair construction of the bills of lading, was to deliver the cargo, with reasonable diligence, in contemplation of such obstruction; and that proceeding to Cincinnati with promptness and diligence, as soon as the state of the river would permit, and safely delivering the cargo there, was a full discharge of his contract as contained in the bills of lading. The libellant also insists that the words, "*privilege of reshipping,*" inserted in the bills of lading, instead of creating an obligation to reship at the falls, in case of low water, are to be construed as a privilege, inuring to his benefit, and designed to secure the right, should the interests of the owners of the boat require it, to reship the cargo at the falls, or at any other point.

§ 919. "*Privilege of reshipping*" inures to the benefit of the carrier, but not so as to excuse delay in delivery.

I am not aware of any judicial decision, settling the legal import and construction of these words, with reference to a state of facts similar to those presented in these cases. The phrase "privilege of reshipping" is one in common use, in carrying on the commerce of the western waters; and questions have been of frequent occurrence, in suits against carriers to recover for the loss of, or injury to, property, where there has been a reshipment under the right secured by these words in the bill of lading. But I know of none — nor have any been referred to — determining their effect, in a case asserting a loss, from a failure to deliver within a reasonable time. In the cases referred to, involving liability for loss or damage, it is well settled that the privilege of reshipping in a bill of lading is intended for the benefit of the carrier, but does not limit his responsibility. He is bound for the safe delivery of the property committed to him, precisely as if such words were not used in the bill of lading. The stringency with which the law holds him to this liability is well known, and need not be here stated.

§ 920. *Obligation of a common carrier to deliver within a reasonable time.*

That it is a part of the obligation assumed by a carrier of goods for hire, to deliver them within a reasonable time, is not controvertible. But what shall constitute a reasonable time depends on the peculiar circumstances of the case. Parsons on Con., 657; Flanders on Shipp., 312. And this is the principle which must govern in giving a construction to these bills of lading. No time is stated in them within which the carrier obligated himself to deliver the goods. If such a stipulation had been a part of the contract, there would have been a liability for any delay beyond that time, unless it was occasioned by the act of God or the public enemy; or was owing to the usual perils of navigation or fire, which are expressly excepted in the bills of lading. In strictness, the subsidence of the water in the Ohio river, which prevented the boat from passing over the falls, was not a cause of delay which, within any of these principles, would excuse the carrier from the obligation imposed by law, to deliver the property within a reasonable time. It was practicable to have delivered the cargo at Cincinnati, by draying the molasses and sugar around the falls, and reshipping on other boats. But this would have been attended with very considerable expense to the carrier, and some loss and injury to the cargo. Was the carrier bound to incur this expense, and was he justified in detaining the property at the falls, awaiting a rise in the river? Apart from all extrinsic facts, there would seem to have been an obligation on the carrier to avail himself of all the means within his power to forward the sugar and molasses to the consignees, in the fulfilment of his undertaking, according to the legal import of the bills of lading, to deliver them within a reasonable time. But it is insisted that the uniform usage among those connected with the commerce of the Ohio and Mississippi rivers, either as shippers or carriers, sanctions a different construction; and that, in conformity with that usage, the libellant in these cases was justified in waiting at the falls till there should be a stage of water that would enable the boat to pass up.

§ 921. *Usage considered as bearing upon the construction of words, "privilege of reshipping."*

That evidence of such usage is admissible seems clear upon the authorities applicable to the subject. It is well settled that a written contract cannot be varied, controlled or contradicted by parol proof. But in the case of *The Ree-*

side, 2 Sumn., 567 (§§ 451-454, *supra*), Judge Story said "the true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications or presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses," etc. In the case of *Wayne v. Steamboat Pike*, 16 Ohio, 421, it was held that where terms used in a bill of lading have by usage acquired a particular signification, the parties will be presumed to have used them in that sense; but usage will not be permitted to control the terms used, unless it is established by clear and satisfactory proof; other decisions to the same effect have been made, to which it is not deemed necessary specially to refer. At this day, there can be no doubt that proof of usage is admissible in explanation of the intention of the parties, if that intention is doubtful or equivocal. And when clearly proved, it will be regarded as in the contemplation of the parties at the time the instrument was executed, and as virtually embodied in it. In the first volume of *Parsons on Contr.*, 661, it is said that "usage so long established, so uniform and so well known that it may be supposed the parties to the contract knew it, and referred to it, becomes, as it were, a part of the contract, and may modify in an important manner the rights and duties of the parties."

The evidence of a usage fixing the meaning and construction of the words, *privilege of reshipping*, fully meets the requirement of these authorities. A number of witnesses, of high standing and intelligence, and great experience in the commerce and business of the west, embracing both shippers and carriers, say that this phrase has been known to them for many years, and that when used in shipments from below to any point above the falls of the Ohio, it is intended for the benefit of the carrier, leaving it to his choice to reship or not, as he may deem most for his interest; but it is never understood as creating an obligation to reship. These witnesses say, in reference to the obstruction at the falls of the Ohio, the words not only do not import the duty of reshipping, but that, in case of inability to pass the falls from low water, the carrier incurs no liability for the detention, though it should be for an entire season. And several of the witnesses testify that in all cases where it is intended to impose the obligation to reship, the words, "to be reshipped," are uniformly used. The proof, therefore, of a well known and established usage, in the particular referred to, is full and satisfactory. It results that the libellant has not violated his contract by detaining his cargo at the falls for the period of something more than thirty days, and is, therefore, entitled to a decree for full freight to Cincinnati, according to the rates specified in the bills of lading, with interest thereon from the time it accrued.

COOMBS v. NOLAN.

(District Court, Southern District of New York: 7 Benedict, 801-803. 1874.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—In October, 1872, the schooner *Yankee Blade*, of which the libellant was master, brought a load of granite blocks to New York, under a bill of lading therefor which contained no provision in respect to their discharge, except that they were to be delivered to the respondents, and to be discharged with the assistance of the crew of the vessel. The libel claims \$300

damages for the detention of the vessel by the respondents, on the allegation that they took fourteen days to discharge her, whereas they ought to have discharged her in two days, and that the delay was caused by the negligence of the respondents after the arrival of the vessel, and after they received notice of her readiness to discharge. She arrived on the 19th of October and reported to the respondents. She did not obtain a berth at the proper wharf for unloading, so that her unloading could have been commenced until the 25th. She actually began discharging on the 31st, and finished discharging on November 2d. Due diligence was used after she began discharging, and, on the evidence, the only delay for which the respondents could, in any event, be held liable, would be for the six days from October 25th to October 31st. As to this delay, the defense set up in the answer is, that it was not possible to procure the necessary horses for the discharge of the cargo until the 31st of October; that horses were indispensable for the purpose; and that, owing to an epidemic or contagious disease which then prevailed among horses, it was not possible to procure them at any price. The evidence shows the prevalence of such an epidemic among horses; that the respondents, after the vessel obtained her berth for unloading, used all reasonable diligence to obtain horses; that horses were indispensable, not only to hoist the stone on to the dock, but to cart it away, because the owner of the wharf would not allow the stone to lie on the wharf; that the respondents finally obtained and used three horses for the work, one to hoist the stone from the vessel, and two to cart it away; and that they paid for the use of the three \$20 per day, when the ordinary price would have been, for the three, \$8.25 per day.

§ 922. *Act of God excuses delay in delivery, unless demurrage is expressly promised.*

On these facts the question of law arises as to whether the respondents are liable for the delay caused by their inability, because of the epidemic, to procure the necessary horses. There can be no doubt, I think, that the only obligation resting on the respondents, under the contract in question, was to take the stone in the usual and customary way, with reasonable diligence. There was no contract binding the respondents to discharge the cargo in a specified number of days. According to all the authorities, a delay caused by the act of God, or other *vis major*, while it will not relieve a freighter from paying demurrage, where he enters into a positive undertaking to discharge a cargo in a given number of days, will not be visited upon him where his liability results from implication of law, and extends only to the exercise of proper diligence in the customary manner. In such cases the delay is regarded as a misfortune, caused by *vis major*, and each party must bear the loss he has suffered, if no fault can be imputed to him; and the discharge of the cargo was rendered impossible by a cause over which he had no control. *Ford v. Cotesworth*, Law Rep., 4 Q. B., 127, and 5 Q. B., 545; *Cross v. Beard*, 26 N. Y., 85. In the present case, in view of all the circumstances, I think that the respondents discharged the cargo in a reasonable time; that they were guilty of no fault or laches; and that any delay which occurred was attributable to causes over which they had no control. The libel must be dismissed, with costs.

BRITTAN v. BARNABY.

(21 Howard, 527-538. 1858.)

APPEAL from U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This cause involves an important commercial principle, of daily recurrence in practice, which does not appear to be well understood and settled in San Francisco. Our decision will correct the misapprehension there in regard to the delivery of merchandise by ship-owners, and the payment of freight for its transportation.

The libelant was the owner and consignee of goods of a value exceeding \$4,000, which were shipped in good order and condition at New York, on board of the ship *Alboni*, to be carried and delivered in San Francisco, in the same order, at a rate of freight expressed in the bill of lading. It amounted to \$247.12, including \$11.77 for primage. The bill of lading, upon its face, is in the ordinary form; but there was a stamp upon the back of it, in these words: "That the goods were to be delivered at the ship's tackles when ready for delivery — not accountable for loss or damage by fire or collision; freight payable prior to delivery, if required; contents unknown." The proctors in the cause agreed that those words were stamped on the original bill of lading. The ship arrived at San Francisco. Notice of it was given to the libelant by the consignee of the ship; and he also required payment of the freight of the goods as they should be landed from the ship on the wharf, and that if it was not paid, and the goods received by four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the libelant. The notice and the requirement are taken from the second article of the respondent's answer to the libel. He adds, that the libelant had refused to pay the freight according to the terms of the bill of lading. The testimony discloses what the respondent considered to be its terms, and the refusal of the libelant to acquiesce in his interpretation.

The goods were landed from the ship in parcels, on different days, from the 24th to the 27th of October, inclusive. The clerk of the libelant attended on each day to receive them. In conformity to the notice which had been given, he offered to pay the freight of such of the merchandise as had been landed. The consignee of the ship refused to receive it, or to deliver such goods, claiming that he had a right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it. In the assertion of this right (certainly not in conformity with the notice he had given to the libelant) the respondent from day to day warehoused the goods. The libelant did all he was bound to do under the notice which had been given to him. He could not have done more. The respondent's refusal to deliver the parcels as they were landed cannot be justified, under the notice he had given, by any delay there may have been in the delivery, either from the necessity of weighing or measuring them, or from the claim made by him to have the freight paid upon the whole shipment before he would deliver a part of it. He had taken his course, and the libelant acquiesced in it, by offering to pay the freight on each parcel as it was put on the wharf, though not bound to do so by the commercial law. The respondent's refusal has no justification, either in law, nor can it be vindicated by any evidence in the cause.

We do not mean to say that the libelant had a right to take the parcels on the days they were landed, without the payment of a *pro rata* freight; but

where a ship-master has a larger shipment under one bill of lading than he can land in the business hours of a day, as he has the control of unloading the cargo, he must take care not to do it in such quantities that he may not be able to have the *pro rata* freight ascertained in the only way in which it can be done. Until it shall be done, he is not in readiness to deliver such part, or to demand the freight which may be due upon it. Goods so landed will be under his care and responsibility, without additional expense to the consignee of them, until they shall be ready for delivery. Ordinarily, no difficulty arises between the ship's owner and the consignee of the goods; their interest, convenience and responsibilities usually suggest to them some arrangement for the freight beforehand, by which goods landed from day to day may be taken without delay by the consignee of them. In this instance, however, no opportunity was given to the libellant to make such an arrangement, the consignee of the ship having absolutely demanded the whole freight of the shipment as the condition for the delivery of any part of it. On the fourth day, when all of the libellant's shipment had been landed, and before they were sent to a warehouse, he demanded from the consignee of the ship a delivery order for all the merchandise specified in the bill of lading, tendering at the same time, in gold, the whole freight due. The delivery order was refused, the answer being that the goods were subject, in addition to the freight, to a charge for storage and cartage. The last was also warehoused by the respondent, as those of the three previous landings had been.

The foregoing is a sufficient statement of the facts and evidence in this case for the decision of it. It will not be necessary to notice again the attendance of the clerk of the libellant, on the days of landing, to receive the goods and pay the freight.

§ 923. *Freight defined; it is only payable when merchandise is deliverable.*

The word freight, when not used in a sense to imply the burden or loading of the ship, or the cargo which she has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for. In other words, the rule is, in the absence of any agreement to the contrary of it, that freight under an ordinary bill of lading is only demandable by the owner, master or consignee of the ship when they are ready to deliver the goods in the like good order as they were when they were received on board the ship. Such is the general rule. Neither party can *require* from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery, or for the payment of freight. They may do so by stipulation in the bill of lading, or by subsequent agreement, for either of the purposes just mentioned. The master is bound to deliver the goods in a reasonable time. What may be so depends upon the facilities there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it.

§ 924. *When shipment is landed in parts master may ask security, but not the whole freight.*

When the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a

security or arrangement is all that he can ask. He may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods to see if the obligations of the bill of lading have been fulfilled by the ship-owner. Nor is the ship bound to land an entire shipment in a day, for the proper storage of the goods is the master's care, and he may do it in such a way as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them. And when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the ship-owner's name, to preserve his lien for the freight. This course was not pursued in this case by the consignee of the ship. He attempts to justify what he did upon the allegation in his answer to the libel that the bill of lading contained a stipulation that the freight to be earned on the whole shipment was payable when a portion of it had been landed.

§ 925. *Stamp on bill of lading cannot of itself constitute special contract as to freight.*

The bill of lading, upon the face of it, is the ordinary one between parties for the transportation of merchandise. The merchandise mentioned in it was to be carried from New York to San Francisco at fixed rates for freight, with prime and average accustomed. There is no other stipulation or condition in it than the undertaking for carrying the goods, and that of the shipper to pay the freight. But the consignee of the ship claimed that the stamp upon the back of the bill of lading was equivalent to one. So his counsel contended in argument. This stamp was in red ink, and was put on the bill of lading by the ship's owner. We will suppose it had been made by Captain Barnaby before he signed the bill of lading. But it was not signed by the parties, nor is there any proof that it was ever recognized by the shipper as a part of his contract. Nothing seems to have been said about it when the bill of lading was signed, nor until it was claimed in San Francisco to be a part of it. It no doubt has a relation to the subject-matter of the bill of lading, and was put there by Captain Barnaby for that purpose; but, unless it received the assent of the shipper, it cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. The question we are now considering is not what effect might be given to such a stamp upon a bill of lading by proof that the parties, at the time it was made, adopted it as a stipulation or agreement that the shipper was to pay the whole freight upon his shipment when a portion of it had been landed from the ship; but the question is whether such a stamp, *of itself*, upon a bill of lading can change the well-known commercial rule in respect to the delivery of goods and the payment of freight. It is that which is asked in this case by the respondent. There is not a word of proof that the shippers in New York, or the consignee in San Francisco, ever regarded it in such a light; none that Captain Barnaby considered the stamp to be part of the bill of lading, assented to by the shipper, until it was asserted by him to be so in his answer, after the consignee of the ship had attempted to enforce it, as a part of the contract, upon the libellant. It was properly resisted. The personal obligation to pay freight rests upon a bill of lading, when one has been given, and the payment of it is made a condition of delivery. The general rule is, that the delivery of the goods at the place

of destination, according to the bill of lading, is necessary to entitle the ship to freight. The conveyance and delivery is a condition precedent, and must be fulfilled. 3 Kent, 218.

Such a stamp cannot be considered a stipulation, according to the legal meaning of that word. All writers upon commercial law use the word stipulation to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship-owners and shippers of merchandise, in charter-parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship-owner may have made it as an intimation of *his mode* of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee. An attempt was made to assimilate the stamp in this case to a memorandum on a policy of insurance. In the first place, as loose, indefinite and dangerous as some of the decisions in the English and American reports are concerning memorandums of that kind, no case can be found in either, in which effect has been given to any memorandum which was not on the face or in the margin of the policy. But if such a case can be found, we should not feel ourselves at liberty to extend it to a bill of lading for the transportation of merchandise. Those instruments of commerce are construed by very different principles and usages. The cases cited by counsel to show that the memorandums upon the face of the one were analogous to a stamp put upon a bill of lading do not apply. Neither do the texts from Duer, 75, 141, do so. The rule in respect to policies of insurance is, that it is not material whether the written words of a policy are inserted in the body of the instrument, or written on its face or on the margin of it; but they must be there in fact; must have been written before the execution of it, or by mutual consent after the execution, and before the commencement of the risk. Thus they then form parts of the contract, it having been determined, from the usages of insurances, that the parties contracted in reference to them, and that the signature and acceptance of the policy was proof that they had done so. All of the other cases cited are agreements, varying, in some particulars, the payment of notes of hand, entered into contemporaneously with the execution of the notes, and which, by proofs, were shown to have been meant by the parties to be a part of them.

§ 926. *Usage in San Francisco cannot give stamp on bill of lading the effect of a special contract.*

An attempt was also made to show that a practice prevailed in San Francisco which gave an effect to the stamp upon the bill of lading so as to control the general rules of commercial law in respect to the payment of freight, and the delivery of merchandise from ships. Whatever may be the practice there, or however general it may be, it is too recent in its use to make an exception on the ground that it was a custom. The trade of San Francisco is already large; every day develops its resources and the advantages of its position for commerce. No doubt it has not as yet those facilities for the landing of merchandise and loading of ships which our older ports have; but that will not give to any practice there, however general it may have become, the force of custom

to release its merchants from the obligation of an ordinary bill of lading. If inconveniences exist in the particular just mentioned, it will be best for the merchants of San Francisco, and those with whom they deal in other parts of the world, that the contract of a bill of lading should have its fixed meaning and obligation, and that it is only alterable by express stipulations made in the way which has been already stated in the decision. The testimony, however, in this case shows a very uncertain opinion and a fluctuating practice in San Francisco upon the subject of the delivery of shipments of goods and the payment of freight; that such a demand as was made upon the libellant to pay his freight upon all the merchandise mentioned in his bill of lading, when only a portion of it had been landed upon the wharf, had only been acquiesced in by many of the merchants there to avoid trouble, to get early possession of their importations, and from an unwillingness to be troubled with lawsuits. There are also differences of opinion as to the efficacy of such a stamp as there was upon the bill of lading in this case, many of them, from their experience and knowledge of trade elsewhere, having a more correct apprehension of the commercial law than the reverse of it, which was attempted to be imposed upon the libellant. Nor can any previous assent to the usage of a particular firm engaged in the shipping business, though acquiesced in by one who had had other dealings with it, be interpreted into an agreement so as to deprive him of a right under an ordinary bill of lading subsequently made.

§ 927. *Demand of entire freight pronounced wrongful in present instance.*

The view which we have given of this case determines the whole controversy. It comprehends every point raised by the record, or made in the argument of it. The respondent having in the first instance demanded the entire freight called for by the bill of lading, without any right to do so, and having refused to deliver the merchandise belonging to the libellant when the last parcel of it was landed on the wharf, and when the freight due upon the whole of it was tendered, on the ground that there were due charges for cartage and storage, *did so without color of law* for such refusal. Our judgment is, that those charges must be paid by the respondent, and we shall reverse the decision of the court below, and direct a mandate to be sent to the circuit court to order a decree for the libellant for the sum of \$4,367.45, with interest from the 2d day of November, 1855 (9th vol. Stat. at L., 181). The sum mentioned is proved to have been the value of the libellants' merchandise after freight and primage had been deducted, when it was wrongfully detained by the respondent. The respondent will also be charged with the costs which have been incurred in the prosecution of this libel.

MR. JUSTICE DANIEL dissented on the ground that the admiralty had no jurisdiction.

NINE THOUSAND SIX HUNDRED AND EIGHTY-ONE DRY OX HIDES.

(District Court, Eastern District of New York: 6 Benedict, 199-204. 1872.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—The facts out of which the present controversy arose are not in dispute. Garden B. Perry shipped on board the bark *Ada Gray*, then lying at Buenos Ayres, a quantity of hides, to be transported thence to the port of New York. The hides were taken on board by number, and not by weight, and a bill of lading was given which acknowledged the receipt on

board of nine thousand six hundred and eighty-one dry ox and cow hides and four hundred and seventy-eight dry kip skins, to be delivered at New York to Brown Bros. & Co., or their assigns, "he or they paying freight for the said hides and kips, five-eighths of a cent, United States gold, per pound, with five per cent. primage and average accustomed." The voyage was duly performed, and the hides arrived in New York in like good order and condition as shipped, and their delivery was tendered to the proper consignees upon payment of the sum of \$1,515.79, as freight and primage. This amount was arrived at by taking for a basis of calculation two hundred and thirty thousand nine hundred and seventy-seven pounds, the weight shown in the invoice and entry of the hides presented by the consignees at the custom-house, and according to which they paid the duties. The right of the ship to demand freight so calculated was disputed by the consignees, who insisted that the proper mode of calculation was to take the weight of the hides landed, as ascertained by an actual weighing. The freight, when so calculated, they offered to pay on receiving the cargo. In order to obviate the difficulty, which thus arose in the discharging of the ship, this action *in rem* against the hides was instituted by the owners of the ship to enforce a lien for the amount of freight as calculated by them. The consignees intervened, and, upon giving a stipulation for value in a sufficient amount, received the hides. They then joined issue with the libellant, and the dispute is thus before this court for its determination. The rights of the parties in the premises do not appear to me to be in doubt.

§ 928. *Freight on hides should be computed by weight on delivery.*

"The net quantity," says McLachlan (p. 392), "ascertained by the queen's scales or bushel at the port of delivery is the measure of freight payable by the merchant." The contract of a bill of lading like the present is that the freight is to be paid on the quantity shipped, carried and delivered. *Gibson v. Sturge*, 10 Ex., 621. See German Mercantile Law, book V, part 5, art. 621. It is upon this understanding of the contract expressed in a bill of lading that, when living animals are to be transported, and some die, freight is paid only on those which arrive. *Pet. Adm.*, 125. So, also, the weight of sugars and of molasses at delivery, which is always less than the weight shipped, determines the amount of freight. *Abbott*, 430. The usage of this port, as shown by the evidence, conforms to this understanding of the contract, for it is proved not to be customary to pay freight on hides by the invoice weight, but according to the weight delivered, as the same may be agreed on or ascertained by weighing. Furthermore, in this instance, the cargo was shipped by number and to be delivered by number. It does not appear to have been weighed when shipped, and no statement of weight is made in the bill of lading, although the freight was agreed to be paid by weight, and although such a statement made in the bill of lading would doubtless have furnished the basis for the calculation of freight. German Mercantile Law, art. 658, book V, part 5. This omission to ascertain the weight at the shipment warrants the inference that the parties understood that the weight at delivery would determine the amount of the freight.

§ 929. *Instances where freight is computed according to weight of cargo received.*

Unless, then, the weight by which the duties were paid, and to which the ship-owner resorted for the basis of his calculation of the freight, was the correct weight of hides delivered, the position taken by the libellant cannot be upheld. It is, indeed, true that in many countries the weight of cargo, by

which duties are paid, is the weight upon which freight is calculated. But I think it will be found that in such cases there is an actual weighing required by law and made by officials according to law. The custom-house weight in such cases is therefore the actual weight delivered, as legally ascertained. But here there is no such ascertainment of the actual weight. The sworn statement of the consignee, coupled with the invoice, furnishes the basis upon which duties are paid; and if, in a suit for freight, the action of the consignee in respect to the duties be competent evidence, as an admission, to show the weight of hides landed, it is not conclusive. In this action, therefore, the actual weight of hides landed is open to be shown. Accordingly, it has been made to appear by an actual weighing of the hides, which the consignee caused to be made after his receipt of the cargo, and when there is no reason to suppose that any change in weight had occurred, that the weight of hides delivered was two hundred and twenty-four thousand and two pounds, instead of two hundred and thirty thousand, nine hundred and seventy-seven pounds. From which it results that the freight and primage due on delivery of the hides was \$1,417.01, instead of the \$1,515.17 which the ship-owner had demanded.

§ 930. *It is incumbent on the carrier to weigh the goods, in order to collect his freight.*

A further question has been discussed in this cause, and that is, upon whom rests the obligation to weigh the cargo, under a bill of lading like the present? My opinion is that, in the absence of an agreement to the contrary, the ship is bound to weigh the cargo whenever a weighing is necessary to enable her to compute the amount of her freight. "The person who wants to ascertain the quantity must pay the expense of weighing." *Willis, J., Coutthard v. Sweet*, Law Rep., 1 C. P., 654. See, also, *The Schooner Treasurer*, 1 Spr., 474 (§§ 950, 951, *infra*). The same rule appears to prevail upon the continent of Europe. Thus it was adjudged by the Tribunal of Commerce of Havre, in 1861, that when the freight can only be determined by weighing the cargo, the ship-master must bear the expense. *Recueil de Jurisprudence Commerciale Maritime du Havre*, 1861, part 1, p. 135. On the contrary, when a weighing is not necessary for a determination of the freight, as is the case when the freight is made payable by the weight given in the bill of lading, the expenses of weighing are adjudged to be borne by the owner of the goods. Judgment of Tribunal of Nantes, 1863, n. 64, p. 60. See Caumont, *Traité Affrètement*, 252; also, *Traité Fret*, 89. There remains to indicate the proper decree to be made in this action, under the views of the law above expressed. The prayer of the consignee is that the libel be dismissed with costs, upon the payment of the freight by the consignee. But I am of the opinion that the right to recover the freight, if imperfect at the commencement of the action, may be considered to have become perfect upon the subsequent receipt by the consignee of the whole number of hides in good order; and inasmuch as by giving the stipulation for value, a stipulation was substituted for the property, the interest of the ship-owner in the cargo should be considered as transferred to the proceeds of the stipulation. The libelants should therefore take a decree directing their freight, conceded to be due them, to be paid out of the proceeds of the stipulation. Such a practice renders a proceeding like the present very convenient in cases of dispute in regard to freight, as it enables the consignee to receive his cargo promptly without paying a demand which he deems illegal, and enables the ship-owner to obtain a security for his freight which, while it fully protects his rights, saves risk and expenses in regard to the cargo. The decree

will therefore be in favor of the libelant for the sum of \$1,417.01, gold, with interest from the time of landing the cargo, less, however, the taxed costs of the claimants in this action. Clearly the libelants are not entitled to costs, for they wholly fail to maintain the position taken by them. On the other hand they should pay costs, because, if the cargo had not been bonded, a dismissal of the libel with costs would have been the result of the action; and the claimants should not suffer by reason of having substituted a stipulation in place of the property, as that course was equally for the advantage of the libelants and the claimants.

OPINION ON THE QUESTION OF COSTS.

§ 931. *Rule governing costs.*

Opinion by BENEDICT, J.

This case having been opened for further testimony bearing upon the question of costs, and it now appearing that before the filing of the libel the merchandise in question had passed into the control of the claimants, and it also appearing that the answer of the claimants admits that freight was due at the filing of the libel, and it also appearing that the amount of such freight, when ascertained, was not paid into court pursuant to the rules of court, it is therefore ordered that the decree in this case be for the amount of freight heretofore found due, namely, \$1,417.01, gold, with interest, and that the libelants recover also their costs of this action, to be taxed.

SAMPAYO v. SALTER.

(Circuit Court for New Hampshire; 1 Mason, 43, 44. 1816.)

STATEMENT OF FACTS.—Plaintiff, a neutral, resident at Lisbon, in 1812, after the declaration of war, shipped, on a vessel commanded by defendant, fifteen hundred barrels of flour from Baltimore to Lisbon. The vessel and cargo were captured by the British, taken to Bermuda, and condemned as enemy property, except plaintiff's shipment. The plaintiff having obtained a restoration, defendant sold the flour at Bermuda, and this suit was brought to recover a balance of the proceeds of sale remaining in defendant's hands. Defendant claimed the right to retain the stipulated freight to Lisbon, or a *pro rata* freight.

§ 932. *Neither full nor pro rata freight is earned where a capture defeats the voyage.*

Opinion by STORY, J.

There is no pretense for the claim of freight in this case. The freight for the whole voyage cannot be due, for it was never performed, and was defeated by the capture. As to a *pro rata* freight the claim is as little supported. The doctrine upon this subject in *Luke v. Lyde*, 2 Burr., 882, and other subsequent cases, rests upon the ground that there is a voluntary receipt of the goods at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them further. But it never has been supposed that a *pro rata* freight was due when, by a capture, the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the admiralty. The plaintiff is, therefore, entitled to a verdict for the whole sum in controversy. *Caze v. Baltimore Ins. Co.*, 7 Cranch, 358.

Verdict for the plaintiff.

THE VELONA.

(District Court for Massachusetts: 3 Ware, 139-142. 1857.)

Opinion by WARE, J.

STATEMENT OF FACTS.—This is a libel on a bill of lading. The libellant shipped at Boston, on board the Velona, one hundred and twenty-nine and two hundred and twenty two-thousandths tons of ice, to be carried and delivered at Savannah. The vessel sailed in February last, and on her voyage met such severe gales, and was so much injured by the violence of the seas, that she was obliged to put into the port of Norfolk for repairs. In that situation the master had a right to repair his vessel, if it could be done in a reasonable time, and proceed on his voyage to deliver his cargo, or he might tranship it and send it in another vessel, and thus perform his contract and earn freight. He did neither, but he called a survey on his vessel, and it was found by the report of the surveyors that the repairs required were so considerable, and would require so much time, that he sold the ice at Norfolk.

§ 933. *Duty of master as to perishable goods in case of disaster.*

In such a case of disaster, if the cargo is of a perishable nature, and his own ship cannot, in a reasonable time, be repaired, the master may either sell or tranship the cargo. But it is said that he is not absolutely bound to send forward the cargo by another vessel, but that he ought, as a faithful agent, to do that which will be most for the interest of the merchant. The master is not, ordinarily, the agent of the shipper for any other purpose than that of carrying and delivering the goods. But in these cases of unforeseen and unprovided necessity, as they have been called, the law clothes him with the authority of a supercargo, and he is to make such a disposition of the cargo as will be most for the interest of the merchant. The *Gratitudine*, 3 C. Rob., 259, 262. In this instance he sold the ice, and I do not understand that any complaint is made that he did not act discreetly.

§ 934. *A carrier selling perishable goods in transitu must account for the proceeds.*

The libel claims damages for the non-delivering the cargo according to the tenor of the bill of lading. But the contract was safely to deliver it, the dangers of the seas excepted, and these have prevented the master from performing his contract. He is not liable, therefore, for a breach of his contract. But by the sale of the ice a sum of money has come into his hands to which the shippers have a claim, and my opinion is that it may be recovered in this action against the vessel. *The ship is bound to the merchandise and the merchandise to the ship.* This vessel, having received the goods, must account for them.

§ 935. *In case of compulsory sale of goods after a disaster, freight is not payable.*

This is not denied, but it is contended on the part of the respondents that they are entitled to deduct from the proceeds of the sale either the entire freight stipulated for in the bill of lading, or at least a *pro rata* freight. The contract by a bill of lading is an entirety, and the general principle of the common law is that an entire contract cannot be apportioned. Until the whole is performed nothing is due. *Powell v. Cutler*, 6 Tenn., 320. But by the maritime law the contract for the transportation of goods, whether by a charter-party or bill of lading, admits of an equitable apportionment in one case. When a vessel meets with a disaster by which she is obliged to put into a port for repairs, if the owner of the goods then voluntarily receives them instead of

requiring the master to carry and deliver them at the port of destination, the master is entitled, not to the entire, but to a *pro rata*, freight. It is on the ground that the merchant voluntarily excuses him from completing his contract. The master is then equitably entitled to a compensation for what he has done, so far as the other party has derived a benefit from it. But the acceptance to give this right to the master must be voluntary. The cases cited in the argument establish this beyond a question. The Nathaniel Hooper, 3 Sumn., 550; Hurtin v. Union Ins. Co., 1 Wash., 530; Vlierboom v. Chapman, 13 Mees. & W., 230. In this case there was no option left for the merchant, but the goods were sold from necessity to save them from a total loss. To escape from this conclusion it is contended, for the libelants, that the misfortune that had happened to his ship imposed on the master the responsibility of acting as an agent for the benefit of all concerned; that he thus became the agent of the shipper to make the best disposition of his goods, and that as such he might consent for him to accept the goods at Norfolk. But the agency, which in such cases is thrown on the master by the law, is an agency of necessity, and extends no further than the necessity requires. It is an agency like that of the *negotiorum gestor* of the Roman law, a person who intervenes in the business of another without a previous mandate. The principal will be bound by his acts so far as they are proper, judicious and beneficial to him, either in preventing a loss or procuring him a benefit. It is an agency by which he has a right to act for the benefit of his principal, but not to charge him with a burthen. So, in this case, the law made the master the shipper's agent to sell the ice, to save him from a total loss, but it did not make him the merchant's agent to accept the goods at a port of necessity, to excuse him from performing the whole of his contract, and thus charging him with freight. The case of Vlierboom v. Chapman is a perfect parallel to the present. A cargo of rice was shipped at Batavia for Rotterdam. The ship was disabled in a tempest, and put into Mauritius for repairs. The rice was damaged by sea water, and to prevent a total loss was properly sold by the master. The owners of the ship claimed a *pro rata* freight; but the court, after taking time to consider the case, held that no freight was due, on the ground that there was no voluntary acceptance of the goods by the owners. The case clearly negatives the idea that the master had any power, as their agent, to accept for them.

The decree must be for the full amount of the sale of the ice, deducting the necessary and proper charges of sale.

THE ANN D. RICHARDSON.

(District Court for New York: Abbott's Admiralty, 499-507. 1849.)

Opinion by BETTS, J.

STATEMENT OF FACTS.—The facts upon which the points in contestation in this cause arise are these: The libellant shipped at Philadelphia, on March 18, 1847, on board the bark Ann D. Richardson, for Londonderry, a cargo consisting of wheat flour, Indian meal, corn and navy bread, for which the usual bills of lading were executed by the master, engaging to deliver the cargo to the consignees in the bill of lading named, they paying stipulated freight therefor. The vessel sailed next day on her voyage. She was new and staunch, but before leaving sight of the Capes made water at the rate of one hundred strokes the hour. It appears, however, upon the evidence, that she was fully

seaworthy when she sailed, and that the amount of leakage she exhibited was usual in new vessels, and did not affect the cargo or her seaworthiness.

On the 27th of March she encountered a heavy gale from the S. E., which continued to the 30th, and then increased to extreme violence. The bark was thrown on her beam ends, her masts were cut away, and she lay water-logged. The crew, with great labor, freed her of water, and rigged spars and endeavored to work the vessel to Bermuda, but, being unable to make that port, they put into St. Thomas, on the 23d of April, as a port of necessity. A survey was there held of the cargo. A portion of the corn (five hundred and fifty-seven bushels) was found in a putrefying state, and was thrown overboard as valueless. The chief part of the residue of the cargo had been wet and damaged by the stress of weather to such a degree that it could not safely be transported to the port of destination, and the master was advised by the surveyors to sell the whole cargo remaining, that not injured not being deemed of value to justify carrying it to Londonderry. It was accordingly sold on the 11th of May, at auction, for \$7,730.02. The claimants allege this sum is subject to an average charge of \$582.08; and they also contend that the vessel is entitled to full freight and primage for the whole voyage, amounting to \$4,562.26, and the balance, \$1,712.85, they are willing to pay over to the libellant. They deny their liability for anything beyond that sum. The vessel was repaired at St. Thomas, and ready to receive a cargo and prosecute her voyage by the 2d of June. She did not offer to proceed to Londonderry with the sound portion of the cargo, nor did she provide any other vessel in her place. She was employed on a different service. The libellant was not present in person or by any authorized agent at St. Thomas, and was no way consulted in the disposition of the cargo and breaking up the voyage.

Three questions were discussed upon these facts: 1. Whether the owner of the vessel was entitled to full or *pro rata* freight, or any freight, for the transportation of the cargo to St. Thomas. 2. Whether he was justified in selling the cargo and breaking up the voyage at the latter port. 3. What average the cargo of the libellant was legally liable to pay.

§ 936. *Whether full freight, pro rata freight, or no freight, was here payable.*

In arguing the case, the counsel have examined minutely the doctrines obtaining in the English and American courts, and it is strenuously contended for the ship-owner, that, upon the well-recognized principles of American law, full freight was earned in this case, and that the acts of the master, under the emergency, must be regarded as the acts of the libellant, by which the vessel was deprived of her cargo and prevented completing the voyage undertaken. If this position is not sanctioned by the court, it is urged that the libellant, by demanding the proceeds of the cargo and bringing suit to recover them, adopts and confirms the sale made by the master.

It is not to be controverted that the English rule, applicable to a voyage so circumstanced, debars the ship-owner of all claim to freight. The case of *Vlierboom v. Chapman*, 13 Mees. & W., 230, presents a statement of facts covering all the essential features of this case. A cargo of rice was shipped at Batavia for Rotterdam, by the bill of lading to be delivered there on payment of a stipulated freight. The ship encountered a severe hurricane, and it became necessary to throw part of the cargo overboard and to take the vessel, in a damaged state, to the Mauritius. The cargo was there examined, and it was found necessary, without delay, to sell the whole, otherwise it would become utterly worthless from the progress of rapid putrefaction. The rice was sold at

Mauritius by agents, to whom the master, acting *bona fide*, confided the ship and cargo; and the proceeds were remitted to the ship-owners. The plaintiff (owner of the cargo) had no agent at Mauritius, and neither of the parties was present at any part of the transaction, nor had any knowledge thereof until after the sale of the cargo. Thus far the two cases are brought under the same range of facts. The English suit, however, seems to have been an amicable one, as the defendants did not retain freight money, nor set up an absolute charge for it. The question submitted to the court was, whether the defendants had any lien or right of deduction or set-off against the proceeds of the rice, either for the freight in the bill of lading, or for *pro rata* freight, or for any freight on a *quantum meruit*. The plaintiffs' point was that, under the above circumstances, the defendants were entitled to no set-off for freight. The defendants' point was that they had a set-off or lien, for freight, to the extent of £1,413.0.4, the produce of the sale, or, at all events, to some extent. The court decided that if the master might be regarded the agent of the owners *ex necessitate*, so as to validate the sale, he was not such agent with a right to accept for them a delivery of the cargo at Mauritius, in place of Rotterdam, and that the plaintiffs, not having transported the cargo conformably to their contract, were not entitled to full freight, nor to *pro rata* freight, as for a part performance accepted in lieu of a full one.

It was also decided that there was no foundation for a *quantum meruit* claim or allowance of freight. The court grounded their reasoning and decision very much upon some American cases, cited by Judge Story in his edition of Abbott on Shipp., p. 328. The argument for the defendant in this case now is, that the doctrine of the American decisions was misapprehended, and that the rule to be deduced from them is, that the ship-owner, under like circumstances, is entitled to full freight, or at least to *pro rata* freight. In the case of *Miston v. Lord*, 1 Blatch., 354, decided in the United States circuit court for this district, in September, 1848, the doctrines of the case of *Vlierboom v. Chapman* were recognized in so far as the authority of the master to sell cargo under similar circumstances was involved. As between owners and underwriters, he may, on general authority, have an implied power to do what is fit and right to be done, with ship or cargo, in case of emergency. Park. Ins., ed. 1842, 345. But the court regarded it a fundamental principle of the contract of affreightment, that, as between the owner of cargo and ship-owner, no right to freight accrued except upon performance of the contract by the ship, unless the terms of the contract were dispensed with by the owner of the cargo; although such discharge need not be by express agreement, but might be implied or inferred from his acts. This is believed to be the rule of maritime law adopted and enforced in the European and American courts. Pothier *Traité du Contrat de Louage*, No. 59; Boulay Paty, tit. 5, sec. 16; Pardessus, part 4, tit. 14, ch. 2, No. 718; Abbott on Shipp., 492, note 1; *Vlierboom v. Chapman*, 13 Mees. & W., 239; 3 Kent, 6th ed., 218; *Hurtin v. Union Ins. Co.*, 1 Wash., 530.

The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight, and without that, the acceptance of the cargo at an intermediate place, by the owner of it, is necessary to enable the ship-owner to maintain a claim to full or *pro rata* freight. *Caze v. Baltimore Ins. Co.*, 7 Cranch, 358; 3 Kent, 228, 229, note a; Abbott on Shipp., 534, note 1; *The Nathaniel Hooper*, 3 Sumn., 542. The case of *The Nathaniel Hooper* demonstrates that the rule in admiralty is in consonance with that at common law on the subject. 3 Sumn., 555. The case is not affected by the later decision

in *Jordan v. Warren Ins. Co.*, 1 Story, 342, for there a voluntary acceptance of the cargo by its owner was made; but a claim to the proceeds of sale, or bringing suit therefor, does not amount in law to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage; nor is the master, though agent for the ship and cargo to the extent of being empowered in a case of extreme urgency to sell either or both, *ex officio* an agent of the ship, authorized to accept the cargo short of the port of delivery and break up the voyage. *Miston v. Lord*, Circuit Court, 1848 [1 Blatch., 354].

The points in the case now under consideration, not involved in the decision in *Miston v. Lord*, or in *Vlierboom v. Chapman*, are that a portion of the cargo, on the arrival of the vessel at St. Thomas, was sound and in a condition to be transported to the port of destination, but was sold by the master, together with that which was injured and perishing, and that the vessel was repaired within a reasonable time at St. Thomas, and placed in a condition to perform her voyage, but did not offer to complete it. Most unquestionably the master was not bound to take on board and attempt to carry forward the putrid and worthless portion of the cargo, nor was it his duty to receive that which had been so injured as to be liable to putrefaction, or to occasion disease or discomfort to his ship's company, or injury to the sound cargo on its transportation.

Those principles are stated and enforced with earnest perspicuity in the two American cases before cited. *Jordan v. Warren Ins. Co.*, 1 Story, 352, 353; *Miston v. Lord*, Circuit Court, 1848 [1 Blatch., 354]. When the whole cargo is so damaged that it cannot be transported without endangering the safety of the ship or crew, or cannot, from its perishing state, be probably so preserved as to endure transportation at all, the ship need not proceed with it, or offer to do so; but the remedy of the ship-owner is on his policy for freight, he having failed to earn it, by means of perils insured against or insurable. 1 Phill. Ins., 290. The loss of the cargo must, however, be total, for although damaged to such a degree as to be not worth the freight at the port of destination, this does not amount to that kind of total loss which authorizes a recovery of the freight on a policy. *Herbert v. Hallett*, 3 Johns. Cas., 93; *Griswold v. New York Ins. Co.*, 1 id., 205.

§ 937. *Where the cargo is sold at an intermediate port, the ship-owner is not entitled to freight as against the owner of the cargo.*

The present action seems framed upon the notion that if the ship-owner, on the facts, would have a right to recover freight on a policy of insurance, he has the same remedy against the owner of the cargo. That is clearly not the law. Considering the condition of the cargo on the arrival of the vessel at St. Thomas as equivalent to a total loss or physical destruction of it, the plaintiff would be entitled, on insurance of freight, to recover his whole freight for the voyage (1 Phill. Ins., 290, 427); yet as against the shipper, he cannot recover freight except on performance of the condition of transporting the cargo and delivering it at the port of destination, conformably to the contract of affreightment.

§ 938. *Where a portion of the cargo can be transported after disaster, it must be taken in order to earn freight.*

Independent of this principle, there remained a portion of the cargo in this case in sound condition; and to entitle the ship-owner to claim freight at all, he must have carried forward so much of the cargo as could be transported. It is no concern of his, whether by so doing the interests of the shipper would be ad-

vanced or consulted. He has nothing to do with the question of profit or loss to the shipper; and his vessel having been soon repaired and capable of performing the voyage, it was his duty to complete it, and then he would be entitled against the shipper to full freight on all the cargo delivered, in specie, whatever its condition or value; and might recover against the underwriter for that portion which perished on the voyage, which, for that reason, could not be delivered. I shall, therefore, pronounce against the libellant on that part of his action which claims the recovery of freight in full or *pro rata*, or compensation upon a *quantum meruit*.

§ 939. *Principles of average contribution stated where the ship and cargo are injured.*

It is not denied by the libellant that the ship-owner is entitled to a contribution from the cargo on the general average of losses sustained by the ship. But it has been made a serious question in the cause as to the particulars of valuation and loss which shall enter into the computation and adjustment of that average. Counsel, on both sides, however, conceding that a readjustment must be made, admit that the better course now is to take general directions from the court respecting the method of stating the average, and to wait until the adjustment is presented, before a decision is asked in detail upon the particulars proper to be included in it. The adjuster may so settle these points as not to leave it desirable to either party to litigate the matter before the court. In the adjustment presented to the court, the ship is credited with full freight for the voyage. This is erroneous. No allowance is to be made on that item beyond the value of the freight on the cargo thrown overboard, and that value will be made contributable, also, in the general average. The cargo, on the question of general average, is not to be charged with any expenses incurred in respect to it, after the voyage was broken up and abandoned. The charges for reparations made to the vessel subsequently may properly be referred to as a means of measuring the actual value of her injuries sustained for the common benefit. That allowance has no application to claims for the care and management of the cargo after it ceased to be connected with the vessel for the purposes of the voyage. Services or expenditures of that character have no connection with the ship or the injuries she incurred for the common advantage, and cannot, therefore, be subjects of general average.

A decree, with special directions, must be entered according to the foregoing principles.

RIDYARD v. PHILLIPS.

(Circuit Court for New York: 4 Blatchford, 443, 444. 1860.)

STATEMENT OF FACTS.—Action to recover balance of proceeds of the sale of a lot of damaged corn. The corn was shipped at New York for Liverpool, but the vessel was so damaged by a storm that she put back to New York, and the corn in question was found to be greatly injured, so that instead of being re-shipped it was sold. The vessel after being repaired completed the voyage. The master of the vessel (defendant) claimed the right to retain out of the proceeds of the sale the freight on the corn.

§ 940. *No freight is earned as against the shipper where delivery has become impossible.*

Opinion by NELSON, J.

The question in this case is, whether, on the facts, the owner of the vessel is entitled to freight. This question was very fully examined by me in the case

of *Hugg v. Augusta Insurance & Banking Co.*, 7 How., 595, 606, 607, it being indirectly involved in the first question presented, on the division of opinion in the court below. The court there held that the underwriters would be liable for freight, as a total loss, if it should be found by the jury that there was a destruction *in specie* of the cargo, so that it had lost its original character at the port of distress, or that, if it had been reshipped, a total destruction *in specie* would, from the damage received, have been inevitable, before it could have arrived at its port of destination. The latter principle decides the question before me, upon the facts in this case. The shippers were not liable for the freight, but the underwriters were. There must be a judgment for the plaintiffs, for the amount of freight retained, with interest from the demand of the same.

BORK v. NORTON.

(Circuit Court for Illinois: 2 McLean, 422-431. 1841.)

Opinion by the COURT.

STATEMENT OF FACTS.—The plaintiff, being master of the brig Illinois, has brought this action for the freight of certain merchandise from Buffalo to Chicago. The amount claimed, \$1,400. A written agreement between the defendant and the agent of the American Transportation Company, by which the company bound themselves to deliver the goods at Chicago, etc., at a certain sum per hundred, was given in evidence.

The deposition of Hubbard, who was the consignee of the cargo, and to whom a part of it was delivered, was offered in evidence, which was objected to on the ground that he was an interested witness. In his deposition, Hubbard, being asked the question as to his interest, stated that he had none, whatever, in the event of the suit. But it is insisted that having received a part of the goods and delivered them without the payment of freight, he is liable to the plaintiff for the amount, and that his evidence, which may establish the right of the plaintiff against the defendant, will go to discharge himself. This witness states that he delivered the goods to the defendant, who at the same time deposited with him \$500 in scrip, which was to be subject to the order of the defendant, and was not to be applied in payment of the freight except by his direction.

There can be no doubt that the freight is recoverable in the name of the master of the vessel. *Abbott*, pt. 3, ch. 2; 4 *Cowan*, 475. And it is equally clear that he may recover it from the consignee of the goods, or the owner, if they have been delivered to him and the freight has not been paid. The master had a lien upon the goods, and was not bound to deliver them until his transportation charge was paid. And so the consignee, who is liable for the freight, may refuse to deliver the goods to the owner until the freight shall be paid. But if in the one case or the other, the goods are delivered without payment of the freight, an action may be maintained for it. And it is optional with the master, when the goods have gone into the hands of the owner, whether he will sue the consignee or the owner. He has in this case sued the owner, and the question is, whether the consignee is a competent witness to prove the delivery of the goods.

§ 941. *Whether the consignee is a competent witness to prove delivery of the goods.*

Is Hubbard interested in the event of this suit? Can the verdict be used either for or against him as evidence? These are believed to be the true ques-

tions; for if he is not interested directly in the event of the suit, and the verdict cannot be used as evidence against or for him — if he have any interest it must be an interest in the question which does not exclude him. Although the plaintiff has a demand against the consignee and the owner for the freight, it is not a just demand. A recovery without satisfaction, against the owner of the goods, cannot be pleaded in bar to a suit against the consignee. And it is very clear that the verdict which the plaintiff may obtain in this suit can be no evidence either for or against the consignee in an action against him for the freight. Then how can he be an incompetent witness. In the case of *Bent v. Baker*, 3 Term R., 27, after an elaborate argument and consideration of the question, the court held that a person who had been employed as a broker by the plaintiff, in procuring the policy to be subscribed by the defendant, and afterwards had himself subscribed as assurer, was a competent witness for the defendant. In a replevin against one of two brokers, partners, who took the goods, the partner not sued was held competent for the defendant. *Duncan v. Meikleham*, 3 Carr. & P., 172. So, where process was issued against three joint trespassers and two only served, the other trespasser never having appeared or pleaded, he was held to be an admissible witness for the defendants; and the court said, "the incompetency of a witness, on the ground of interest, must be confined to a legal fixed interest in the event of the suit." *Stockham v. Jones*, 10 Johns., 21. The rule is general that one co-trespasser, or, indeed, any joint wrong-doer not sued, is a good witness for another. *Humphreys v. Miller*, 4 Carr. & P., 7. Where the plaintiff, being indebted to the witness, promised him an order on the fund in question when recovered, this was held not to render him incompetent. *Ten Eyck v. Bill*, 5 Wend., 55.

§ 942. *Interest in the suit pending can alone affect the competency of a witness.*

An interest in the suit pending can alone affect the competency of a witness. *Owings v. Speed*, 5 Wheat., 420. In general the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him. *Evans v. Eaton*, 7 Wheat., 356.

The deposition of Hubbard was admitted, and, with many others, was read in evidence. These proved that the vessel was detained at Buffalo several days, by the order of the defendant, until the reception of all his goods at that place. That after her cargo was on board high and adverse winds prevented her leaving the port; and that, having left before the storm ceased, she encountered much peril, and was driven back to Buffalo. She left that port so soon as the state of the weather permitted, late in October or the beginning of November, and passing Detroit, on her way to Chicago, she encountered high winds and floating masses of ice in Lake Huron, which placed her in imminent peril, and forced her back to Detroit, where her cargo, having been much exposed and somewhat injured, was unladen. During the winter the defendant had the greater part of his goods conveyed to Chicago, by land, at a heavy expense. So soon as the navigation opened, in the spring, the vessel, with that part of the cargo which remained at Detroit, sailed for Chicago and delivered it to Hubbard, the consignee, as above stated.

Under this state of facts the plaintiff contends that he is entitled to full freight. That the delays in the voyage were not attributable, in any degree, to his default, and that he performed the contract by running the vessel to Chicago so soon as it was practicable to do so, and that a proper construction of

his contract can require nothing more from him than this. And, in the second place, it is insisted that, under the most unfavorable view which can be given to his case, he is entitled to freight *pro rata itineris*. On the other side the defendant's counsel insists that the plaintiff, having failed to perform his contract, can recover no compensation.

§ 943. *General principles stated on which freight is payable where transportation is delayed or broken up.*

Marine contracts, and this is in the nature of a marine contract, are not of frequent cognizance in our courts of the west; but the rules by which they are governed, which emanate from the civil and maritime law, are founded in good sense and the great principles of justice, and are not dissimilar, in most respects, to the settled principles of the common law. As a general principle, freight on goods is not payable till delivery at the port for which they are shipped. *Howland v. The Lavinia*, 1 Pet. Adm., 126. And it is an admitted principle that where the owner of the cargo is himself the cause of defeating the voyage, freight is recoverable the same as if the voyage had been performed. If a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. *The Saratoga*, 2 Gall., 164. If a freighted ship becomes disabled on its voyage accidentally, and without any fault of the master, he has his option either to refit it, in convenient time, or to procure another ship to carry the goods. If the freighter disagrees to this, and will not suffer it, the master shall yet be entitled to his whole freight as of the full voyage. 2 Burr., 887. And this is conformable to the laws of Oleron, article 4. 2 Brown Civ. & Adm. Law, 191. But in the event of another vessel being employed, the master could recover only under the first charter-party. He would not be entitled to any increased freight agreed to be paid by the new contract. Still the goods would be bound under the new contract, and any increased sum which the owners might be compelled to pay would be chargeable perhaps to the insurers. It is insisted that on the above principle the plaintiff is entitled to recover full freight. That the taking away of the greater part of the goods from Detroit was the act of defendant in his own wrong, and cannot prejudice the plaintiff. That he was ready to perform and did perform his part of the contract by completing the voyage so soon as the upper lakes were navigable. And the cases in 4 John. Ch., 218; 16 John., 36, 364 and 356; 10 East, 556; 2 John. Rep., 325; 9 John. Rep., 210, are relied on in support of this claim.

It may well be a matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of the present case may test this principle. The defendant is a merchant, and the cargo in question consisted of merchandise. It was important that his goods should be conveyed to Chicago expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the delivery of his goods? The vessel arrived at Chicago some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor any reasonable construction which can be given to the contract.

In the case of *Hadley v. Clarke*, 8 Term R., 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the

further orders of council; it was held that such embargo only suspended, but did not dissolve, the contract between the parties; and that, even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. The court well remarked that that was a case of great hardship; both parties being innocent, one must suffer. Lord Kenyon put the case on the ground that a temporary interruption of a voyage by an embargo does not put an end to the contract. And, he adds — if this contract were put an end to, it might equally be said that interruptions to a voyage from other causes would, also, have put an end to it — as a ship being driven out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the northwest parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark, where they have been obliged to winter.

A distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risks are numerous, and, being well understood, may, to some extent at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is, the transportation by sea is the only means of conveyance in the one case, while, in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted. And the contract is made in reference to this fact, either express or implied. It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months, that the owner of the goods should be bound to wait this period for their delivery. In the decision cited above, the plaintiff recovered only £297 18, which sum he paid for insurance and other charges.

§ 944. *Where cargo is voluntarily received by the owner, the carrier is entitled to pro rata freight; otherwise, where he receives by compulsion.*

But it is not material to decide this point. The greater part of the goods were received by the defendant at Detroit, and there is no complaint that the residue of the cargo was not only duly delivered by the vessel at Chicago in the spring. Now there is nothing in the evidence which goes to show that the goods received by the defendant were not voluntarily delivered to him by the agents of the plaintiff, or of the transportation company in whose service he was employed. This being a fact, it must be considered a modification of the contract by the parties. And it is upon this ground that a *pro rata* freight may be recovered. In the case of *Sampayo v. Salter*, 1 Mason, 43 (§ 932, *supra*), the court say, a *pro rata* freight can be demanded only upon the ground that there is a voluntary receipt of the goods at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther. Where the cargo is compulsorily received by the owner, no freight is earned. *Hurtin v. Union Ins. Co.*, 1 Wash., 530. In *Cook v. Jennings*, 7 Term R., 382, where the defendant to pay so much for freight for goods delivered at A., it was held freight could not be recovered, *pro rata itineris*, if the ship be wrecked at B. before her arrival at A., though the defendant accept his goods at B. 1 B. & P., 634, 240; 1 East, 628; 4 East, 45; 1 Taunt., 300.

There can be no doubt that to entitle the master to a *pro rata* freight, where the voyage has only in part been performed, the acceptance of the goods by the owner or his agent must be voluntary. If the master, without sufficient cause, refuse to repair his ship at the intermediate port, and send on the goods, or

procure another vessel for that purpose, he can recover no freight. *Welch v. Hicks*, 6 Cow., 504. In the case of *Mitchell v. Darthez*, 2 Bing. N. C., 555, which was decided in 1835, where defendants chartered plaintiff's ship from London to Buenos Ayres, there to deliver her cargo, reload, and proceed to a port between Gibraltar and Antwerp; freight for voyage out and home £1,300, if delivered at Gibraltar, in Spain, London or Liverpool; £200 to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo. The ship proceeded to Buenos Ayres, delivered her cargo there, and sailed again with a cargo of hides, which defendants consigned to Gibraltar. At Fayal the ship and about one-third of the hides were lost. The vice-consul of Fayal, acting on behalf of the defendants, at the request of the captain of the ship transmitted the residue of the hides, by another vessel, to defendants' consignees at Gibraltar, where they were accepted and the freight from Fayal to Gibraltar paid by defendants. Held, that the plaintiff was not entitled to the £1,300 freight; that he was not entitled to *pro rata itineris* for freight to Buenos Ayres, or from Fayal to Gibraltar, but that he was entitled to freight, *pro rata*, from Buenos Ayres to Fayal. Had the vessel been lost at Buenos Ayres nothing more than the £200 could have been claimed, and that sum was paid on the departure of the vessel.

On an examination of the authorities we think the rule is well settled, that where, through any cause, not within the control of the master, the voyage is terminated at an intermediate port, where the cargo is voluntarily received by the owner, that freight *pro rata itineris* may be demanded. And in this case they so instructed the jury. And they also instructed the jury that the deposit of the \$500 in scrip by the defendant, with Hubbard, the consignee, being special, could not be applied as a payment for freight, unless a special direction to that effect was subsequently given by the defendant. For the goods delivered at Chicago the plaintiff is entitled to full freight under the contract. And whether any part of this freight has been paid, it will be for the jury to determine from the evidence.

MURRAY v. ÆTNA INSURANCE COMPANY.

(Circuit Court for Illinois: 4 Bissell, 417-423. 1864.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—I am of opinion, as a matter of law, that the plaintiff cannot recover in this case. The contract the defendant made was that the vessel should earn or be entitled to freight, and in the case of loss of freight, or if the plaintiff was not entitled to receive freight in consequence of some accident or misfortune within the terms of the policy, then the defendant agreed to become responsible. The question is whether, according to the terms of the contract, the defendant is liable. Fifteen thousand bushels of corn, in the fall of 1862, were shipped on board the schooner owned by plaintiff to be transported from Chicago to Kingston, and it was the freight list on this corn that was insured by defendant. A marine disaster happened to the vessel. She was dismasted and was towed into the port of Goderich, in Canada. The vessel lay there some time. The hatches were then taken off, and it was found that the corn was damaged more or less. Of course the schooner in the condition in which it then was could not proceed on her voyage without repairs. The corn was unloaded from the vessel and placed in a warehouse, and the

sound corn separated from the damaged corn. Shortly after it was so placed, it being in different stories of the warehouse, the warehouse broke down and the corn became again intermingled. There was a policy of insurance on the cargo by the Corn Exchange Company, and upon the receipt of intelligence of the disaster the agent of that company proceeded to Goderich with a view of determining what was to be done for the best interests of all concerned. The proof shows that about thirteen thousand bushels of the corn were in a sound condition when it was landed from the vessel, the remainder being more or less damaged. There is some conflict of evidence as to the manner and circumstances under which the corn was sold. The captain of the schooner claims that the corn was sold by the agent of the Corn Exchange Company. The latter, on the contrary, claims that the corn was sold by the captain. I do not think it is material which was the fact, but we will assume, what is undoubtedly true, that it was sold by the common consent of both. The plaintiff retained \$2,200, and the balance of the proceeds was paid over to the agent of the Corn Exchange Company. It is immaterial what was the fact as to the manner in which this money was paid or received. Of course if it was paid and received as freight it could not again be recovered; but, according to the view the court takes, it is immaterial whether it was or not. It seems to be conceded that there was no material injury done to the hull of the schooner; that the chief injury was to the spars and rigging. We have to assume, of course, under the finding of the jury, that the vessel could not have been repaired in the port of Goderich that fall, and there is no dispute but it could have been repaired in the following spring or during the winter, and that the vessel would have been ready upon the opening of navigation to proceed on her voyage. The question is, whether, under the circumstances of the case, it was not the duty of the captain to go on and complete his contract, which was to transport the corn from Chicago to Kingston.

§ 945. *Temporary delay does not relieve the carrier from performance so as to earn his freight.*

When a vessel takes a cargo, as in this case, in the fall of the year to transport to a distant point, it is one of the incidents of the navigation that, owing to variable weather or freezing up, she may not be able to reach her port of destination. The mere fact that the vessel is not able to do so does not relieve the carrier from completing his contract and thus becoming entitled to his compensation. Neither here does the fact that the vessel was dismasted and was obliged to make a port of safety, and the corn had to be unloaded, relieve the carrier from the duty of completing his contract, provided by proper repairs the vessel could have proceeded in the spring of 1863. The corn was in such a condition that it could have been transported in whole or part in specie, and could have reached the port of destination. This being so, then it follows as a conclusion of law that if the owner of the corn chose to take it or have it sold he could not deprive the plaintiff of the right to the freight. There is no controversy but that the vessel could have been repaired in the winter of 1862 or the spring of 1863. There can be none under the proof but that the corn could have been transported in specie, in whole or in part at least, to the port of Kingston, in the spring of 1863. Those facts being admitted, upon well-settled principles of law I think the plaintiff cannot recover.

§ 946. *Cases reviewed.*

Among the numerous authorities which have been referred to, I will only advert to three. The first is the case of *Anderson v. Wallis*, reported in 2

Maule & Sel., 240. That was a case of insurance upon a cargo, and in that respect was different from this. The ship sailed from London on the 16th of September, 1811, bound for Quebec. Having encountered heavy gales, so that she made a great deal of water, the master was obliged to return (having proceeded a considerable distance on the voyage) to the port of Kinsale, Ireland, and arrived there October 25th. On the arrival of the ship it was found necessary to make repairs upon the vessel before she could proceed on her voyage. These repairs were not completed until the 25th of March following. On examination it was ascertained that the cargo was damaged, and it was sold as a damaged cargo. Prior to this time the insured abandoned the cargo to the underwriter. The underwriter refused to accept the abandonment, so that the question arose whether there was a loss within the true construction of the policy. The court held there was not. Why? Because the goods were not lost, and because the vessel could have been repaired and could have proceeded on her voyage in the spring of 1812 to Quebec. The time that elapsed was from October 25th until March following, when the vessel should have so proceeded, and it was held — Lord Ellenborough delivering the opinion — that it was a mere retardation of the voyage. Now if in this case the cargo had been destroyed so that it lost its identity, and it did not in point of fact exist in specie, then, as a matter of course, it would have been a loss within the policy, and the court would have held that the insured was entitled to recover; but the cargo remaining in specie, although in a damaged state, the carrier having a right when the repairs were made to go on and complete the voyage, the property being sold as a damaged cargo, there was not a loss within the meaning of the policy.

The principle, although that was a case of insurance on the cargo and the case at bar is a policy on the freight, must necessarily be the same as to the question of loss. Here, as there, the agreement was to indemnify the plaintiff in case of loss — in one the loss of the cargo, in the other of freight,—and in that case the court held that there was not a loss within the meaning of the policy, as we must hold here. The language of the court in that case has been cited with approbation in subsequent cases, and no court has ever yet decided that a temporary retardation is a total abandonment. Disappointment of arrival would be a new idea of abandonment in insurance law. Here the question is, whether the loss of freight was in consequence of a peril of the sea or of the voluntary act of the master, and the answer is, it was the voluntary act of the master.

The next case to which I shall advert is the case of *Jordan v. Warren Ins. Co.*, reported in 1 Story, 342. That was a case of a policy upon freight precisely like this. The freight insured was a quantity of cotton, tobacco and other articles of merchandise from New Orleans to Havre. The freight bill was nearly \$10,000. The vessel proceeded from New Orleans down the Mississippi, and on her progress to the Gulf of Mexico on the 7th of June, she met with an accident which rendered it necessary for the vessel to return to New Orleans for repairs. The vessel was fitted again for sea on the 21st day of July following, a little over a month. On examination it was ascertained that the cargo was injured and it was taken out; a large portion of it was sold at public auction for the sum of nearly \$20,000. The residue, being in a sound state, was shipped for Havre in another vessel. Mr. Justice Story, upon these facts, says the ship was repaired and capable again of taking a part of the cargo at New Orleans within a reasonable time, and the master had a right to

require that it should be so taken on board and carried on the voyage as soon as it might be in a condition to be safely reshipped, and he had a right to wait until the cargo could be dried, sorted, repacked and prepared for reshipment; the delay arising thereby would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction [prostration is a bad word to be used in that connection I think]. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole testimony shows the cargo could have been dried, assorted and repacked for the voyage at the farthest within six months. It is true that the vessel was ready, so far as the repairs were concerned, within about six weeks; but he says the proof shows the cargo could have been ready in six months, and what was the consequence? That the party was entitled to his freight, and consequently the underwriter was not responsible as for a loss of freight. He proceeds: "Mere delay in the voyage or disappointment as to time never constitutes, as we have seen, any ground for the abandonment of the voyage."

The next case is *Hugg v. Augusta Insurance and Banking Company*, 7 How., 595. That was also a case of insurance on freight like this. It went up on a certificate of difference of opinion between the judges below. The vessel in that case took a cargo of jerked beef at Montevideo to be transported to Matanzas or Havana. It was the freight on this cargo that was insured against. The vessel met with a disaster, and was obliged to put into the port of Nassau. Some of the cargo was thrown overboard, and another portion of it was found in so offensive and damaged condition that the authorities at once refused to have it landed. Another portion of it was sold, and the question in this case was, whether the underwriter was liable as for a loss of freight. Various questions were certified to the supreme court. Upon the first question the court held that, if the jury found that the beef was a perishable article within the meaning of the policy, the defendant was not liable as for a total loss of the freight, unless it appeared that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, etc.

§ 947. *If the vessel might have completed the transportation in specie, a sale by the owner does not involve the loss of freight.*

Admit that in the case at bar it was for the interest of the owner of the cargo, or of all parties, that it should be sold, still, if the vessel could have been repaired in the following spring, and have proceeded on her voyage from the port of Goderich, and could have transported the corn in specie to the port of Kingston, the plaintiff could not recover against the underwriter for a loss of the freight. The case last cited, and all the other cases, I think, settle that. As to whether it was a reasonable time or not. That question I think is also decided by the authorities and upon principle. Independent of authority the plaintiff cannot recover in this case, because, if he could, it would be substantially holding that where there was a detention of a cargo shipped in the fall, in consequence of stress of weather, or frost, or other causes, so that the cargo could not arrive at the port of destination till the following spring, there was a loss of freight, and that the insured should proceed at once against the underwriter for the freight. That would be an exceedingly dangerous doctrine to hold, so far as the commerce of the lakes is concerned. So that it resolves itself after all into, What was the reason there was a loss of freight, if there was such a loss? The only answer that can be given is, If there was a loss, it

was in consequence of the voluntary act of the master, and not because of a peril of the sea; so that the verdict will have to be, as a matter of law, for defendant in this case.

SCOTT v. UNITED STATES.

(12 Wallace, 448-445. 1870.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal from the judgment of the court of claims. The facts of the case, so far as it is necessary to consider them, are as follows: On the 13th of February, 1866, Henry T. Noble, assistant quartermaster in the volunteer military service of the United States, entered into a contract with the appellant Scott, whereby the quartermaster “agrees to furnish all the transportation the United States may require from Little Rock, Arkansas, to Fort Smith, Arkansas, and to and from all points between Little Rock, Arkansas, and Fort Smith, Arkansas, when the same is to be furnished by river.” Transportation was called for by the United States between Little Rock and Fort Smith, furnished by Scott, and duly paid for by the government. Upon that subject there is no controversy between the parties. But the United States also shipped troops and stores from St. Louis to Fort Smith and Fort Gibson. The vessels, on their way, touched at Little Rock, but did not discharge there. While they were at Little Rock, Scott, in a written communication to the quartermaster, claimed the right, under his contract, to transport the troops, and stores in question from that point to Fort Smith, and had boats ready to perform that service. None of the lading was delivered to him. Had he transported it, the freight, according to his contract, would have amounted to \$17,605.66. The court of claims held that the transportation thus claimed was not within the contract, and dismissed his petition. Hence this appeal.

§ 948. *A contract of transportation between two points does not comprehend different ones.*

We think the decision of the court of claims was correct. The soundness of this view of the subject is too clear to require or admit of much discussion. The contract was for transportation between Little Rock and Fort Smith. Transportation from Little Rock to Fort Smith was not the same thing by any means as transportation from St. Louis to Fort Smith or Fort Gibson. Transportation from St. Louis to those places necessarily involved transportation by Little Rock, and thence over a common river route to the higher points of destination, but the voyages were wholly distinct and independent of each other. The greater includes the less, but that does not make them identical. In their totality they are as different as if the partial sameness did not exist. In the transportation between St. Louis and the other points named the part performed above Little Rock was but an ingredient in the mass. There is nothing which requires us to disintegrate it and give to Scott one part more than another. Such elongated transportation is neither within the letter nor the meaning of his contract.

§ 949. *Present contract viewed in light of surrounding circumstances.*

In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This

process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning. It must have been known to both Scott and the quartermaster that such transportation would be required as that under consideration. It is incredible that they intended to subject the United States to the delay, inconvenience and expense of the unlivery and reloading of every cargo which came up the river to Little Rock only to feed Scott's contract and meet its demands. He claims a monopoly, without regard to circumstances, of all the government transportation upon the water-way where his contract was to be fulfilled. Fort Gibson is above Fort Smith. As respects all lading to be shipped beyond Fort Smith the same unloading and reloading would be necessary there which had before occurred at Little Rock. A proposition, from which flow consequences so unreasonable, must itself be regarded as of that character. Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. *Baldwin v. Mildeberger*, 2 Hall, 176. Where there is a written contract, and a like misunderstanding is developed, a court of equity will refuse to execute it. *Coles v. Bowne*, 10 Paige, 534; *Calverley v. Williams*, 1 Ves. Jr., 211. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. *James v. Morgan*, 1 Lev., 111; *Thornborow v. Whitacre*, 2 Ld. Raym., 1164; *Baxter v. Wales*, 12 Mass., 365. But it is unnecessary to invoke the aid of anything outside of the contract itself. Its interpretation presents no question for our consideration. That the proper construction has been given to it, we think is equally clear.

Judgment affirmed.

THE SCHOONER TREASURER.

(District Court for Massachusetts: 1 Sprague, 478-475. 1859.)

Opinion by SPRAGUE, J.

STATEMENT OF FACTS.—It is proved that a contract of sale was made last week, for an agreed price in cash, or a promissory note, and the bill of lading indorsed and delivered to the libellant. And, further, that the master had hauled his vessel to the libellant's wharf and made a tender of the cargo, and that the delivery had been prevented by a controversy which arose as to the weighing of the cargo. The libellant insisted that it should be weighed by a weigher whom he named, who was to be employed and paid by him. To this the master and consignee objected, declaring that they had not confidence in the weigher who had been designated. They proposed that there should be two weighers, the one insisted upon by the libellant, and another to be selected and paid by themselves; the latter also to weigh the cargo on the wharf. But this the libellant refused, insisting that the weighing should be done only by his own weigher, according to whose certificate of quantity payment should be made; and finally refused to discuss the subject further, and told the master that he had nothing more to say to him. The libellant did not pay, nor tender payment, for the coal. Howard, the consignee, demanded the return of the bill of lading, but the libellant refused to give it up. The vessel was then removed to another wharf, and the cargo was sold by the consignee and delivered to another person. The libellant now claims for its non-delivery.

§ 950. *Assignee of bill of lading cannot require delivery without paying; right to weigh stated.*

As assignee of a bill of lading, under the contract of sale, he had no right to require the delivery of the cargo to him without paying the freight, but he had a right to require that it should be discharged from the vessel, so as to give him an opportunity to examine it, and ascertain whether it corresponded with the bill of lading in quantity and quality; and for this purpose he had a right to weigh it. But the master had the same right, of which he could not be deprived by the libellant's having selected his own wharf as the place of discharge. He should have permitted the master to have the means of examining the cargo and ascertaining its weight, and had no right himself to select the weigher, and insist that his certificate should be taken as conclusive.

§ 950a. *Vexatious conduct of assignee held equivalent to a refusal to accept delivery.*

The conduct of the libellant in prescribing conditions which were sanctioned neither by law nor reason, and to which the master was not bound to submit, was equivalent to an absolute refusal to receive the cargo.

§ 951. *Where the consignee of a bill of lading, on tender of the cargo, imposes conditions equivalent to a refusal to receive it, the assignor of the bill may rescind the contract.*

And even if the libellant were the owner of it, the master would have been authorized, as an agent from necessity, to dispose of the cargo, and would have been responsible for the net proceeds after deducting freight, and his expenses and compensation as such agent. But the libellant cannot be deemed the owner, so as to recover even the net proceeds. By the contract of sale, he was to receive the cargo, and pay therefor, either by cash or note. He refused to receive the cargo, and made no payment, or offer of payment, in any form, and must be deemed to have refused payment according to the terms of sale. Howard, the consignee, therefore, had a right to rescind the contract of sale. This he has done, and sold the goods to a third party. It is true the bill of lading was assigned and delivered to the libellant, and this is generally considered a transfer of the property. But a delivery of the evidence of title, or delivery by symbol, can have no greater efficacy than a manual delivery of the property itself, which, it is well known, will not deprive the vendor of the right to rescind the sale, if the purchaser refuse to perform its conditions; as, for example, to pay cash on delivery. The libel must, therefore, be dismissed with costs.

SWETT v. BLACK.

(District Court for Massachusetts: 2 Sprague, 49-51. 1862.)

Action against the assignee of a bill of lading to recover freight due on the cargo.

Opinion by SPRAGUE, J.

STATEMENT OF FACTS.—This libel is brought to recover freight, also on a claim for storage. In regard to the claim for freight, the libel charges the defendants, as the parties contracting, for the carriage of this lumber. It does not set out the bill of lading, or refer to it or its contents. The first question to be considered is, Have the libellants proved such a contract as they have alleged? The respondents allege that this cargo was carried under a bill of lading, which they set up, and which is in the case. This bill of lading is a written contract,

and the cargo was carried under it. Upon the face of it, Brown & Tukey are the shippers, and the contract of carriage is between them and the libelants as carriers. The defendants are connected with it only as assignees, and as such they certainly cannot be considered as the original contractors; and in this view it is immaterial whether the assignment was written a few moments before, or a few moments after, the master signed it. Evidence *aliunde* was offered to show that the defendants were the owners of the property. Of course this evidence must be offered to show that Brown & Tukey, while appearing on the bill of lading as the shippers, were not in fact so, but were really to be considered as the agents of the defendants in making the shipment. The evidence failed to show this, and the fact undoubtedly was, that Brown & Tukey bought and shipped this cargo on speculation, and, not having the means to pay for the whole of it, assigned the bill of lading as security for a part of the purchase money.

§ 952. *The assignee for security of a bill of lading is not liable for freight.*

This decision is supported by the case of *Blanchard v. Page*, 8 Gray, 281, where the late Chief Justice Shaw has examined the whole subject of the liability of shipper and carrier with great care and thoroughness. The claim for storage cannot be allowed, as the libelants have not placed themselves in a position to be allowed to offer parol evidence of the contract, and so there is no legal evidence upon this point before the court.

THE CARGO OF THE SHIP ANNA KIMBALL.

(District Court for Massachusetts: 2 Sprague, 83-85. 1861.)

Libel to enforce a lien on the cargo for a balance due upon a charter of the ship.

§ 953. *Maritime liens do not depend upon possession; but lien is lost by delivery.*

Opinion by SPRAGUE, J.

Maritime liens do not depend upon possession. This rule is almost universal, but there is one exception. If the owner of a vessel part with the possession of goods by delivering them to the consignee, he thereby loses his lien for freight. Such is the law at least in this circuit, it having been so declared by the circuit court, and followed by this court.

§ 954. *Where credit is given for the freight money the lien is waived.*

And it has been held that if an agreement be made between the shipper of goods and the carrier, by which a credit is given for the freight beyond the time when they are to be delivered to the shipper, the lien for freight is thereby waived; for in such case the carrier, being bound to deliver the goods before the freight is payable, must, in the performance of that contract, divest himself of the possession, and transfer it to the consignee without payment of the freight, and the lien must be thus terminated.

STATEMENT OF FACTS.—In the present case, the libelant, on the 31st of August, 1857, took two notes for \$10,000, payable in six months, for freight. This necessarily gave a credit until the expiration of those notes. It was a new contract entered into by the parties for adequate consideration; both expected that the ship would arrive several months before the maturity of the notes, that is, before the freight would be payable, and both must have contemplated that the cargo would be delivered to the consignee upon arrival. There is no part of the agreement which indicates that the carrier was to hold on to the goods

until the maturity of the notes, and the parties must have understood that the cargo would be delivered in the usual time after arrival. It could not have been contemplated that the owner of the goods should be kept out of the possession and control of them for several months because he had for an adequate consideration obtained a credit for that time for the freight. The credit upon such a condition would be an injury rather than a benefit. This ship did not arrive as early as was expected, but she arrived more than a month before the expiration of the credit. The cargo was in a condition to be delivered to the consignee, and the delivery was duly demanded by him before the freight was payable; but the carrier refused to deliver it unless the freight was first paid. This refusal was wrongful. He had by a valid agreement given a credit for the freight, which had not then expired, and by so doing had agreed that he would deliver the goods and relinquish his lien, without payment of the freight; and he cannot, by violating his agreement and holding on to the goods, place himself in a situation to maintain a suit to enforce the lien which he had agreed to relinquish.

SEARS v. WILLS.

(1 Black, 108-115. 1861.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—The charter-party in this case, between the libelants and Tuckerman, Townshend & Co., reserved a lien for freight maturing five and ten days after discharge. The goods belonged to Wills, the claimant. He was not a party to the charter-party, but received an ordinary bill of lading. The goods were delivered to him without any reservation of the lien. The decree of the district dismissing the libel was affirmed in the circuit court.

Opinion by TANEY, C. J.

The rights of the parties in this case depend altogether on the contract created by the bill of lading. That instrument does not refer to the charter-party, nor can the charter-party influence in any degree the decision of the question before us. Augustine Wills was not a party to it, and it is not material to inquire whether he did or did not know of its existence and contents; for there is nothing in it to prevent Wills & Co., the sub-charterers, or Augustine Wills, the consignee, from entering into the separate and distinct contract stated in the bill of lading, and the assignees took the rights of Wills & Co., in this contract, and nothing more. The circumstance that it came to hands of the ship-owners by assignment from the sub-charterers, who knew and were bound by all the stipulations of the charter-party, cannot alter the construction of the bill of lading, nor affect the rights or obligations of Augustine Wills.

§ 955. *Ship-owner has lien for freight due and may enforce it by proceedings in rem.*

Undoubtedly the ship-owner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship-owner may enforce his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the ship-owner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and if he delivers them, the

incumbrances of the lien do not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it.

§ 956. *Nature of maritime lien for freights; it depends upon possession.*

The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant, that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. *Cutler v. Rae*, 7 How., 729; *Dupont de Nemours v. Vance*, 19 How., 171. In the last mentioned case, the court, speaking of the lien for general average, and referring to the decision of *Cutler v. Rae* on that point, said: "This admits the existence of a lien arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation, which, as is well known, is waived by an authorized delivery without insisting on payment." After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument. But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our constitution was adopted, yet it has never claimed the full extent of admiralty power which belongs to the courts organized under, and governed altogether by, the principles of the civil law.

§ 957. *Waiver of maritime lien not strictly inferred.*

But courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship-owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the ship-owner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations

and convenience of commerce, both as to the ship-owner and the merchant. It is true that such a delivery, without any condition of qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship-owner reserves the right to proceed *in rem* to enforce it, if the freight is not paid. And it appears by the evidence that such an understanding did exist between the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the ship-owner as still constructively in possession, so far as to preserve his lien and his remedy *in rem*.

§ 958. — *but lien is lost by unconditional delivery, as in the present case.*

But in the case before us, there is nothing from which such an inference can be drawn. The goods were delivered, it is admitted, generally, and without any condition or qualification. Upon such a delivery there could be neither actual nor constructive possession remaining in the ship-owner; and, consequently, there could be no right of retainer to support his lien. The decree of the circuit court, dismissing the libel, must therefore be affirmed.

THE BIRD OF PARADISE.

(5 Wallace, 545-563. 1866.)

APPEAL from U. S. Circuit Court, Northern District of California.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Assignees of the charter-party and of the bill of lading libeled the ship Bird of Paradise, her tackle, apparel and furniture, in a cause of contract, civil and maritime. Breach of contract alleged in the libel is the refusal of the master of the ship to deliver the cargo as stipulated in the charter-party and bill of lading. Voyage was from Liverpool to San Francisco, and the cargo consisted of nine hundred and fifty-two tons of coal. Terms of the charter-party, material to the inquiry, are that the freight shall "be paid in Liverpool on unloading and right delivery of the cargo," at the rate therein prescribed, and in full of all other specified charges. "Such freight is to be paid, say one-fourth in cash, and one-fourth by charterer's acceptance at six months from the final sailing of the vessel, . . . and the remainder by like bill at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading, or in cash under discount at five per cent. per annum, at freighter's option." Other material clauses are, that the "vessel shall" be addressed to the freighter's agent abroad, that five hundred pounds sterling shall "be advanced in cash at port of discharge on account of the freight," and that "the ship and her freight are bound to this venture," but it does not contain the usual clause that the cargo is bound to the ship. Bill of lading is in the usual form and contains the clause, "they paying freight for the goods at the rate as per charter-party." Sum advanced for first instalment of freight was subject to three months' interest, at five per cent. per annum, and cost of insurance. Charter-

party was signed by the claimants, and the bill of lading was signed by the master. Ship was loaded by the charterer, and it is proved she arrived in safety at the port of destination with the cargo on board. Consignees demanded the goods, but the master refused to deliver the same unless the freight was paid contemporaneously with the delivery, placing the refusal upon the ground that the ship had a lien upon the cargo for the unpaid balance of the freight, but the libelants claimed that they were entitled to the delivery of the cargo without paying any freight except in the manner provided in the charter-party.

1. Proofs showed that ship sailed on the 16th day of April, 1863, and that she arrived at the port of destination on the 26th day of December in the same year. Cash instalment of freight was paid as stipulated in the charter-party. Acceptance of the charterer given for the second instalment, payable in six months from date, was delivered to the claimants on the day the ship sailed from the port of departure. Before she arrived at the port of destination, the charterer failed in business, and became and is insolvent and bankrupt. Payment of the acceptance was never made, and the proofs show that it is still held and owned by the claimants. Whole freight remains unpaid except the cash instalment paid before the ship sailed, and the five hundred pounds stipulated to be advanced in cash at the port of discharge. Amount due and unpaid is \$7,050 in gold, deducting the sum advanced at the port of discharge and including the residue of the last instalment and the unpaid and protested acceptance. Pending the suit, the cargo was delivered to the consignees under a stipulation that it should be returned to the master in case the claim of lien for freight should be sustained. Decree of the district court was that the claim was unfounded; that the ship had no lien for freight on the cargo, and that the stipulation for the return of the cargo should be given up to be canceled. Circuit court affirmed the decree, and the claimants appealed to this court.

§ 959. *Ship-owners have a lien upon the cargo for freight, unless stipulating otherwise.*

2. Equities of the case in view of the whole record are strongly with the ship-owner, but the questions presented for decision are questions of law, and must depend upon the construction of the contract as expressed in the charter-party. Reference need not be made to the bill of lading, as it is in the usual form, and refers to the charter-party as the controlling evidence of the contract in respect to the matter involved in this controversy. Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention, and which displaces the lien.

§ 960. *Maritime lien is founded in possession; but may be expressly modified.*

3. Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is, that the ship-owner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the district court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the ship-owner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it

stands upon the same ground with the lien of the carrier on land, and arises from the right of the ship-owner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee. *Sears v. Wills*, 1 Black, 113 (§§ 955-958, *supra*). Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien. *The Eddy*, 5 Wall., 481 (§§ 968-976, *infra*).

§ 961. *Presumption is against displacement of lien, and such stipulation should be clearly expressed.*

4. Presumption is in favor of the lien, as already explained, but it may be modified, or it may be excluded or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right. Contracts of affreightment, like other commercial contracts, where the language employed is ambiguous or of doubtful meaning, are subject to judicial construction, and it often happens that the terms of the instrument in respect to the payment of freight and the delivery of the cargo are so inaptly chosen that it gives rise to very close and embarrassing questions. Where the stipulation is that the goods are to be delivered at the port of discharge before the freight is paid, without any condition or qualification, it seems to be agreed that the lien of the ship-owner for the payment of the freight is waived and lost, as the right of lien is inseparably associated with the possession of the goods. Unless the stipulation is that the delivery shall precede the payment of the freight, and the language employed, as applied to the subject-matter and the surrounding circumstances, is such as clearly to show that the change of possession is to be absolute and unconditional, the lien is not displaced, as the presumption of law is the other way, which is never to be regarded as controlled, except in cases where the language employed in the instrument satisfactorily indicates that such is the intention of the parties.

§ 962. *Where payment and delivery are to be concurrent, the lien exists.*

5. Such precedent delivery, if absolute and unconditional, displaces the lien for freight, because it is repugnant to it and incompatible with it; but where the payment or security of payment is to be concurrent or simultaneous with the delivery of the cargo, the lien exists in full force, and the ship-owner cannot be required to make the delivery until the payment of freight, or security, as the case may be, is tendered.

§ 963. *Cases reviewed.*

Judge Story says the lien exists if it appears that the payment is to be made before or at the delivery of the cargo, or even if it does not appear that the delivery is to precede such payment. *The Volunteer*, 1 Sumn., 571. Accordingly, he held in that case, that the stipulation that the freight should be paid within ten days after the vessel returned to the port of departure did not displace the lien on the return cargo, as the unlivery of the cargo might be rightfully postponed beyond the ten days after the return of the ship, when, by the terms of the charter-party, the freight would become due. Same defense, that is, the waiver or displacement of the lien by a clause in the charter-party giving

credit for the payment of the freight, was set up in a subsequent case before the same court, in which the terms of the clause relied on afforded more color to the views of the respondent. *Certain Logs of Mahogany*, 2 Sumn., 600.

Terms of the stipulation in that case were, that the freight should be paid "in five days after the vessel's return to, and *discharge* in, the return port of the voyage." Argument of the respondent was that the word *discharge*, as used in the clause, meant not merely the unloading of the brig, but the delivery of the cargo to the charterer or owner of the goods. Aided, however, by the terms of the bill of lading, which referred to the charter-party, the court came to the opposite conclusion, and held that the word *discharge*, as there used, meant merely the unlading of the cargo from the ship, without any reference to a delivery to the owner or consignee. Exactly the same rule was adopted and applied by this court in the construction of a similar clause of a charter-party in a case heard and decided at the last term. Part of the charter-money, in that case, was agreed to be paid, and was paid, before the ship sailed, or during the voyage, and the stipulation was that the balance should be paid, "one-half in five and one-half in ten days after the discharge of the homeward cargo," and the decision was that the stipulation, construed in the light of another clause in the same instrument, which provided in effect that the ship should be bound to the merchandise and the merchandise to the ship, was not inconsistent with the right of the owner to retain the cargo for the preservation of the lien, as the clause was intended for the benefit of the charterer, giving him time to examine the goods and ascertain their condition, and to decide whether he would or would not take them and pay the freight. But the court remarked that the credit might be for so great a period as to justify the inference that the ship-owner intended to waive his right of lien; and it was decided, in an earlier case, that the lien may be waived without express words to that effect, if the charter-party contains stipulations inconsistent with the exercise of such a right, or where it clearly appears that the ship-owner meant to trust to the personal responsibility of the charterer. *The Kimball*, 3 Wall., 42; *Raymond v. Tyson*, 17 How., 59.

6. Repeated decisions of the courts in Westminster Hall have adopted the same general rule, and in some decisions of very recent date the same principles have been applied in cases entirely analogous to the one now before the court. Settled doctrine of those courts is, that the law merchant gives to the ship a lien for the freight, or rather the right of the ship-owner to retain the goods until the freight is paid. *Philips v. Rodie*, 15 East, 554. They hold it to be a common law right, not cognizable in the admiralty; but they admit that special clauses in the charter-party or bill of lading, inconsistent with it, operate as a waiver, and may destroy the right. *Lucas v. Nockells*, 4 Bing., 731; *Chase v. Westmore*, 5 Maule & S., 180; *Tate v. Meek*, 8 Taunt., 280; *Horncastle v. Faran*, 3 Barn. & Ald., 497; *Small v. Moaltes*, 9 Bing., 588. Unless, however, the special agreement is absolutely inconsistent with the retention of the goods, the waiver or displacement is not shown, and the right remains. *Crawshay v. Homfray*, 4 Barn. & Ald., 50; *Pinney v. Wells*, 10 Conn., 104; *Howard v. Macondray*, 7 Gray, 516; *Wilson v. Kymer*, 1 Maule & S., 157; *Neish v. Graham*, 8 Ell. & Bl., 510; *Campion v. Colvin*, 3 Bing. N. C., 26. Recent decisions in that country put the principal question under consideration in a clear light, and leave no doubt, if the case were pending there, how it would be solved. Take, for example, the case of *Alsager v. Dock Co.*, 14 Mees. & W., 798, which was decided in the court of exchequer. Charter-party in that case contained two

clauses material to be noticed. First clause was, that the vessel might discharge in any dock the shipper might appoint, "on being paid freight" at the prescribed rate per ton. Second clause was, that the freight should be paid "on unloading and right delivery of the cargo, two months after the vessel's inward report at the custom-house." Conclusion of the court was, that the two clauses of the charter-party must be construed together; but they held that the freight was not payable until two months after the inward report, and that the ship-owner had not any lien on the cargo for the freight, because the delivery of the goods was required to precede the payment of the charter-money.

Terms of the charter-party in the case of *Foster v. Colby*, 3 Hurlst. & N., 715, were substantially the same, so far as respects the principal question in this case. Freight was payable in that charter-party in three instalments, but the terms of the first two payments are unimportant. Material clause reads as follows, to wit: "The remainder in cash, two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at five per cent. per annum, at freighter's option." Held, that the charter-party did not create any lien in respect of that part of the freight which was payable two months after the vessel's inward report, although the charter-party contained the stipulation that the owners of the ship should "have an absolute lien on the cargo for all freight, dead freight and demurrage." Latter clause was intended, as the court held, not to enlarge the right of lien for freight, as generally understood, but to include dead freight and demurrage within the operation of the general provision.

§ 964. *Words of charter-party in present case are inconsistent with lien.*

7. Words of the charter-party in this case are that the third instalment shall be paid by "bill, at three months from date of delivery at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo, agreeably to the bills of lading." Giving the usual meaning to language, it is plain that the intent of the parties was that the delivery of the goods should precede the payment of the freight, and it is equally clear that the delivery was to be without qualification and unconditional. Certificate of right delivery of the cargo could not be obtained until the vessel was discharged and the cargo delivered, and, if forwarded by the next steamer, a month would elapse before it could be delivered at charterer's office in Liverpool, which would extend the credit to four months from the delivery of the cargo.

§ 965. *Insolvency of shipper cannot restore a lien excluded by agreement.*

8. Appellants contend that, inasmuch as the charterer failed in business and became a bankrupt before the vessel arrived at the port of discharge, the case is taken out of the operation of those rules of law, even in respect to the last instalment. Basis of this argument is a supposed analogy between the ship-owner as against the shipper, and the vendor of merchandise as against the vendee, as exemplified in the law of stoppage *in transitu*, but it is not perceived that any such relation exists between the ship-owner and the charterer, or that there is any foundation whatever for the argument. Intention of the parties in the contract of affreightment, as in other commercial contracts, must be ascertained from the language employed, the subject-matter, and the surrounding circumstances, and it is clear that the question of construction cannot be affected in the smallest degree by the subsequent solvency or insolvency of one of the contracting parties. Credit was given in this case to the charterer for the payment of the last instalment of the freight of four months from the time when the goods were required by the terms of the instrument to be de-

livered to the consignee at the port of discharge, and it is too plain for argument that the subsequent insolvency of the charterer can neither erase that clause from the charter-party or shorten the term of the credit. *Alsager v. Dock Co.*, 14 Mees. & W., 798; *Tamvaco v. Simpson*, 1 Law Rep., C. P., 371; S. C., 19 Com. B., N. S., 478. Insolvency of shipper occurring while the goods are in transit, or before they are delivered, will not absolve the carrier from his agreement as made, nor authorize him to retain the goods until the freight is paid, unless the lien exists independently of that occurrence. *Crawshay v. Homfray*, 4 Barn. & Ald., 50; *Chandler v. Belden*, 18 Johns., 157; *Fielding v. Mills*, 2 Bosw., 498.

§ 966. *Bill of exchange given for payment held not to displace lien.*

9. Claim of the appellants, also, is that the ship in this case had a lien for the second instalment of the freight, secured by the charterer's acceptance, made payable in six months from date, and delivered to the ship-owner on the day the ship sailed. Acceptance became due, and the charterer also became a bankrupt before the vessel arrived at the port of discharge, and it is admitted that the acceptance is still held and owned by the ship-owner. Established rule in this court is that a bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the same, unless such was the express agreement of the parties. Agreement of the parties filed in the case and made a part of the record shows that the acceptance was presented to the bankrupt court, and that it has never been paid, and it is not pretended that it is of any value. Valueless as the acceptance is, the objection, if made, that it had never been tendered to be canceled, would be a mere technicality; but no such objection is made, and as the parties agree that it has never been negotiated, it must be understood that any such objection is waived. Payment of that instalment of the freight, therefore, is not proved, and there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived. Ship-owner under the circumstances has a right to stand upon the original contract, and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given. *Steamer St. Lawrence*, 1 Black, 533; *The Kimball*, 3 Wall., 45; *The Active, Olc.*, 206; *Bark Chusan*, 2 Story, 457. Entire freight under this charter-party, except the small advance stipulated to be made at the port of discharge, was to be paid in the port of shipment. Port of shipment was also the port where the ship lay when the contract was made, and the terms of the contract afford the most plenary evidence that the parties regarded the charter-money stipulated to be paid at that port as freight in the usual and proper sense in which that word is understood in the maritime law. *Gilkison v. Middleton*, 2 Com. B., N. S., 152; *Neish v. Graham*, 8 Ell. & Bl., 610; *Gracie v. Palmer*, 8 Wheat., 605.

10. Suppose, however, a different rule could be applied to the sum actually paid or advanced before the vessel sailed. Still that concession, if made, would not affect the question as to the second instalment in this case, because that instalment was not advanced in money, and has never been paid. Separated from the acceptance, which, under the decisions of this court, was not payment, it presents the ordinary case of a promise to pay freight and a failure to fulfil the contract, and in this point of view the case is clearly distinguishable from the decision in which it is held that sums stipulated in charter-parties to be paid in advance and not dependent on the carrier's contract do not have the incidents of freight, and are not protected by the lien of the ship-owner, unless

by usage or special contract. *How v. Kirchner*, 11 Moore, P. C., 21; *Kirchner v. Venus*, 12 id., 384; *Maclachlan on Shipp.*, 383.

11. Foundation of those decisions is that money advanced as freight cannot be recovered back, not even in case the ship is lost on the voyage, and the freight is never earned; because, as it is said, payment determines the lien, and anything accepted as an advance, such as a bill of lading, is the same thing, unless there is an express agreement to the contrary. Undoubtedly an actual payment determines the lien to that extent, but it is not correct to say that a bill of exchange has the same effect, unless it be so agreed between the parties; and the settled doctrine in this country is that freight paid in advance is not earned unless the voyage is performed, and that the shipper may recover it back, if for any fault not imputable to him the contract is not fulfilled. *The Kimball*, 3 Wall., 44; *Benner v. Insurance Co.*, 6 Allen, 222; *Chase v. Insurance Co.*, 9 id., 313; *Watson v. Duykinck*, 3 Johns., 335; *Griggs v. Austin*, 3 Pick., 20; 3 Kent Com. (11th ed.), 304; *Pitman v. Hooper*, 3 Sumn., 66.

§ 967. *Whether absence of a clause binding cargo to ship affects the question.*

12. Absence of the clause that the merchandise is bound to the ship cannot affect the question, as that is the presumption of the law merchant, from the relation between the ship and the cargo, independently of any express stipulation, unless the presumption to that effect is negatived by the language of the contract. 1 Parsons' M. L., 124, 253. Whenever the owners of the ship constitute one party and the owners of the cargo the other, the law of freight applies, and the fundamental rule, says Mr. Parsons, is that the rights of the respective parties are reciprocal, and that each has a lien against the other to enforce those rights; and the better opinion is, that the lien for freight commences as soon as the goods are delivered into the control of the master, or certainly as soon as they are put on board. 2 Parsons on Contr. (5th ed.), 286; *Abbott on Shipp.*, 462; *Fragano v. Long*, 4 Barn. & Cress., 219; *Cooke v. Wilson*, 1 Com. B. (N. S.), 153; *Maclachlan on Shipp.*, 353; *Tindall v. Taylor*, 4 Ell. & Bl., 219; S. C., 28 Eng. L. & Eq., 210. Usually the charter-party contains a clause binding the ship to the merchandise and the merchandise to the ship, but the law merchant, as already explained, imposes that mutual obligation even if it be omitted. *Brig Casco*, Dav., 184; 2 Parsons on Contr., 303; 2 Parsons' M. L., 561.

Decree of the circuit court must be reversed, with costs, and the cause remanded for further proceedings in conformity to this opinion. Libelants, upon the payment of the amount of the protested acceptance and interest and costs of suit, will be entitled to a decree that the stipulation given for the return of the goods shall be given up to be canceled. Otherwise the libel must be dismissed.

Decree reversed, with costs.

THE EDDY.

(5 Wallace, 481-496. 1866.)

ERROR to U. S. Circuit Court, District of South Carolina.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Substance of the allegations of the libel setting forth the cause of action was that certain merchants at New Orleans, on the 25th day of March, 1854, shipped on board the schooner *Mary Eddy*, then lying in that port, one hundred and two hogsheads of sugars, for which the master

gave a bill of lading to the shippers, and that he contracted to transport the sugars from that port to the port of Charleston, and there to deliver the same to the appellants in good order and condition, saving and excepting only the dangers and accidents of the seas and navigation; and the libelants averred that the vessel departed on the voyage, and that the master had neglected and refused to deliver the sugars.

Answer of the respondents admitted the reception of the sugars, the contract of affreightment as set forth in the bill of lading, and the arrival of the schooner at the port of destination with the sugars on board in good order and condition. Principal defense set up in the answer was that the contract to deliver the sugars was subject to the lien of the respondents for the payment of the freight, as stipulated in the bill of lading; and they averred that the vessel proceeded on her voyage, and arrived safely at the port of destination with the sugars on board in good order and condition, and that the master gave immediate notice of those facts to the consignees, and offered to deliver the sugars to them, according to the bill of lading, but they utterly neglected and refused to pay the freight.

First appeal of the libelants to this court was dismissed, it appearing that neither this court nor the circuit court had jurisdiction of the case, as no final decree had been entered in the district court where the libel was filed. *Mordecai v. Lindsay*, 19 How., 199. Such being the fact, this court dismissed the appeal and remanded the cause to the district court, in the same condition in which it was before the appeal was taken to the circuit court, in order that the district court might proceed with the case to a final decree. Pursuant to the mandate of this court, the district court completed the hearing, and still being of the opinion that the claim of the libelants was well founded, entered a final decree in their favor; but the circuit court reversed the decree, on the appeal of the respondents, and the libelants appealed to this court.

§ 968. *Controversy originating in a difference of opinion as to delivery.*

1. The record shows that the controversy in this case, in its origin, grew out of a difference of opinion between the parties as to the respective rights and duties of the master of the schooner, as a carrier by water, and the shipper of the cargo, in respect to the delivery of the goods, or rather of the ship-owners and the consignees and owners of the cargo, under the usual bill of lading stipulating for the delivery of the goods upon payment of the freight. Appellants, as the consignees and owners of the cargo, conceded that the owners of the schooner had a lien for the freight, but insisted that they, as consignees and owners of the cargo, had a right to inspect the sugars before paying the freight, as stipulated in the bill of lading, and that it was the duty of the master, under the usages of the port, to discharge the entire consignment before exacting the payment of freight, and to allow them, as the consignees, to take possession of the sugars, and transport the same to their store, in order that they might be enabled satisfactorily to make such examination and inspection. Acting for the owners of the vessel, the master admitted that it was his duty to discharge the entire consignment, and to permit the same to be inspected by the consignees, but he denied that it was his duty to allow the sugars to be transported to the warehouse of the consignees until the freight was paid. On the contrary, he insisted that it was his right to retain possession of the sugars as the means of preserving the lien of the vessel, to which the sugars were subject for the payment of the freight. When the agent of the libelants first went to the vessel, shortly after her arrival, and asked for the sugars, he was duly notified

by the master that the lien of the vessel for the payment of the freight would not be waived. Subsequently, one of the libelants went on board and had some conversation with the master in respect to the payment of the freight and the delivery of the consignment. They came to an understanding that all the sugars which were in good order should be sent to the store of the libelants, but that the freight on all so sent should be paid on the wharf.

The whole consignment consisted of one hundred and two hogsheads of sugars and twenty-one barrels of syrup. Libelants' clerk sent the twenty-one barrels of syrup and three hogsheads of the sugar to their store, under that arrangement, but the libelants refused to furnish the money to pay the freight, and the master declined to permit any more to be sent, except upon payment of the freight, as it had been understood in that arrangement. Finding that they were unable to agree, the master notified the libelants that he should exact the payment of freight on the wharf; and they, in reply, notified the master that they should hold him responsible for any injury the sugars should receive on the wharf. Correspondence took place between the parties in respect to the delivery of the sugars and the payment of the freight, which is exhibited in the record, together with the testimony of various witnesses who were examined upon the subject.

The vessel arrived at Charleston on the last day of March, 1854, and the cargo was discharged on the third and fourth days of April following. Notice was given to the libelants, early in the afternoon of the latter day, to the effect that the consignment was ready to be delivered in good order and condition, on payment of freight, but that if they refused to pay freight, as stipulated in the bill of lading, the sugars would remain on the wharf until sunset, and would then be stored at their expense and risk. Their response was that they would give security for the freight to be paid, in accordance with the usages of the port, upon the delivery of the consignment. They also objected to the notice as too late in the day to enable them to transport the sugars from the wharf and store them in their warehouse. Throughout the correspondence it is obvious that the libelants denied all obligation to pay the freight until the entire consignment was discharged and delivered without qualification, so that they could store the goods and inspect them in their own warehouse. Refusing to accede to those terms the master discharged the sugars, and after waiting a reasonable time stored them, and notified the libelants that they were stored at their risk and cost, to be delivered to them upon payment of freight and charges. Proofs also show that the libelants examined the sugars the next day — both those on the wharf and those in store,—but no demand was made nor was any freight tendered.

§ 969. *Ship-owner has lien for freight unless stipulating to the contrary.*

2. Undoubtedly the ship-owner has a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention and which displaces the lien. *In re Certain Bags of Linseed*, 1 Black, 112 (§§ 955-958, *supra*). Text-writers usually state the rule as follows: *Le batel est obligé à la marchandise et la marchandise au batel*. Cleirac, p. 597; Abbott on Shipp., 8th ed., p. 248; Maude & Pollock on Shipp., 254. Unquestionably the general rule of law is well expressed in that maxim, but it is subject to an important exception as applied to the cargo, that the lien may be displaced by an inconsistent and irreconcilable provision in the charter-party or bill of lading, mak-

ing it the duty of the master to deliver the goods unconditionally before the consignee is required to pay the freight. Saving that exception, the rule is universal that the ship and freight are bound to the merchandise and the merchandise to the ship.

§ 970. *Ship and cargo have reciprocal liens and are reciprocally bound.*

Ship-owner contracts for the safe custody, due transport and right delivery of the merchandise, and the shipper, consignee or owner of the cargo contracts to pay the freight and charges. These are reciprocal duties, and the law creates reciprocal liens for their enforcement, but the lien of the ship-owner may be displaced, as before explained, or it may be waived.

§ 971. *Lien of carrier is founded in possession.*

Such a lien — that is, the lien of the ship-owner — is not “the privileged claim” of the civil law, but it arises merely from the right of the ship-owner to retain the possession of the goods until the freight is paid, and therefore it is lost by an unconditional delivery of the goods to the consignee. Subject to this explanation, the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of all the obligations created by the contract of affreightment, is the settled rule in all the federal courts. *Dupont de Nemours v. Vance*, 19 How., 168.

§ 972. *Owner of ship or cargo proceeds, in rem if other party is in the wrong.*

3. Contracts of affreightment, notwithstanding it is held that the lien of the ship-owner is nothing more than the right to withhold the goods, and is inseparably associated with his possession, are regarded by the courts of the United States as maritime contracts over which the courts of admiralty have jurisdiction, and consequently that either party in a proper case may enforce his lien by a proceeding *in rem* in the district court. Where the ship is in fault, the usual remedy of the consignee is by the proceeding *in rem*; but where the shipper, owner or consignee of the cargo is in fault, the ship-owner usually finds an adequate remedy by retaining the goods until the freight and charges are paid.

§ 973. — *but carrier by water cannot detain goods on ship until paid.*

His right to do so is beyond doubt, but he cannot detain the goods on board the ship until the freight is paid, as the consignee or owner of the cargo would then have no opportunity of examining their condition. Practice in England is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid; and it is held that in such cases the lien of the master continues, as the goods remain in his constructive possession. *Chitty & Temple on Carriers*, 222; *Ward v. Felton*, 1 East, 512; *Machlachlan on Shipp.*, 369.

§ 974. *Delivery on wharf preserves constructive lien of carrier by water.*

4. Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. 2 *Parsons on Contr.*, 5th ed., 195; *Ship Middlesex*, 21 Law Rep., 14. Where the contract is to carry by water from port to port an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or

put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment. *Richardson v. Goddard*, 23 How., 28 (§§ 786-796, *supra*); 1 *Parsons' Maritime Law*, 153; *MacLachlan on Shipp.*, 367; *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R., 389; 2 *Parsons on Contr.*, 5th ed., 191; *Brittan v. Barnaby*, 21 How., 532 (§§ 923-927, *supra*).

§ 975. *Goods may be deposited in consignee's warehouse with agreement reserving lien.*

5. Parties may agree that the goods shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as a waiver of the lien, and where they so agree the courts of admiralty will uphold the agreement and support the lien; but there was no agreement in this case. The appellants refused to pay the freight, and the master declined to part with the possession of the goods. He discharged the cargo upon the wharf, gave due notice to the consignees, and they refused to pay the freight, claiming that they had a right, by the usages of the port, to remove the goods to their store for inspection, without paying freight. They examined witnesses upon that subject, but it is sufficient to say that they failed to prove any such usage. Relying on proof of such a usage, they refused to accept the goods, and the master stored them in a place of safety and gave due notice to the libelants.

§ 976. *Defense to libel being shown on carrier's behalf, a point not before the court will not affect a decree in his favor.*

Misinterpreting the mandate of this court, the district judge came to the conclusion that the interlocutory decree entered in the cause before the former appeal could be supported by proof of the subsequent misconduct of the bailee of the goods, who sold certain portions of them to pay the charges for storage. All we think it necessary to say upon the subject is that none of those questions are involved in the pleadings in this record. Present libel was *in rem* against the vessel for the non-delivery of the consignment of the libelants. Respondents appeared and set up the defense that the goods were subject to the lien of the vessel for the freight, and that the libelants, without just cause or excuse, refused to pay the freight, and they fully proved their defense. Having proved their defense, they were entitled to a decree in their favor, wholly irrespective of any subsequent misconduct of the bailee of the goods, who was not before the court. The decree of the circuit court is therefore affirmed, with costs.

MARSH v. UNION PACIFIC RAILWAY COMPANY.

(Circuit Court for Colorado: 8 McCrary, 236-249. 1882.)

§ 977. *General doctrine of carrier's lien for freight stated.*

Opinion by HALLETT, D. J.

The lien of a carrier for freight money on goods transported by him depends on the contract with the owner. Not that it is necessary that the lien should be mentioned in the contract, but there must be a contract for carriage on which it may rest. In the ordinary course of business, goods delivered for carriage are subject to the condition implied by law that the carrier may re-

tain possession of them until his reasonable charges shall be paid. In delivering them to be carried, the owners assent to that condition, although nothing may be said on the subject, and thus it becomes a part of the contract — just as, in the absence of agreement as to price, the law will imply that it shall be reasonable. On this principle it is settled that a wrong-doer cannot confer on the carrier the right to assert a lien against the true owner.

§ 978. *No lien exists for freight if goods are not carried by the stipulated route.*

And when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money (*Fitch v. Newberry*, 1 Doug. (Mich.), 1; *Robinson v. Baker*, 5 Cush., 137; *Stevens v. Boston & Worcester R. R.*, 8 Gray, 262), because the owner cannot be divested of his property without his consent, and to allow a lien on the goods in a matter to which he has not assented would divest him of his property to the extent of the lien.

STATEMENT OF FACTS.—To apply the rule to the present case, it is only necessary to say that, in the contract with the Pittsburgh company, plaintiff did not in any way consent to have his goods charged with a lien for carrying them to Denver. It was not an agreement to pay, and that his goods should be held until he should pay, but he did in fact pay the price of carrying the goods, and as to him the contract was fully executed before the goods left Zanesville. Plaintiff paid the price demanded of him, and all that was demanded for carrying the goods, and it would be absurd to say that he assented to a lien on his goods for the same thing — the money which he had already paid. But it is said that the Pittsburgh company had no authority from defendant to fix the price of carrying the goods in the way that it was done on the schedule published by the Wabash and Missouri Pacific Companies. And so the court ruled at the trial, without referring to defendant's rule that for carrying household goods payment must be made in advance, under which it might be claimed with reason that the company first receiving the goods was defendant's agent to fix the rate and receive the money. This point was not stated to the jury, however, and they were advised that the Pittsburgh company was without authority from defendant to make the contract. The jury was also instructed to find whether the goods were received by defendant at Kansas City with knowledge that a through contract had been made by the Pittsburgh company, and the price paid for carrying them. Of that there was ample evidence in the rule of defendant requiring prepayment on household goods, and the fact that \$85 was paid to defendant by the Wabash company on account of freight money. Some of defendant's witnesses say that the payment by the Wabash company is of no weight, as freight money is often advanced by shippers when a through contract has not been made, and it would be impossible to determine whether the money was paid on a through contract or as an instalment of freight money. This means that money is paid both ways, and leaves the payment by the Wabash company to stand as affording some evidence of a through contract. Taken in connection with the rule requiring payment in advance on household goods, it was sufficient to warrant the finding that defendant received the goods with knowledge that a through contract had been made for carrying them to their destination. And if defendant was advised of the terms of the contract before it performed the part assigned to it, there would be force in the suggestion that by such performance the contract was accepted. It is not necessary, however, to go so far, for the fact that a through contract and payment were made, and that defendant had knowl-

edge of it, is enough to defeat the lien. Independently of that circumstance there may be room for debate whether one who has paid the price of carriage can be further charged in respect to the same matter; whether all companies who have a part in the contract and perform that part shall not be regarded as accepting the contract; whether any of the companies in the line of transportation after the first shall be taken to be the agent of the shipper to make a new contract for him, when, by acting for himself, he has practically denied the authority of another to act for him. But these are points with which we are not now concerned. The jury have found, upon sufficient evidence, that defendant received the goods with knowledge of the fact that a through contract for carrying them had been made, and that plaintiff had paid for the service, and that, of itself, displaces the lien on which defendant relies.

§ 979. *Trover lies for the value of goods unlawfully withheld under a claim of lien for freight.*

This is enough to show that the action may be maintained, for trover lies for the value of goods illegally withheld under a claim of lien for freight money. *Adams v. Clark*, 9 Cush., 215.

§ 980. — *what is the measure of damages in such action?*

Objection is made to the plaintiff as a witness to prove the value of the goods, on the ground that he had no knowledge of the market for such goods in Denver. Many cases are cited to the point that the market price in the place of conversion must control; a proposition which cannot be controverted. Whenever it appears that there is anything like an established price in the market, for which the articles in controversy can be replaced, that price will measure the damages for converting such articles. But for household goods, more or less worn, there is no established price, unless it be that at which second-hand goods of the same kind are sold. And although people who discontinue housekeeping may be compelled to accept that price, no one will contend that it is the full value of the goods. The fact that goods in use, if sold at all, must be sold at a sacrifice, is too plain for argument, and, therefore, the price of such goods in market will not be adequate compensation to one who is deprived of his goods by a wrong-doer. Perhaps the best way to arrive at the value of such goods would be to show the price in market of new goods of the same kind, and then show, as nearly as possible, the extent of depreciation from use. But this course was not open to plaintiff, for the goods were in defendant's possession, probably not in a condition to be examined, and plaintiff was not bound to inquire whether he would be allowed to send witnesses to inspect them. If it is suggested that a dealer, hearing a description of the articles, would be able to fix their value, the answer may be that few persons would be able to give a description which can be understood. The average man would find himself very much embarrassed in any effort to describe furniture and other articles of household use definitely, so as to enable one who never saw them to judge of their value. No one in Colorado knew anything of these goods, and among plaintiff's acquaintances in Zanesville he could not expect to find any one more competent than himself to testify as to their value. On the whole, it would seem that if plaintiff's testimony as to value cannot be accepted, he will be defeated of his right, and that will not be allowed. In the matter of values, as in other matters, the law will give relief, according to the injury, on the best testimony that can be obtained. *Stickney v. Allen*, 10 Gray, 352; *Starkey v. Kelley*, 50 N. Y., 676.

On the other hand, defendant, being in possession of the goods, was in a

position to prove their value in a manner which would dispel all doubts. It attempted to do this, but the evidence is not very satisfactory. The goods were not in a condition to be examined with care, and defendant's witnesses did not give the attention necessary to correctly estimate their value. Evidence of the value in this market of new goods of the same kind, which would have enlightened the jury, was not offered by either party, and if the verdict is wrong, the fault is not wholly with the jury. There is, however, some reason to believe that the amount returned is large, and the plaintiff will be required to remit \$500, or submit to a new trial. The evidence of value offered by defendant was probably entitled to greater weight than was allowed to it, although it cannot be said that it should control. If the plaintiff will remit from the damages the sum of \$500, the verdict may stand, otherwise a new trial will be allowed.

ONE THOUSAND TWO HUNDRED AND SIXTY-FIVE VITRIFIED PIPES.

(Circuit Court for New York: 14 Blatchford, 274-279. 1877.)

§ 981. *When freight or delivery is demandable; duties of carrier and consignee are concurrent.*

Opinion by JOHNSON, J.

The rule of law in respect to the delivery of merchandise from vessels is well settled. Under the ordinary bill of lading the freight is demandable only when the goods are discharged from the vessel and an opportunity is had for their examination by the party who is to receive them. On the other hand, the carrier is not bound to part with the possession or to make actual delivery except upon payment of the freight. Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels on the freight of such parcels being separately paid. All such arrangements rest upon the special agreement of the parties concerned, and not upon the general law. In *Clark v. Masters*, 1 Bosw., 177, 185, Duer, C. J., states the rule thus: "The consignee is not bound to pay the freight until the goods are delivered, nor the master to deliver the goods until the freight is paid. If the goods are withheld the freight must be tendered; if the freight, the goods, to enable either party to maintain an action against the other for a breach of contract." In the case of *The Eddy*, 5 Wall., 481 (§§ 968-976, *supra*), Mr. Justice Clifford, giving the opinion of the supreme court of the United States, says: "Delivery on the wharf, in the case of goods transported by ships, is sufficient, under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody."

§ 982. *Question whether libel for freight was filed prematurely.*

The question in this case, therefore, is whether the libelants, at the time the libel was filed, were in that condition in respect to the goods in question which entitled them to demand payment from the claimants or entitled them to assert, as against the goods themselves, not a mere lien for payment, or a right

to hold the possession of the goods until payment was or should be made, but a right to require immediate payment of the freight as against the goods carried. In illustration of this position, Mr. Justice Curtis may be cited, who says, in *Salmon Falls Manuf'g Co. v. The Bark Tangier*, 11 Mo. Law Rep. (N. S.), 6, 9: "If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel or because they are so mixed with others on the wharf that they are not accessible . . . is immaterial. If he is not ready to deliver, the law does not deem the delivery made." In the case of *The Middlesex*, id., 14, 15, the same learned judge says: "When the master of the vessel gives notice to consignees of cargo that the vessel is about to discharge at a particular wharf, it is deemed equivalent to a declaration by him that he will be in readiness to deliver the cargo there at some proper time as soon as, by due diligence, he can get it out of the vessel, in a state to be delivered. . . . It must be remembered that it is not knowledge of the arrival of the vessel, and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact."

STATEMENT OF FACTS.—The first communication upon the subject of the delivery of the pipes was contained in a note from Thomas Dunham to Nelson, dated February 21st, in which Dunham says: "I am anxious to secure to the vessel the freight on the pipes before delivery, and beg of you to send me check for the amount. Otherwise I must take legal measures to secure the payment of the same." This communication was made before the vessel was ready to commence the discharge of the pipes. On the 26th another note was sent to Mr. Nelson from Mr. Dunham, notifying him that the vessel would that morning commence to discharge on Pier No. 19, East river, the stoneware, sewer-pipes, rings, etc., consigned to him. It adds: "You are requested to pay the amount of freight named in the bill of lading upon the same, and remove them from the wharf. Upon payment of the freight the pipes, etc., will be delivered to your carts. If not paid and removed from wharf, I shall proceed against them to collect it." On the same day, and immediately upon the receipt of the note last mentioned, Nelson wrote to Dunham, and had delivered at the office of the latter his answer, in which he says: "When the goods are on the wharf, and I am properly notified of same, I shall then pay the freight due on them; or, I will take them away from wharf and pay you, ton by ton, freight on same for all pipes, rings and covers delivered as per bill of lading held by me. If I do not hear from you by one P. M. to-day of your election of either of above propositions, I shall be in attendance on the wharf at that time and make formal demand of my property, and shall hold you responsible," etc. To this communication no reply was made, and about, or shortly after, one o'clock Mr. Nelson, the claimant, with his clerk Mr. Walmsley, went to Mr. Dunham's office, and there, having in his hand the amount of the freight, according to the bill of lading, said to a person in charge of the office that he was ready to pay the freight, and demanded his pipes by the H. L. Routh. To this the reply was that the pipes would not be delivered except upon the payment of the full amount of freight, as per bill of lading. The parties then proceeded to the wharf where the vessel was, and there it appeared that a part only of the pipes were discharged. As to what then took place the witnesses are not exactly agreed, except that no adjustment took place of the questions as to the respective claims of the parties. The libelants appear to have insisted that the whole freight should be paid before the claimant

should take any part of the goods from the wharf. On the other hand, the claimant insisted that he was not bound to pay the freight until all the goods were discharged from the ship, in order that there might be opportunity to examine the goods before the completion of the delivery and payment of the freight. Each party seems, by law, to have been right in the view thus presented; and, of course, neither was, so far, in fault. The claimant further offered to take the cargo in parts, as the same was landed, paying the proportional part of the freight, but this the libelants refused to permit, as was their right; and the parties separated without any adjustment of their conflicting views. The claimant reiterated, on leaving, that, when his goods were discharged and ready for delivery, he would, on notice, pay the freight and take them away. It was made a question in the district court whether the claimant did not insist that he was not liable to pay for any broken pipes or rings contained in the cargo, even though not broken by the fault of the carrier; and such was the view of the evidence taken by the district court. Further evidence was adduced in the circuit court, which satisfies me that no such ground was taken by the claimant. From some controversy which had formerly taken place between the same parties the persons acting for the libelants probably apprehended that the claimant would object to pay for broken pipes and rings, and they, therefore, stood upon their legal right not to complete the delivery of the cargo, or any part of it, till payment of the freight. On the other hand, the claimant stood upon his right not to pay the freight until the cargo was discharged ready to be completely delivered upon payment of freight. Neither party was, at this period, in default, and neither was in a condition to maintain an action against the other. Subsequently the cargo was landed, but no notice was given to the claimant, nor was any demand made upon him for the freight. Assuming that the libel was not filed until after the pipes and rings were all discharged, it was premature, because there was no offer, tender or notice of readiness to deliver at any time when it was in the power of the carrier to make delivery on receiving the freight. In the ordinary course of trade property is allowed to be taken away as landed, either on receiving the *pro rata* freight or security for payment; but the claimant's offers in these respects were rejected. Each party chose to stand upon the legal right, and must be judged accordingly. The libelants fail, therefore, to maintain their case, because, when the libel was filed, the claimant was not in default in not paying the freight. But I might well go further and assert that, upon the proof, it appears that the libel was filed before the pipes and rings were discharged from the vessel. I do not see that the examination of this question, upon the evidence, in detail, can be of any advantage to the parties or to the law in general, and I therefore content myself with stating the conclusion at which I have arrived.

§ 983. *Findings of fact and law on review; statutes at large construed.*

In regard to the findings of fact and law required by the act of February 16, 1875 (18 U. S. Stat. at Large, 315, § 1), they seem to be required in view of the exercise of the appellate power of the supreme court of the United States, and, therefore, where the amount involved is not sufficient to permit a review of the judgment of the circuit court by the supreme court of the United States, a more general finding only must be sufficient.

The decree of the district court (5 Ben., 402) must be reversed, and the libel be dismissed, with costs.

THE ELMIRA SHEPHERD.

(Circuit Court for New York: 8 Blatchford, 341-344. 1871.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—In the latter part of the month of February, 1865, the libelant shipped on board the sloop Elmira Shepherd, then lying at Sands' Point, in the waters of Long Island Sound, within the state of New York, a large quantity of onions and other vegetables, to be carried thence and delivered at the port of New York, the voyage of the sloop being begun, prosecuted and ended wholly within the bounds of the state. On arrival, the onions and other vegetables were delivered. This libel is filed to recover for damages alleged to have been caused by bad stowage, a portion of the onions being placed on the bottom of the vessel, in the hold, where, by reason of the leaking of the vessel, salt water, to the depth of several inches, flowed around the lower tier of barrels, soaking in and wetting the onions. A decree was had in favor of the libelant in the district court. The claimant insists that the injury to the onions, if any, was caused by frost, and was not the result of bad stowage; that the libelant ought not to recover, because no sufficient notice of loss or claim of injury to the onions was made or given to the carrier when they were delivered; and that the onions were removed and sold without giving to the carrier a proper opportunity to protect himself against a claim that they were damaged, by examining them or inspecting them, to ascertain the truth.

§ 984. *Claim for injury to goods not made until after delivery considered.*

In my judgment, the clear preponderance of the evidence is that the onions were damaged by salt water which leaked into the vessel; and although there was testimony that there was some frozen water when the onions were taken out of the vessel, the proof is that it was the wetting by salt water, and not the frost, which caused the injury. There was evidence that, as to some of the barrels, the carrier knew, when he delivered them, that the water had flowed in; but it is also true that the onions were removed and were sold without any claim or notice that the owners claimed that they had sustained an injury entitling them to compensation from the carrier. Receiving the onions, removing them, and, after examination and discovery of the alleged injury, selling them, without notice to the carrier, entitles him, and calls upon the court, to regard the claim with some suspicion. In some sense of fairness, it would have been just to the carrier, if still in port, to notify him of the alleged damage, and give him an opportunity to inspect them; and, in determining the question of fact, the court may properly require very full and clear proof of the allegations of the libelant, before crediting a claim made under such circumstances. But the conduct of the libelant in this respect constitutes no legal bar to his recovery, if his claim is established by clear and distinct proof. The carrier was, in fact, aware that some of the barrels were wet. He, knowing that he was under an obligation to deliver in good order, had a right to make such examination as was necessary, to ascertain the truth, before he parted with the possession, so far as could be ascertained at that time. But no authority is cited to me in support of the proposition, that, after goods are delivered by a carrier, and on subsequent examination it appears that they were injured on the voyage, the owner cannot recover for the injury, unless, before he sells the damaged goods, he notifies the carrier of the fact, and claims compensation. All that can be said is, that the conduct of the owner may be scrutinized,

and, if there appear want of good faith, concealment, and, especially, a disposition of the goods for the purpose of preventing inspection, this would go far to warrant the belief that his claim was groundless. Here the proof comes from a witness apparently disinterested. The fact of damage is sufficiently proved, and also its extent. It is not improbable that the effect of the salt water was not fully developed until after the onions were delivered. At all events, the proof fully sustains the claim of the libellant.

§ 985. *Jurisdiction in admiralty where voyage begins and ends on navigable waters of one state.*

It was suggested on the argument that the district court has no jurisdiction, in admiralty, of a contract of affreightment, where the voyage contemplated begins and ends in the state, and is prosecuted only in waters within the state. This has, unquestionably, been stated in terms in some cases, and in substance and effect in many. But whatever doubt was caused by the earlier decisions, the question has been put at rest by the case of *The Belfast*, in the supreme court of the United States (7 Wall., 624). I assume that this case was not in the mind of the counsel when the point was urged upon my attention. It would not be difficult to show that there is no such limitation of the jurisdiction of courts of admiralty, and that the jurisdiction of the admiralty over causes of action founded on contract, as well as those founded in tort (see *The Brooklyn*, 2 Ben., 547), depends not on the question where the voyage of the vessel begins or terminates, but on the question whether the contract is to be performed, or the tort is committed, upon navigable waters; and, taking the whole course of decision prior to the case of *The Belfast*, this will be found the result upon authority. It is, however, quite unnecessary, and perhaps impertinent, for me to do more than refer to that case.

The libellant is entitled to a decree for the damages and costs awarded him in the district court, with his costs on the appeal to this court.

THATCHER v. McCULLOH.

(District Court for New York: Olcott, 365-373. 1846.)

STATEMENT OF FACTS.—Action by the master against a consignee for freight. Demurrage claimed for delay in stopping at Havana and Key West on a voyage from New Orleans to New York. Extra insurance was obtained on account of such deviation. The stoppage at Havana at the time of season the voyage was made was a well-known custom.

§ 986. *Admiralty has jurisdiction of an action by the master against a consignee for freight.*

Opinion by BETTS, J.

A leading point made by the respondents is, that the court cannot take jurisdiction of an action *in personam* for freight brought by a master of a vessel against a consignee of her cargo. It is not controverted that the vessel is bound to the shipper for the delivery of the cargo, nor but that the cargo is bound *in rem* for the payment of freight; but it is urged upon the notion of the English common law courts that the action against the consignee upon the implied contract to pay freight must be sued in a court of law in the name of the ship-owner. No additional light can be thrown upon the question of the jurisdiction over the subject in this court by restating the decisions already before the public, or the principles upon which they rest. I consider the right-

ful jurisdiction of the admiralty in such cases fully sustained by the authority of the eminent jurists who have discussed and sanctioned it. 1 Sumn., 551; 2 Sumn., 589; 1 Ware, 149; 3 Kent, 3d ed., 218, 223; Cleirac, 722; Boulay Paty, 297. I hold, in concurrence with the doctrines of those authorities, that this court has jurisdiction over the subject-matter. The method of exercising the jurisdiction is merely matter of practice; and the remedy is no more restricted in principle to actions *in rem* than *in personam*. Indeed, in the original constitution of the court, suits in their personal form were those in which the jurisdiction was most distinctly exercised (2 Browne's Civ. & Adm. Pr., 432; Clark's Praxis, tit. 1, Marriott form, 30), and there is no principle involved in the functions of the court which imparts to it cognizance *in rem* over a broader field of cases than falls within its powers in actions *in personam*. 4 Wheat., 479. Its special and vital properties are the brevity, simplicity and celerity of its proceedings, adapting it to the emergencies of commerce and navigation. 1 Kent, 380.

§ 987. *A consignee who accepts the cargo cannot annul the contract on account of a deviation.*

If the respondent intended to set up the alleged deviation of the ship on her voyage as a rescission of his liability for freight, he should have refused to receive the cargo. By accepting that he waived the right to annul the whole contract, and must rely upon his right to indemnification under it because of its imperfect fulfilment. Abbott, 192; 3 Kent, 221. Although the evidence falls short of proving a direct consent on the part of the respondent to the libellant, in respect to this particular shipment, that the voyage might be made by way of Havana, yet the assent of his agent to the agent of the ship in regard to other shipments on board her at the same time, of like goods, to the same destination, that the circuitous route might be run, affords a reasonable implication that the arrangement with all the freighters was substantially of a common import, and with the understanding that the ship was to touch at Havana for the purpose of making up a full cargo.

§ 988. *Consignee held bound by the custom of ships from New Orleans to stop at Havana.*

I think, independently of any binding assent to the circuitous voyage, that the evidence establishes sufficiently the usage of the trade in respect to voyages from New Orleans to New York in general ships, at that season when freights are short, to have been to touch at Havana to complete their cargoes. The evidence satisfactorily shows that the entire voyage in that way is usually essentially expedited. The shipper must be supposed cognizant of this course of trade, and to have had it in view when the contract was entered into, and cannot, therefore, take exception to it because the deviation may affect his insurance. Abbott, 192; 1 Phillips' Ins., 182-184; 1 Condry's Marshall, B. 1, ch. 6, § 2, pp. 185, 186. Nor probably would such departure from a direct voyage be a deviation which would affect the policy. 2 Phillips' Ins., ch. 12, § 1. In a case before Lord Eldon, on a vessel bound from Newfoundland to Portugal, where the vessel went to Sidney, in Nova Scotia, for a cargo of coals, he rules that such subordinate voyage, *being in conformity to usage*, was not a deviation. *Origin v. Jennings*, 1 Camp., 505; *Lockett v. Merchants' Ins. Co.*, 10 Rob. (La.), 339. By a bill of lading, expressing that goods are to be carried from one port to another, a direct voyage is *prima facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper that such a course is to be pursued.

Lowry v. Russell, 8 Pick., 360. A ship, under these circumstances, would ordinarily be detained at New Orleans a period greatly longer to fill up her freight than is required to run the additional distance by way of Havana. Under the proofs, the voyage in question, by way of Havana, did not amount to a deviation which affected the rights of the ship-owner, as against the shippers (7 Cranch, 487), and but from her afterwards putting into Key West, without necessity, there would be nothing in this branch of the case demanding special consideration. After stopping at Havana and finding her cargo could at once be made up at Key West, she ran over and filled up at that port. There is no evidence that it was a customary course for vessels from New Orleans, or even from Havana, to touch at Key West. 1 Phillips' Ins., 154. This was accordingly a deviation which impaired the policies of the respondent, though it might conduce to expedite the voyage. 13 Mass., 68; *Roccus on Ins.*, note, 52; 3 Johns. Cases, 10; 2 Johns., 138; 3 Wash., 150; 2 Cranch, 257, note.

§ 989. *Consignee permitted to recover damages for a deviation commensurate with his injury.*

In a special action for the loss sustained because of the circuitry and delay of the voyage, the freighter might undoubtedly recover damages commensurate to any injury he could prove accrued from that cause; such cross-action might probably be sustained by the merchant, notwithstanding his acceptance of the cargo. *Bowman v. Tooke*, 1 Camp., 377. I perceive no objection to adjusting the equitable rights of the parties, without double action, by allowing, by way of recoupment of freight, the amount of damages sustained by the respondent by means of the breach of contract of affreightment in the deviation to Key West. No specific objection has been raised by the libellant to that course, and it may avoid a cross-action, with accumulated expenses. I think it is clear the libellant is entitled to his full freight according to the bills of lading. On the other hand, he should be charged with the invoice value of forty pigs of lead lost on the voyage, with ten per cent. added thereto, and he should also repay the extra insurance because of the circuitous voyage, with interest thereon from the time of its payment to the arrival of the vessel at this port. The consent to vary the route was upon condition that her owner should pay the extra premiums of insurance disbursed by the consignees, to whom the assent was given. The testimony is not very explicit as to the time of such payments, nor, indeed, to the amount; and the subject must go before a commissioner for adjustment, unless the parties, by stipulation, settle the facts between themselves.

There is no reliable evidence how much, if any, the voyage was prolonged by the ship's touching at Key West. It is reasonably to be inferred that she was delayed all the time of her detention at that port. Still that fact would not afford a satisfactory measure of the time she should have arrived in this port, so as to afford a basis for allowing a *quasi* demurrage for such period. There is testimony tending to show that entering that port withdrew her from the range of hurricanes prevailing at that season in that region, which might have occasioned a much more serious delay. These contingencies of navigation are not of that definiteness to afford a guide for the computation of detentions and damages therefor. The court cannot speculate upon that point now. The proper time for the respondent to have availed himself of the deviation, it being known to him, was on the arrival of the vessel; and on the circumstances of this case, he should be deemed, by accepting the cargo without objection then, to have waived alike all damages for delays and deviations on the voyage.

These particulars will, therefore, be disallowed in the present case, although under a different state of facts they might properly go before a commissioner for investigation and allowance, with other claims for losses or prejudices sustained by the freighter on the voyage. Nor is the proof on his part satisfactory to show any deterioration in the price of lead within ten or fifteen days antecedent to the arrival of the *Celia*. The evidence to that point was exceedingly indefinite and discordant, and, I think, in its general result, conduces to establish the contrary.

I accordingly decree for freight according to the terms of the bills of lading, deducting from it the forty pigs of lead not delivered, and allowing the respondent the value of that lead at New Orleans, with ten per cent. added thereto, and also allowing the respondent extra premiums of insurance actually paid by him on account of the change of route, and interest on such extra insurance from the time of payment to the time of the arrival of the ship in this port. If the parties do not, by mutual arrangement, fix the time of the arrival of the *Celia* in this port, and the time and amount of extra insurance, and the value of the forty pigs of lead in New Orleans, let the case be referred to a commissioner to ascertain and report those particulars. The question of costs will be reserved until it is ascertained whether a balance be due the libelants.

WINTERPORT GRANITE AND BRICK COMPANY v. SCHOONER JASPER.

(Circuit Court for Massachusetts: 1 Holmes, 99-102. 1872.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—Libelant shipped, in November, 1867, a quantity of pine wood on the schooner *Jasper*, then lying in the port of Winterport, Me., to be transported to Boston and delivered to Phinley W. Reed, the agent of the libelants. The master of the schooner gave libelants a bill of lading for ninety-five cords, more or less, with the usual exception of the perils of the seas. The vessel sailed on her voyage, and proceeded down the Penobscot river as far as Bucksport Narrows, when a heavy squall from the northwest drove the vessel ashore, where she lay two tides, causing her to leak badly. After getting her off, the master proceeded with her down the river to the port of Stockton, where the master came to anchor and called a survey, which pronounced the vessel unseaworthy. The crew then left the vessel on account of her unseaworthy condition. The master remained on board, and, with some assistance, took the vessel to Rockland, where the wood was landed and subsequently sold. In October, 1868, this libel was filed, alleging the shipment of ninety-five cords of wood, according to the bill of lading; that the master converted to his own use seventy-eight cords thereof, and carelessly and negligently lost the balance; and praying for process against the schooner, her tackle, apparel and furniture.

The answer admits the shipment of the cargo, but denies that the amount shipped exceeded seventy-eight cords and one foot; alleges that the schooner sailed from Winterport with that quantity on board; that, without fault of the master or crew, she was driven ashore, and became unseaworthy and unable to complete the voyage; that she was got off in a reasonable time thereafter, and as soon as it could be done, and proceeded to the port of Stockton, where the master immediately notified the agent of the libelants of the facts; and that thereupon the libelants, through their agent, bargained and sold all the wood

to Josiah G. Staples, the master of said schooner. The answer alleges that the voyage was terminated at Stockton by the perils of the seas, without default for which the schooner would be liable; and that the liability of the schooner then ceased, any further detention of said wood having been solely in pursuance of the contract of sale between the libelants and Staples.

At the time of the shipment of the cargo, Olessor Gray and William R. Ginn were part-owners in the Jasper. In January, 1868, they sold their interest to Henry S. Staples, who owned the remaining shares in the schooner. In June, 1868, Staples sold the schooner to George W. Reed and William B. Reed, of Bangor, Me. From the time of the disaster to the time of filing the libel the schooner was either in the district of Maine or the district of Massachusetts, or on voyages between ports in said districts, being frequently in the ports of both districts. Libelants are a corporation established by the laws of Massachusetts, and having also a place of business and agents at or near Winterport, in Maine. On the 22d of November, the master advised the agent of the libelants that the vessel had been ashore and was not seaworthy to perform the voyage; that he would be obliged to discharge the cargo, and pile the wood on the wharf; that the vessel would require to have the sheathing taken off and to be recalked and sheathed, which, on account of the ice, could not be done until spring. He then inquires of the agent, "What is the least you will take for the wood here?" On the 25th of November, Reed acknowledges the receipt of the master's letter of the 22d, and writes, "Should you prefer to buy rather than ship the wood, you can have it for \$4 per cord, for the quantity shipped." On the 29th of November, the master writes to Reed acknowledging the receipt of Reed's letter of the 25th, and accepting his offer of the wood.

On the 30th of November, Staples again writes to Reed, "I have concluded to take up with your offer. I think of going to Rockland, and do the best thing I can with the wood, and I will remit the money as soon as I can make it convenient. I will get a sworn surveyor on the wood, and good measure as I can." On the 3d of December, Reed writes to Staples acknowledging the receipt of Staples' letter of the 30th, but claiming that Reed's offer to sell for "\$4 per cord for the quantity shipped" "means per bill of lading," and requiring the master at once to remit the proceeds, with bill of lading to verify the account, and notifying Staples that the wood was "not his property to move away or dispose of until he complied with these conditions." Before this letter was received, Staples had sold the wood for \$4.37 per cord in Rockland, accounting to the owners for the advance of thirty-seven cents per cord, as freight from Winterport to Rockland.

§ 990. *Propositions by mail in contract of sale.*

The offer to sell the wood to Staples, and his acceptance, were both unconditional. When a proposition is made in writing, and sent by post, the person making the offer can retract or modify by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail, the contract is closed as to both parties. Although a letter of retraction be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of the letter of assent. The acceptance by written communication takes effect from the time when the letter of acceptance is sent, and not from the time when it is received by the other party. *Adams v. Linsdell*, 1 Barn. & Ald., 681; *Dunlop v. Hig-*

gins, 1 Clark & F., 381; *Taylor v. Merchants' Fire Ins. Co.*, 9 How., 390; *The Palo Alto*, Dav., 344; *Mactier v. Frith*, 6 Wend., 103.

§ 991. *Acceptance of cargo at an intermediate port waives lien against the vessel.*

The property was in the possession of Staples, and no formal delivery was necessary to change the title. His letter of acceptance reached Reed before Reed's letter of December 3d was written. And even if the modification of the contract by the letter of December 3d took effect, and the wood was not to become the property of Staples "to move away and dispose of until he had complied with the conditions" of that letter, it is clear that, after that time, he would hold the cargo, not as the agent of the owners of the schooner, but subject to the arrangement between Staples and the owners of the cargo. The owners of the schooner, after that time, were under no obligation to forward; in fact they had no right to forward the cargo to Boston, the place of its original destination. If the libelants had any lien on the cargo until the price was paid, they clearly had no lien against the vessel, having waived any right to have the cargo delivered in Boston, and consented to accept it at an intermediate port.

§ 992. *Claim of lien should be enforced in reasonable time.*

And if any claim existed against the vessel, libelants should have enforced it within a reasonable time. What is a reasonable time is a question dependent upon the circumstances of each case; and the court, in the exercise of its discretion in determining this question, will be guided by the evidence of opportunities to enforce the lien, of the lapse of time, of the change, if any, of ownership. In this case, ten months had elapsed; the vessel had been in Massachusetts four times, and she was in Boston eighteen days before being libeled, consigned to the same person who, as agent of the libelant, had been the consignee of the cargo in controversy, and had been publicly advertised and sold before the service of the libel. If the libelants had any lien, they would have lost it by their neglect to enforce it under such circumstances.

Decree affirmed, with costs.

§ 993. *Forfeiture, detention, etc.*—Where goods were forfeited, through the negligence of the master, for a breach of the revenue laws of Brazil, the carrier was held liable. *The Griffin*,* 4 Blatch., 203. See *post*, §§ 1128, 1129; *Stiles v. Davis*, 1 Black, 101; *Wells v. Maine Steamship Co.*, 4 Cliff., 228.

§ 994. *Action for failure to deliver goods according to contract where the vessel was intercepted in consequence of a supposed violation of revenue laws.* Possession of a master, not being tortious as between himself and the owner of the vessel, the rights of *bona fide* consignees will be protected in their contracts of affreightment as against the vessel. *Jackson v. The Julia Smith*,* 1 Newb., 61; *Jackson v. The Julia Smith*, 6 McL., 484 (§§ 1172-73). See § 1134.

§ 995. *Orders of the secretary of war in 1863, and a customs detention in consequence, not authorized by law, held not to excuse a shipment as illegal, or the carrier's contract to deliver arising out of the bills of lading.* *The Matilda A. Lewis*, 5 Blatch., 520.

§ 996. *Delivery by a vessel.*—A vessel should make delivery of the cargo. And where the bill of lading is silent as to the particular place or mode of delivery, it must be made according to the usage and regulations of the port or the arrangements made with the consignee. *Irzo v. Perkins*,* 10 Fed. R., 779.

§ 997. *In the absence of agreement, the duty of the master in delivering the cargo must be governed by the custom of the port; but the custom of other ports will not govern, where it is shown by the evidence not to be applicable.* *Strong v. Carrington*,* 2 Am. L. Reg. (N. S.), 287.

§ 998. *An undertaking to deliver goods to an individual or his assignee is not satisfied by landing them at a wharf or at a warehouse, without notice to the owner, the obligation being to make the delivery personal.* And if the party has no settled or known place of residence

or of business at New York, the port of delivery, notice through the postoffice is proper. *House v. The Schooner Lexington*,* 2 N. Y. Leg. Obs., 4.

§ 999. A bill of lading providing for delivery at a certain port is properly governed by its express terms as explained by the custom and usage of delivering cargoes of that description at such port; but mere parol evidence of a special contract, limiting the number of running days in delivery, is inadmissible. *Higgins v. United States Mail Steamship Co.*,* 3 Blatch., 282.

§ 1000. Reasonable notice by the master or owner's agent to a consignee of a proposed discharge of a vessel is necessary to constitute the unloading of goods upon a wharf from a general ship a good delivery of the goods, and knowledge that the vessel has arrived, casually acquired by the consignee or the consignee's agent, will not excuse notice. *The Ship Middlesex*,* 21 Law Rep., 14; *Unnevehr v. The Steamship Hindoo*,* 1 Fed. R., 627.

§ 1001. A usage which makes a wharfinger the consignee's agent to accept consignments is not reasonable or lawful. *The Ship Middlesex*,* 21 Law Rep., 14.

§ 1002. Where a cargo of wheat is shipped in bulk, to be delivered under a bill of lading to a consignee who has charge of an elevator at the port of destination, it is not a sufficient delivery to moor the barge at the dock of the elevator in bad weather without notice to the consignee. *Germania Ins. Co. v. La Crosse & Minnesota Packet Co.*,* 3 Biss., 501.

§ 1003. The burden of proof is on the vessel to show that due notice was given to the consignee of the place for discharging the goods. *The Prince Albert*,* 5 Ben., 336.

§ 1004. The newspaper publication of a list of consignees of the cargo is not such a notice of arrival as discharges the vessel's liability as carrier; especially if the bill of lading mentions no vessel, the goods being sent by a certain line. *Caruana v. British, etc., Steam Packet Co.*,* 6 Ben., 517.

§ 1005. Where the bill of lading for goods shipped by a particular line mentions no vessel, and on inquiry by the consignee the agents, by their statements, mislead him as to the probable arrival of his goods, the owners are liable for the value of the goods, if, after their arrival, and without proper notice to such consignee, they are stored and sold for charges. *Ibid.*

§ 1006. The duty of a common carrier by water is to deliver the goods, or at least land them and give notice to the consignee. To store the goods without notice, and without giving an opportunity of inspection, does not relieve the carrier. Nor can an exception be thus alleged on mere proof of the carrier's own usage. *The Mary Washington*,* Chase's Dec., 125; S. C., 1 Abb., 1; S. C., 14 Am. L. Reg., 692.

§ 1007. The fact that after receiving notice, and after opportunity to take the goods, the consignee refuses them, cannot relieve the carrier from liability for injury previously occasioned to the goods. *Ibid.*

§ 1008. Where a bill of lading contains no clause as to the time of discharging, the consignee is bound only to take his cargo in the usual and customary way with reasonable diligence. 175 Tons of Coal,* 9 Ben., 400.

§ 1009. A coasting vessel brought cotton under a bill of lading which excepted "the dangers of the seas and fire." She arrived in New York on the 12th of October, 1865. A fire occurred on the dock on the 20th of October, 1865, in the forenoon, destroying part of the cotton. Notice that the vessel would discharge October 13th was given on that day. It appeared that the vessel did not discharge so soon, but that part of the cotton was taken away by the consignees on the 17th or 18th of October, after which the discharge was continuous. *Held*, that the consignees were bound to attend and receive the cotton as fast as it was discharged; that there was time to have taken away the cotton delivered on the day of the fire, and that the cotton destroyed had been so delivered as to relieve the vessel from liability. *The Barque Iddo Kimball*,* 8 Ben., 297.

§ 1010. Facts stated showing that libellant had full notice that the vessel was discharging cargo; and special clause in bill of lading construed to mean that, after affording the consignees a reasonable opportunity to take the goods, the carrier had the right to store them, without keeping them on the wharf for the consignees until wholly discharged from the vessel. *The Steamer Kathleen Mary*,* 8 Ben., 165.

§ 1011. As a general rule, the delivery of goods on the wharf is sufficient to discharge the master; but unless there has been previous notice, or there is some one present to receive them, the master is not justified in leaving the goods exposed on the wharf. *The Peytona*,* 1 Ware (2d ed.), 545.

§ 1012. Where the consignee requested delivery at once, and the master replied that he would begin discharging at twelve o'clock noon, or soon after, and did so, and gave notice to the consignee, who said his clerk would attend to the goods and take care they were all removed from the wharf, and the clerk neglected to employ drays sufficient to carry all of the goods off before night, so that some were left on the wharf during night, *held*, that there was a good delivery of the goods and the ship was not liable for damage done them by rain over

night; the master having piled the goods up, covered them with tarpaulins and placed a watchman over them. *Ellsworth v. The Bark Wild Hunter*,* 2 Woods, 815.

§ 1013. Effect given to a special clause in a bill of lading, providing that marble is "to be delivered from the ship's deck, when the ship's responsibility shall cease." Proviso giving a right to the consignees to select the place of landing, held to leave the foregoing limitation of the ship's responsibility unaffected. *Turnbull v. 87 Blocks of Marble*,* 9 Fed. R., 320.

§ 1014. Cotton was transported under a bill of lading which expressly stipulated that the articles should be at the risk of owner, shipper or consignee "as soon as delivered from the tackles of the steamer at her port of destination," and further, that they should be received by the consignee, package by package, as so delivered, and that if not taken away by him the same day, they might, at the option of the vessel's agents, be sent to a store or permitted to lay where landed, at the expense and risk of said owner, shipper or consignee. Bales were stolen or carted off to other consignees by mistake after they were placed on the dock. *Held*, that the manner of delivery by the carrier should receive a reasonable construction, notwithstanding such expressions; but that if after due notice, after delivery proffered at the ship's tackles at a proper time, and after a discharge, so conducted that by reasonable diligence the consignees or their servants might identify and receive their own goods, the goods were missing, it was presumable that the carrier could not be charged. *The Santee*,* 7 Blatch., 186; *Willis v. Steamship City of Austin*,* 2 Fed. R., 412.

§ 1015. Facts discussed as to reasonable and suitable notice of delivery, and culpable delay on the consignee's part inducing loss by exposure to rain; the bill of lading expressly stating that the vessel's liability should cease as soon as the goods were discharged from the deck, and discharge being made upon the pier accordingly. *The Kate*,* 13 Fed. R., 891.

§ 1016. For careless handling in the delivery and discharge of the cargo a carrier is responsible, notwithstanding damage resulting from "defective packages" or "arising through insufficiency of strength of packages" was excepted by the terms of the bill of lading. Where boxes of raisins came out crushed and were re-coopered before being delivered, but raisins were missing from every box, and the papers in many of them were soiled by finger-marks, *held*, that the carrier was *prima facie* liable as for negligence. *The Steamship Bellona*,* 4 Ben., 503.

§ 1017. Liability of carriers on the delivery of resin in New York. *Blossom v. Smith*,* 3 Blatch., 316.

§ 1018. Stated exception as to "breakage" applied in the carrier's favor as to millstones which appear to have been carefully stowed and handled. But where some are missing it is incumbent on the carrier to show their proper discharge and delivery. *Carey v. Atkins*,* 6 Ben., 562.

§ 1019. For damages caused in discharging by stevedores specially employed by the shippers of the cargo, the vessel is not responsible. *The Miletus*,* 5 Blatch., 335; S. C., 2 Int. Rev. Rec., 61.

§ 1020. Notwithstanding cement comes on deck with the shipper's consent, the carrier is not absolved from the duty of protecting the cement against damage by rain while the vessel is waiting at the pier over night, intending to unload the next day. *The Canal Boat James Platt*,* 9 Ben., 491.

§ 1021. For cement lost and damaged by careless exposure on the dock, and by careless re-filling where casks were broken, a carrier was held liable. Even though casks become loose through exposure while in the hold, because they were made of green wood, this does not excuse a careless discharge of the cargo; and the carrier should have had the casks re-coopered before landing them. *The Steamship Harold Haarfager*,* 8 Ben., 216; *Nelson v. National Steamship Co.*,* 7 Ben., 340.

§ 1022. The promiscuous piling of goods on a wharf in discharging a ship is not a good delivery of cargo to a consignee, but it is the master's duty as far as possible to separate and render accessible different consignments to the owners. *The Ship Middlesex*,* 21 Law Rep., 14.

§ 1023. Liability for unclaimed goods.—Where the consignee fails to take away his consignment upon notice on the arrival of the vessel and its discharge, the carrier becomes a compulsory bailee; and the course he adopts towards the goods, for arresting the progress of a damage caused by some peril on the transit for which he was not responsible, should be leniently regarded, provided he acts in good faith and with ordinary judgment. *The Bobolink*,* 6 Saw., 148.

§ 1024. A ship is liable *in rem* where goods are stolen through negligence while still on a pier exclusively controlled by its owners, though discharged on the pier and waiting to be conveyed to the public warehouse by the public carman. *Unnevehr v. Steamship Hindoo*,* 1 Fed. R., 627.

§ 1025. Steamship owners occupied a wharf at New York where their vessels regularly discharged their cargoes, and their mode of doing business as to goods which were to be sent

to the custom-house because consignees had not procured custom-house permits, was to deposit at a particular place on the wharf. A case of goods of this description was missing, and it appeared that the carrier was remiss in respect of leaving the case with general order goods, or at all events failed in there watching and preserving it for a reasonable time in order to enable the proper person to remove it. *Held*, that the carrier was liable for the loss. *The Steamship St. Laurent*, * 7 Ben., 7.

§ 1026. If the consignee of a non-perishable cargo refuses to receive it on its arrival at the port of discharge agreed upon in the charter-party, freight being payable "on delivery of the cargo" at that port, the master can neither transport to a different place nor sell it, but must land such cargo at that port and store it for the shipper's benefit, although it could not be sold there; and to secure his lien for freight, if the consignee refuses to pay it, the master should place the cargo in the hands of his agent for the benefit of the owners, but subject to the freight. *Arthur v. The Schooner Cassius*, 2 Story, 81.

§ 1027. Where a consignee refuses to pay the freight on a cargo, or properly secure the payment, the master should store the same at the port of delivery in care of a third party, with directions to deliver to the consignee's order on payment of the freight. If no such party can be found at the port of delivery, the cargo may be left at the nearest convenient port. *Fox v. Holt*, * 36 Conn., 558.

§ 1028. Where the master finds that he will be delayed in discharging his cargo at the port to which it is consigned, he will not be justified in sailing to another port and there storing the cargo; and if he does so, he will not be entitled to demurrage at the first port. *Strong v. Carrington*, * 2 Am. L. Reg. (N. S.), 287.

§ 1029. A railroad company, keeping a warehouse as a necessary appendage to its business as a carrier in which to store goods until removed by the consignee, is, like an ordinary warehouseman, required to exercise reasonable care and diligence respecting such goods, and the storing of powder in the same warehouse is such negligent conduct on its part as will make it liable for any damage resulting to such goods. *White v. Colorado Central R. Co.*, 5 Dill., 428; S. C., 8 McC., 559.

§ 1030. *Special stipulations.*—If a shipper consigns goods to the master to sell, the latter, as to stowage and transportation, represents and binds the owners; but as to the sale and disposition at the port of consignment, acts as the agent of and binds only the shipper. *The Waldo*, * 4 Law Rep., 382.

§ 1031. A memorandum placed by the charterer in the margin of a bill of lading, "that if, on the arrival of the vessel at the port of destination, the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," imposes no obligation on the master to so proceed if ordered. *United States v. Kimbal*, 13 Wall., 636; reversing *Kimball v. United States*, * 5 Ct. of Cl., 252.

§ 1032. *Alleged deficiency on delivery.*—If a cargo on delivery differs in amount from that stated in the bill of lading, the variance may be explained by showing that the methods employed in either case to ascertain such amounts must necessarily cause the difference. *Manchester v. Milne*, Abb. Adm., 115.

§ 1033. Where a bill of lading stated the cargo as very much larger in quantity than the official weight at the port of delivery disclosed, and where the proof was that all the cargo received was delivered, in the absence of the testimony of those who actually loaded the vessel, the official weight is conclusive of the measure of the carrier's liability. *Cafiero v. Welsh*, * 8 Phil., 130.

§ 1034. Facts considered, tending to the conclusion that, where a deficiency in quantity appeared on the delivery of a cargo of wheat at the end of the transit, the mistake arose in delivering to the carrier; and *held*, that as between the original parties the bill of lading is in the nature of a receipt as to the quantity put on board and is open to explanation. *The J. W. Brown*, * 1 Biss., 76.

§ 1035. Where a lot of nine thousand one hundred and thirty-seven and one-half bushels of corn, for which a clean bill of lading is given, fell short at port of delivery two hundred and forty and one-half bushels, *held*, although carrier proved that he delivered all the corn received by him, and that at the port of delivery corn was sold by weight, that carrier must deliver the same number of bushels at port of delivery as were received at port of shipment. *Creighton v. Steamer George's Creek*, * 5 Pittsb. L. J., 13.

§ 1036. Whether a master's responsibility for accurate accounts of the lading and discharge of a vessel may be affected by particular custom, *quære*. *Steelman v. Taylor*, * 19 Law Rep., 86.

§ 1037. *Delivery to the right party.*—Usage cannot be set up to justify a delivery contrary to the terms of a bill of lading, so as to prejudice the rights of a holder for value whose cognizance and acquiescence do not appear. *Myrick v. Michigan C. R. Co.*, 9 Biss., 44 (§§ 1297-1302).

§ 1039. Where, through the carelessness or fraud of the ship's agent, a memorandum is made on the ship's copy of a bill of lading that it was to be delivered to A., and meanwhile the shipper procures an advance on the goods, and indorses over his bill of lading for security to B., who advances in good faith and without notice of such memorandum, the delivery of the goods to A., on payment of freight, and without notice or inquiry by the master as to the bill of lading given to the shipper, is unavailable against B. as a delivery discharging the carrier. *The Thames*, * 3 Ben., 279.

§ 1039. The execution of a bill of lading is not necessary to render liable a vessel to a consignee, who is recognized as such by the master, and who has made advances and to whom the goods are delivered with a demand for the freight. *Brower v. Brig Water Witch*, * 19 How. Pr., 241; 16 Leg. Int., 348; *The Water Witch*, * 1 Black, 494.

§ 1040. A vessel was chartered to take flour on the outward voyage and coffee on the return, the charterer to pay \$1.25 per barrel on the flour for the round voyage in full for the hire of the vessel; so much as was necessary for expenses to be paid to the master at end of outward voyage, and the balance on the return. The charterer obtained from A. large advances on the flour and indorsed the bills of lading to A., who indorsed them to his agent, with orders to buy coffee with the proceeds, to be shipped to him on return voyage. A.'s agent took possession of the flour on its arrival, the net proceeds of which did not cover the advances, and shipped coffee on the return voyage to A. On the arrival of the vessel, the charterer having stopped payment, the consignment of coffee, which was insufficient to make up the deficit of advances, was seized to meet the owner's claim for freight due from charterer. *Held*, that the coffee was the property of A., and that the charterer had no right to its possession or proceeds, unless there was a surplus after liquidating the advances. *Webb v. Anderson*, Taney, 504.

§ 1041. In order to charge the carrier vessel, some evidence, however slight, must be given on the part of shipper or owner, of non-delivery of the goods, according to the requirement of the bill of lading. And where delivery was to be made to either A. or B., evidence that it did not reach A. is insufficient. *The Falcon*, * 3 Blatch., 64.

§ 1042. One as master took on board L.'s coffee and signed a bill of lading to deliver the same to C. Afterwards L. borrowed money of J., and the master signed a second bill of lading, by which he stipulated to deliver forty-five bags to the plaintiff as security for the money borrowed. *Held* that, as stakeholder or otherwise, the master was liable to the plaintiff for the forty-five bags of coffee, although he had delivered all the coffee to C. under the first bill of lading. *Stille v. Traverse*, * 3 Wash., 43.

§ 1043. Where flour is shipped by two different shippers, all of which flour is branded "Nonpareil Mills," but the two different lots have other marks by which they are easily distinguishable, and all the flour having been discharged on the dock, the delivery clerk permits the consignee of the inferior lot to carry off part of the superior lot, the consignee of the latter, if not at fault, may libel the vessel in damages for the misdelivery. *The Ship Ben Adams*, * 2 Ben., 445.

§ 1044. Where goods are levied upon after being placed upon the vessel, and are carried to the port of destination under an agreement on the part of the master to return them to the sheriff, the master may refuse to deliver them to the consignee. *The Lord*, * Chase's Dec., 527.

§ 1045. Demurrage.—Where there is no stipulation in a bill of lading for "lay" days and demurrage, a consignee is not liable for delays occurring without his fault. *Schooner Glover v. 8,144 Bushels of Barley*, * 5 Ch. Leg. N., 125.

§ 1046. As to an accidental discrepancy between two bills of lading concerning demurrage, *held*, upon the facts, that the first bill of lading showed the true contract, the consignee having been put on inquiry concerning the true contract, inasmuch as his bill of lading did not purport to be signed by the master or by any one authorized to bind the vessel. *Vandover v. Wilmot*, * 10 Ben., 228.

§ 1047. After delivery of the bill of lading to the agent of respondents, whereby they became owners of the cargo, their unreasonable detention of the vessel renders them responsible for its use. *Crawford v. Mellor*, * 1 Fed. R., 638.

§ 1048. A bill of lading stated that the vessel was bound to a specified wharf in Charlestown and undertook to deliver safely at aforesaid port of Charlestown. Reference to demurrage was written across its face. *Held*, that the lay-days began to run after the arrival of the vessel at the wharf. *Cain v. Garfield*, * 1 Low., 483.

§ 1049. Upon the arrival of a vessel phosphates were seized by the marshal by virtue of process issued against the property in a possessory action, and sold at auction as it lay. *Held*, that the purchaser had a reasonable time to remove the phosphates, but that for longer detention the master was entitled to demurrage; and that the claim for demurrage constituted a lien upon the phosphates. 275 Tons of Mineral Phosphates, * 9 Fed. R., 209.

§ 1050. Negotiations between the master after his arrival and the consignees held not to

constitute the mutual substitution of a point for unloading for that stipulated in the bill of lading, in any such sense as to exclude the claim of the vessel for demurrage under the provisions of such bill of lading; nothing being said as to demurrage by either party during such negotiations. *Reed v. Weld*, * 6 Fed. R., 304.

§ 1051. Usage of the port of Chicago as to time of unloading coal vessels considered, and demurrage allowed on the proofs for unreasonable delay by the consignee in arranging piles to suit their convenience and unloading accordingly. *Mitchell v. Langdon*, * 9 Fed. R., 472.

§ 1052. Bill of lading construed, which stipulated in substance that if the consignee should elect to discharge the cargo, instead of leaving the master to discharge it himself, a specified demurrage should be paid. On evidence showing in connection with a receipt in full of all demands signed by the master, that the master on his arrival was assigned dock-room, where other boats were waiting to be discharged by the consignee, and that he voluntarily agreed to wait his turn, *held*, that the consignee did not elect to discharge the cargo under the bill of lading, except for the master's accommodation; that the contract for demurrage was varied accordingly, and that no demurrage could be claimed by the vessel. *Tuttle v. Albany, etc.*, *Iron & Steel Co.*, * 10 Ben., 449.

§ 1053. Where the bill of lading names a wharf for delivery, and the consignee, finding such wharf occupied on the arrival of the vessel, requests the master to unload at another neighboring wharf, the master cannot insist on his strict rights to the extent of waiting unreasonably long until the wharf named in the bill is cleared and then claiming demurrage. *Robbins v. McDonald*, * 2 Low., 140.

§ 1054. A bill of lading which gives an option of reshipment to the shipper does not by implication, *semble*, give such option to the consignee. *McGovern v. Heissenbuttel*, * 8 Ben., 46.

§ 1055. But the master, by accepting a reconsignment of the consignee, may waive the right to make such objection. And for the master's own delay in pursuing such arrangement the vessel cannot claim demurrage. *Ibid*.

§ 1056. Where, on the arrival of a vessel, an arrangement was made between the ship's agent and consignees of the cargo that the vessel should go to a particular dock, where the consignees should send out their lighters to receive the cargo, such arrangement while unrevoked is binding, and the consignees are estopped to deny their liability for demurrage where the vessel goes to the dock and is compelled to wait long for lighters to be sent out. *Irzo v. Perkins*, * 10 Fed. R., 779.

§ 1057. Freight; compensation in general.—Railroad companies are, unless protected by their charters, subject to legislative control as to rates of fare and freight. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155; *Peik v. Chicago, etc., R. Co.*, 4 Otto, 164. See *Munn v. Illinois*, 4 Otto, 113. And see *Chicago, etc., R. Co. v. Ackley*, * 4 Otto, 179, sustaining a Wisconsin statute which prescribes maximum rates of freight and limits the carrier's right to recover accordingly.

§ 1058. A railroad company may participate in the accessory business of making delivery and collecting freight at the doors of customers; but not so as to monopolize such business. *Camblos v. Philadelphia, etc., R. Co.*, * 9 Phil., 411.

§ 1059. As to payment of back charges by one of a line of connecting carriers, see *post*, VII.; *Monteith v. Kirkpatrick*, * 3 Blatch., 279.

§ 1060. Freight in carriage by water.—Freight is usually payable on the safe carriage and right delivery of the cargo. *Strong v. Carrington*, * 2 Am. L. Reg. (N. S.), 299.

§ 1061. Oral agreement between vessel and shipper construed as to the shipment of horses on various vessels, on the understanding that, in consideration of reduced rates of freight, the shipper should pay freight in advance and assume all risks by perils of the sea; and *held*, that, notwithstanding a bill of lading was delivered by the shipper, the vessel was not liable for the return of such freight money where such horses were lost at sea accordingly. *Mehrbach v. Liverpool, etc., Steam Co.*, * 12 Fed. R., 77.

§ 1062. Question of freight considered in connection with an agreement to purchase the vessel, which failed because the carrier could not give a good title. *The Canal Boat Excelsior*, 2 Ben., 434.

§ 1063. Whoever receives cargo from a vessel under a bill of lading is liable for freight in the absence of evidence showing a different mutual understanding. Nor does it affect such liability that the assignee of the bill of lading and buyer of the cargo took such bill without having it formally indorsed, or bought without receiving the bill of lading at all. *Philadelphia, etc., R. Co. v. Barnard*, * 3 Ben., 39. See S. C. on appeal, 6 Blatch., 231.

§ 1064. The assignee of a bill of lading for a valuable consideration, who receives the property mentioned in it, is liable to the owner of the ship for the freight; but no such implied promise arises when the assignee promises to pay it as surety for the assignor. *Trask v. Duvall*, 4 Wash., 181.

§ 1065. Whether, upon a promise by A. to pay freight if B. did not, upon its being ad-

justed with B., due notice to A. of the adjustment with, and non-payment by, B. must be proved, *quere*. *Ibid*.

§ 1066. A vessel was chartered to bring a return cargo of sugar from Havana to New York, and the charter-party, as modified by the charterer's agents in Havana, fixed the amount of the freight money and bound the merchandise for its payment. After the sugar was delivered on board the agents required the master to sign a bill of lading of the cargo deliverable to order at New York at a lower freight, and without allusion to the charter-party. The master, above his signature, wrote: "signed under protest." *Held*, that this signature would prevent an indorsee from obtaining the cargo without payment of the freight expressed in the modification of the charter-party. 779 Boxes of Sugar, 7 Ben., 242.

§ 1067. A consignee, as against a *bona fide* holder of a bill of lading given to secure a draft of the consignor, is entitled to deduct his commissions and charges and insurance advanced by him. *Wolf v. Smythe*, 7 Biss., 365.

§ 1068. Under a charter-party for a voyage out and back at a certain sum per month, payable in three days after the vessel's return, with a memorandum thereon that any freights due on the return voyage the master might receive and account for towards the monthly sum to be paid by the charterer, the charterer has a right to load the whole vessel himself or contract with another so to do, and such other is under no implied obligation to pay freight on the voyage out other than to the charterer; and the fact that the bill of lading taken by the person thus contracting specifies that freight is payable "as by charter-party" is immaterial. *Perkins v. Hill*, 2 Woodb. & M., 158; affirming S. C.,* 1 Spr., 123.

§ 1069. Where by the terms of a charter-party the entire possession and control of the vessel is reserved to the master and owner, the right of the master to collect freight from a consignee after the delivery of goods, to the amount at least due on the charter-party, cannot, in the absence of an express contract by the master with the charterer and consignee, be varied by any agreement between the charterer and the consignee to appropriate any freights that might come into the latter's hands under the bill of lading to repay advances made by the consignee to the charterer, although the bill of lading directs the freight to be paid to the consignee. *Shaw v. Thompson, Olc.*, 144.

§ 1070. Notice by a master to a consignee on the delivery to and acceptance by the latter of goods that freight must be paid to the master and not to the charterer, under a charter-party reserving control and possession of the vessel to the charterer and owner, has the same effect as a like reservation in the bill of lading. *Ibid*.

§ 1071. Where a vessel was chartered for a round sum, to go up a river for a cargo of lumber, with a guaranty of eight feet of water at the place of loading, to enable the shipment of a full cargo, such a guaranty requires a like depth of water in the river below the point of loading, and the master is entitled to the sum agreed upon in carrying less than full cargo because of a lack of depth, and is not liable for the loss of a raft towed by him at the charterer's instance to complete the cargo when deep water was reached. *Shaw v. Hart*, 1 Spr., 507.

§ 1072. Freight, how computed.—The value of freight money expressed in pounds, shillings and pence, sterling, for the transportation of goods from Whampoa to New York, is the value of the specific amount of coin in gold and silver coined money of the United States at New York on the day of delivery. *Forbes v. Murray*, 3 Ben., 497.

§ 1073. A railroad company, as a common carrier, while it may charge an additional sum for the carriage of packed parcels, to guard against any contingent liability, cannot impose upon the public or express carriers a charge therefor equal to the full sum chargeable if each parcel was carried separately. *Camblos v. Philadelphia, etc., R. Co.*,* 9 Phil., 411.

§ 1074. Although the handling of coal in unloading may involve the loss of a certain percentage as a natural result of its character, the carrier is entitled to freight on the whole quantity laden, if it has not been diminished by his fault. *Steelman v. Taylor*,* 3 Ware, 52.

§ 1075. Bill of lading construed which described wood as "one hundred and twelve and one-half cords pine wood, Norfolk inspection," and stated that it was to be delivered on payment of freight at "\$4 per cord." *Held*, that freight was contemplated on the quantity as thus stated, and not on what the wood might prove to measure when discharged. *The Schooner Defiance*,* 6 Ben., 162.

§ 1076. A ship-master is entitled to full freight on the cargo laden and expressed in the bill of lading, although through natural causes and no fault of his the amount delivered may be inferior and diminished. *Steelman v. Taylor*,* 19 Law Rep., 36; *Hart v. Shaw*, 1 Cliff., 353.

§ 1077. Where, under a charter-party, freight was to be allowed on the "gross gauge of the casks delivered," freight is due upon the casks delivered, whether the goods were lost by ordinary leakage or the dangers of the seas. *The Brig Cuba*, 3 Ware, 260.

§ 1078. For goods carried on deck without express permission of the shipper only deck rates can be claimed, and not full freight. *Vernard v. Hudson*,* 3 Sumn., 405; *Brower v. Brig Water Witch*,* 19 How. Pr., 241; 16 Leg. Int., 849; *The Water Witch*,* 1 Black, 494.

§ 1079. Where freight on a cargo of cotton was to be paid at so much per pound, and at the bottom of the bill of lading the words "contents and weight unknown" were added, *held*, that the shipper was liable for freight on the actual weight of the cotton, although there were figures in the margin apparently intended to indicate the weight of the cotton. *The Andover*, * 3 Blatch., 208.

§ 1080. Where a cargo of coal is unloaded, and all that was received on board is delivered, and a deficiency appears in the amount delivered as compared with that stated in the bill of lading, but no fraud or neglect on the part of the carrier, it may be presumed that the carrier has performed his duty; and he is entitled to full freight according to his bill of lading under these circumstances. *Steelman v. Taylor*, * 3 Ware, 52.

§ 1081. When freight is not earned.—There can be no action for freight unless delivery is made or prevented from being made by the act or fault of the shipper or consignee. 175 Tons of Coal, * 9 Ben., 400; *The Brig Cuba*, 3 Ware, 260.

§ 1082. If a carrier is prevented from delivery of goods by dangers of the seas, for which he is excused by the bill of lading, his freight, nevertheless, is not earned. *The Brig Cuba*, 3 Ware, 260.

§ 1083. Where a charter-party stipulates that the freight for a full cargo should be \$3,000, "payable in cash on the correct delivery of the cargo," with no exception as to perils of the sea or other misadventure, nothing can be recovered without delivery of the entire cargo, although, after starting with a full cargo, the vessel is obliged to put back to port on account of perils of the sea, and while there a portion of the cargo is sold by the authorities and the rest is delivered on bills of lading to consignees at the port of delivery. *Willett v. Phillips*, 8 Ben., 459.

§ 1084. If cargo is not conveyed to its destination no freight can be demanded. If voluntarily accepted at an intermediate port, freight *pro rata* is due. But where the cargo is there received or its proceeds, by compulsion, as under judicial procedure, the owner receives without prejudice. *Hurtin v. Union Ins. Co.*, * 1 Wash., 530.

§ 1085. Consignee of property transported by a common carrier held liable for full freight where he demanded and received it before it reached its ultimate destination. *Violett v. Stettinius*, * 5 Cr. C. C., 559.

§ 1086. An insurer who takes and receives possession of cargo damaged by the carrier's fault under an abandonment and sells it, a portion being delivered to the purchaser, and thereupon, fearing that the master will charge freight upon the damaged cargo, countermands the order to sell, unless the master will relinquish his claim to freight, cannot then compel the master to deliver at the port of consignment in good order and condition under the bill of lading, but is liable for freight *pro rata itineris* of the cargo thus accepted: *Propeller Mohawk*, 8 Wall., 153.

§ 1087. On brittle goods properly stowed and cared for with reference to their nature, the vessel is not liable for breakage, although the bill of lading makes no such express exception, and the consignee cannot claim the right to withhold freight money upon the broken goods. 1,265 Sewer Pipes, * 5 Ben., 402.

§ 1088. A cargo of corks, being in part damaged, were sold at auction, and it was claimed that they would have sold to better advantage if the sound had been separated from the unsound portion. *Held*, that the master should have made such separation, and that it was not the consignee's duty to do so. *The Columbus*, * Abb. Adm., 37.

§ 1089. Where a charter-party expressly stipulates for the payment of freight only after the delivery of cargo to the bearers of the bills of lading, and also lays upon the consignees of the charterer the duty of collecting the freight, the latter, although a portion of the cargo was damaged in the transit, are liable for the freight thereon if they fail to reasonably ascertain the extent of the damage. *Eames v. Cavaroc*, Newb., 528.

§ 1090. The vessel's contract is not terminated, nor the right to earn freight by delivery lost, merely because the consignee abandons the property to the underwriters when the vessel sinks at the dock. Delivery at a place designated by the underwriters in suitable performance of the contract set forth in the bill of lading leaves a right to the freight unimpaired and a lien accordingly. *Donovan v. 240 Tons of Coal*, * 8 Fed. R., 369.

§ 1091. Freight is not forfeited by reason of the master's unjustifiable deviation, where the goods are delivered damaged and the consignee seeks to recover what he would have been obliged to pay had the goods been delivered in a sound state. *Knox v. The Ninetta*, * Crabbe, 534.

§ 1092. Lien, remedies, etc.—A carrier in suing for freight may libel the property *in rem*, and join the claimant in the same suit. 680 Quarter Casks of Sherry Wine, * 14 Blatch., 517.

§ 1093. If cargo is lawfully jettisoned, the owner has a lien on the vessel for its contributory share of the general average. *Dupont de Nemours v. Vance*, 19 How., 162.

§ 1094. A ship-master cannot agree to free the charterer's goods from the lien for freight under the charter-party, nor will a bill of lading given by him for that purpose to one, with

knowledge of the charter-party, have the force to deprive the ship-master of his lien. *The Salem's Cargo*, 1 Spr., 389.

§ 1095. If a ship-owner, a common carrier, with the intention only of discharging his cargo, delivers it to the agents of the consignee, he does not thereby lose his lien for the costs of transportation, especially if the bills of lading are retained and the customary receipt for the cargo is not given after such delivery. 600 Tons of Ore, 9 Fed. R., 593.

§ 1096. One who has entered into a special contract with the master of a coasting vessel, by the terms of which the master is to deliver a cargo, and the freight money is to be applied on an account of the consignor for supplies furnished to the master on the latter's credit, partly for manning and victualing the vessel in a home port for the particular voyage, and partly for the private use of the master and his family, cannot resist the lien of the owners of the vessel on the cargo for freight by offering to give security "if he is legally liable." *Fox v. Holt*, 4 Ben., 278.

§ 1097. Delivery of the cargo to the consignee *prima facie* releases the lien for freight; there should be a notice or special agreement in order to preserve it, under such circumstances, and a mere intention to retain the lien, on the carrier's part, is insufficient. *The Tan Bark Case*,* 1 Brown, 151.

§ 1098. The mere manual delivery of goods to the consignee does not necessarily defeat the carrier's lien for freight; nor is a certain delivery by mutual assent, under the expectation that freight will be paid at the time, such a delivery as parts with the lien. 151 Tons of Coal,* 4 Blatch., 368; S. C., 18 How. Pr., 25; 15 Int. Rev. Rec., 34.

§ 1099. Lien for demurrage held to be waived, notwithstanding the master stated that he should look to the cargo for the claim for demurrage; the cargo being actually delivered by him and the freight money paid, and the person receiving the cargo manifesting no assent that such lien should continue. *Winslow v. 403 Barrels of Salt*,* 1 Biss., 459.

§ 1100. Under a charter-party, whereby the charterer covenants to pay the owners, on the vessel's return and before the discharge of her cargo, in approved notes, a gross sum for freight, no special ownership passing to the charterer, the charterer and master cannot at a foreign court defeat the owner's lien for freight by giving a lien on the return cargo to one who advances money for its purchase to the charterer. *Palmer v. Gracie*, 8 Wheat., 605; reversing S. C., 4 Wash., 110.

§ 1101. Goods shipped at one and sold at another intermediate port of a voyage, the proceeds of which are applied to payment of freight under a charter-party, are freed from a lien for balance of freight due at the port of discharge. *The Salem's Cargo*, 1 Spr., 339.

§ 1102. A vessel went ashore on the coast, and, under orders from the consignees and shippers, the master sold the perishable cargo at auction. But afterwards, at the advice of the insurers of the cargo, he broke off the trade, and reshipped the sound part of the cargo by another vessel under a fresh bill of lading, and afterwards sued for freight and demurrage, under the original bill, and the amount of duties paid. *Held*, that the contract of affreightment was ended by the acts of the master in selling the cargo, and that there was no lien in the carrier's favor upon the property for these charges. *Allen v. 3,183 Bushels of Potatoes*,* 8 Fed. R., 763.

§ 1103. Where a vessel on arrival had allowed a portion of the cargo to be transhipped and the remainder to be placed in bond by the owner's administrator without asserting any lien for freight, *held*, that the unconditional delivery discharged the lien. *Sears v. Bags Linseed*, 1 Cliff., 68.

§ 1104. A ship-owner may not appropriate a part payment of freight money to a demand for freight in dispute, and then sue for the remainder upon an undisputed claim. *Crosby v. Grinnell*,* 9 N. Y. Leg. Obs., 281.

§ 1105. Acceptance by consignee.—A master of a vessel, who is also consignee of the cargo, has the authority of supercargo, and his acknowledgment of the receipt of good flour, in lieu of other flour damaged during the voyage, is evidence for the defendant. *Smedley v. Yeaton*,* 3 Cr. C. C., 181.

§ 1106. Where the consignee demands the last of his consignment during proper hours at the ship on Saturday, and tenders all the freight due, and the master had not previously notified him that the freight must be paid elsewhere, a reasonable time should be allowed before the goods are stored at the consignee's expense. *The Bark Diadem*,* 4 Ben., 247.

§ 1107. If the owners of a vessel undertake to retain a portion of the cargo for the entire freight, they are bound to retain it at the port of delivery, and, if they unnecessarily remove it, are liable in conversion for the excess of its value over the freight money. *Fox v. Holt*, 4 Ben., 278.

§ 1108. In a suit by a carrier for freight on a cargo of coal, where it appeared that he delivered all in his possession at the time of his arrival, and that the coal was accepted by the consignee without any reservation of his right to weigh and inspect, the burden was on the

consignee to prove that a deficiency subsequently ascertained was chargeable to the neglect of the carrier. *M'Cready v. Holmes*,* 6 Am. L. Reg. (O. S.), 239.

§ 1109. The consignee may qualify his acceptance by notice to the carrier that he intends to weigh, measure, or, by any other appropriate test, ascertain if what he has received is that which the carrier admitted he had received and agreed to deliver; and such notice would bind the carrier, so that he would be concluded by the examination made in pursuance of it unless he was able to show its insufficiency. *Ibid.*

§ 1110. A ship-master, who had received on his vessel seed, not being able to get sufficient cargo transhipped the seed without the consignees' consent, and on its arrival at the port of shipment, not knowing and being unable to find the consignees or their place of business, after the lapse of several days stored it in a warehouse for that purpose, where one of the consignees, having subsequently seen it and received an offer of delivery on the payment of the freight, refused to accept, so notified the master, and demanded equivalent in damages. The value of the seed had declined between its arrival and the consignees' knowledge of that fact. *Held*, that the consignees should not refuse the shipment, but were entitled only to the depreciation in value. *House v. Schooner Lexington*,* 2 N. Y. Leg. Obs., 4.

§ 1111. A bill of lading provided that "in case consignees discharge cargo, or any part thereof, they are to be charged not to exceed ten cents per ton, and to have four full working days after notice of arrival at dock of consignees of said boat, in which to discharge cargo," with stipulation for payment of demurrage in case of longer detention. *Held*, that a consignee had the option to unload the cargo or not; notification by consignee that he will not unload except in regular turn, and in that case will pay no demurrage, amounts to a rejection of his right to unload. (*Tuttle v. Albany Iron and Steel Co.*,* 10 Ben., 449, approved.) *McLaughlin v. Albany, etc., Iron and Steel Co.*,* 8 Fed. R., 447.

§ 1112. Consignee's rights, etc. — Consignees have a paramount lien upon the goods for advances made under the bill of lading to the consignor; and the consignor has no right to stop them *in transitu* or divert them in any manner. Where part of the goods were not delivered, and another part delivered in a damaged state, the consignees were allowed to recover accordingly to the extent of their advances. *Burritt v. Rench*,* 4 McL., 325.

§ 1113. A shipper of goods has a lien on the vessel for damage or loss of the goods through the fault of the master, and may enforce this lien by proceeding *in rem* against the vessel. *The Rebecca*, 1 Ware, 183.

§ 1114. Where a charter-party provides that the master should be owner for a voyage and share the freight with the owners, such owners are directly liable as owners for the voyage, and a shipper, although making a personal agreement with the master, is not thereby deprived of his remedy against the owners. *Arthur v. The Schooner Cassius*, 2 Story, 81.

§ 1115. Where sugar is carried in a vessel insufficiently dunnaged for its protection against an ordinary leak, and is damaged in consequence, the consignee may set off the damage by way of deduction of freight. Question of sufficient tender by the consignees considered. *Endicott v. Renauld*,* 10 Ben., 532.

§ 1116. Where wheat was shipped under a bill of lading specifying that the quantity and quality are unknown, the burden of proof is on the shipper to show non-delivery of the full amount received by the carrier. *Campart v. The Prior*,* 2 Fed. R., 819.

§ 1117. The refusal of the master to sign bills of lading cannot be alleged in denial of a liability to deliver in good order as received, with the usual exceptions, if the cargo was actually received, carried to the consignee, and then libeled for freight. *The Water Witch*,* 1 Black, 494.

§ 1118. Where a ship is detained by ice after lading, but subsequently proceeds and delivers her cargo, the shipper, unless he rescinds his contract, cannot sue for damages until the time for the performance of the contract has expired. *Jones v. The Floating Zephyr*,* 7 Am. L. Reg. (O. S.), 494. The owner is not released, by the death of the master, from the performance of a contract of affreightment. *The Flash*,* Abb. Adm., 119.

§ 1119. Trover cannot be maintained against the master of a vessel for the cargo without payment or tender of freight or a waiver thereof; nor unless the cargo came to the use of the defendant. *Hodgson v. Woodhouse*, 1 Cr. C. C., 549.

§ 1120. In a suit against a carrier for failure to deliver goods, a claim for freight for other services must be set up by cross-libel; the action will not be defeated by merely showing that no credit is given for such freight. *Maxwell v. The Powell*,* 1 Woods, 101.

§ 1121. A consignee may recoup for damage to the cargo, where the vessel brings a libel for the freight. But though the damage proved should exceed the amount due for freight, no affirmative judgment can be allowed to the respondent; his proper remedy being a cross-libel in such case. *Snow v. Carruth*,* 1 Spr., 324; *Bearse v. Ropes*,* 1 Spr., 331.

VI. ACTIONS BY AND AGAINST COMMON CARRIERS.

SUMMARY — *Actions against common carriers; who should sue*, §§ 1122-1126. — *Evidence*, § 1127. — *Defenses*, §§ 1128, 1129. — *Measure of damages*, §§ 1180-1189. — *Carrier's libel for freight*, § 1140.

§ 1122. Rule as to whether consignor or consignee should sue for loss of cargo considered. The right to sue is in the person who has right of possession and right of property; consignee is *prima facie* thus entitled. *Blum v. The Caddo*, §§ 1141-1143. And see §§ 213, 222, 463, 843.

§ 1123. Consignee of cargo may maintain libel in his own name for injury to cargo. *McKinlay v. Morrish*, § 1155.

§ 1124. A *bona fide* indorsee of a bill of lading becomes owner of the goods, as against any equities subsisting between seller and buyer, no fraud in the original purchase appearing. *The Schooner Mary Ann Guest*, §§ 1144, 1145.

§ 1125. Where the *bona fide* indorsee of the bill of lading sues the vessel for failure to deliver the goods, it is no defense that the goods were seized by judicial process in a suit against the consignee who assigned the bill. *Ibid.*

§ 1126. An insurer of goods, destroyed by accidental fire on the transit, who has paid the loss, may sue the common carrier for indemnity by suit brought in the name of the insured. As between insurer and carrier, the latter is ultimately liable for a loss rather than the former. *Hall v. Railroad Companies*, §§ 1146-1149.

§ 1127. Where a libel charges damages from negligent and improper stowage of cargo, evidence of unseaworthiness is inappropriate. *McKinlay v. Morrish*, §§ 1150-1153.

§ 1128. When goods are seized on the transit under an attachment, the carrier is not in default for yielding to the custody of the law. In such case an aggrieved shipper's remedy is against the attaching officer or the plaintiff who causes the attachment. *Stiles v. Davis*, §§ 1156, 1157. And see §§ 993-995.

§ 1129. Where packages of liquor while on the transit are seized, judicially condemned and destroyed under a state liquor law, the carrier is not liable for their non-delivery, provided he acts in good faith towards his customer, giving the latter due notice of the seizure. *Wells v. Maine Steamship Co.*, §§ 1158-1161.

§ 1130. A carrier is liable for the net value of goods lost at the port of delivery, including interest from the time when they should have arrived, but not anticipated profits. *Bazin v. The Steamship Co.*, §§ 1162-1166.

§ 1131. Measure of damages stated, where carrier contracts to carry goods by a specified vessel and then refuses to perform the voyage, without legal justification, offering to return the goods to the shipper. *Harrison v. Stewart*, §§ 1167-1169.

§ 1132. Measure of damages stated where carrier, at the end of the transit, refused delivery to the consignee on wrongful grounds. *Schmidt v. The Pennsylvania*, § 1170.

§ 1133. Computation of damages where, through the careless stowage of sacks of salt near powdered arsenic, the salt was so impregnated that its commercial value for domestic purposes was destroyed. *The Niagara*, § 1171.

§ 1134. Rule of damages stated where a vessel with its cargo was seized, while coasting on the great lakes, for breach of revenue laws; the master evading the owner of the vessel who had placed him in possession. *Jackson v. The Julia Smith*, §§ 1172, 1173.

§ 1135. Where specie was shipped for the purchase of a return cargo, and the master used part of the specie in procuring necessary repairs, the shipper is entitled to interest which will place him in as good condition as if the property of some other shipper had been taken instead. But possible profits on the sale of a return cargo cannot be computed. *The Mary*, §§ 1174, 1175.

§ 1136. Where a vessel, having flour on board, capsized at the wharf before sailing, it is wrongful for the carrier to make a peremptory sale of the damaged property where he might have taken the directions of the owner. Rule of damages stated in such a case: The whole value of the flour at the port of delivery, etc. *The Joshua Barker*, §§ 1176-1178.

§ 1137. But where the cargo is lost by a collision or other tort, the measure of damages is the value of the lost property at the time and place of shipment. *The Mary J. Vaughan and The Telegraph*, §§ 1179-1181.

§ 1138. Rule of damages stated, allowing for exchange, and with reference to legal tender acts. *Ibid.*

§ 1139. Measure of damages stated where carrier delivers goods to the wrong person and the latter delivers to the right person or accounts for their value. *Rosenfield v. Express Company*, §§ 1182-1185.

§ 1140. On a libel for freight, delay is no defense unless some resulting damage is shown. A failure to sell to parties expected is insufficient proof of such damage, where it appears that the market value at the date of actual delivery was fully equal to the market value when delivery was due. *Page v. Munro*, § 1186.

[NOTES.—See §§ 1187–1242.]

BLUM v. THE CADDO.

(Circuit Court for Louisiana: 1 Woods, 64–68. 1870.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The libel alleges that on or about the 12th of September, 1868, the libelants shipped at New Orleans, on board the steamer Caddo, seven cases and one bale of dry goods to be conveyed to Shreveport, Louisiana, and there delivered to Stacy & Poland, consignees; that the steamer failed to deliver a part of the goods, amounting in value to \$963.74, which sum, together with the freight, insurance and charges upon said goods, amounts to \$1,127.54, for which last named sum, with interest and costs, the libelants ask a decree against the Caddo. A. A. Barnes and Thomas Knee intervene as sole owners and file an answer. The proof shows that the goods were sold on credit by the libelants, who were merchants in New Orleans, to G. Dreyfus, who was a merchant at Jefferson, Texas, and charged to him on books of libelants. The goods were shipped according to the orders of Dreyfus, marked "G. D., Jefferson, Texas," and consigned to the care of Stacy & Poland, of Shreveport, which was an intermediate port. The goods were insured by libelants in the Louisiana Mutual Insurance Company, and the premium charged to Dreyfus. The freight was not paid by libelants, but by Stacy & Poland, of Shreveport, who were agents of Dreyfus for that purpose and also to receive and forward the goods to Jefferson, Texas.

§ 1141. *Whether consignor or consignee should sue for goods lost.*

Upon this state of facts the claimants say that libelants had no property in the goods lost, and therefore cannot maintain this suit. The question whether the consignor or consignee has the right of action in cases where goods consigned to a common carrier are lost or damaged has been somewhat unsettled by conflicting decisions both in England and this country. The decided weight of authorities is now in favor of the proposition that the person having the right of property and the right of possession is the one to sue, whether consignor or consignee. *Tindall v. Taylor*, 28 Eng. L. & Eq., 210; *Potter v. Lansing*, 1 Johns., 214; *Dawes v. Peck*, 8 Term R., 330; *Dutton v. Solomonson*, 3 Bos. & Pull., 582; *Brown v. Hodson*, 2 Camp., 36; *Ludlow v. Bowne*, 1 Johns., 1; *De Wolf v. New York Fire Ins. Co.*, 20 Johns., 214; *Price v. Powell*, 3 Comst., 322; *Everett v. Saltus*, 15 Wend., 474; *Ilsley v. Stubbs*, 9 Mass., 65; *The Venus*, 8 Cranch, 252; *The Merrimack*, id., 317; *The Frances*, 9 id., 183; *Brandt v. Bowlby*, 2 Barn. & Ad., 932. The property in the goods shipped is considered to be *prima facie* in the consignee, and he will be entitled to sue in the absence of proof to the contrary. *Lawrence v. Minturn*, 17 How., 100 (§§ 463–470, *supra*); *Ogden v. Coddington*, 2 E. D. Smith, 317; *Tronson v. Dent*, 36 Eng. L. & Eq., 41; *Coleman v. Lambert*, 5 Mees. & W., 502. In the case of *Evans v. Marlett*, 1 Ld. Raym., 271, it was held: "If goods by bill of lading be consigned to A., A. is the owner and must bring action against the master if they are lost. But if the bill be special, to be delivered to A. to the use of B., A. ought always to bring the action, for the property is in him, and B. has only a trust *per totam curiam*."

A delivery to an agent for and on behalf of his principal will transfer the property equally with a delivery to the principal himself. This is an elementary rule in the transfer of property, and the master of a vessel is considered the agent of the consignee. Per Kent, C. J., in *Ludlow v. Bowne*, 1 Johns., 15. So in *Godfrey v. Furzo*, 3 P. Wms., 185, the like rule was laid down by Chancellor King, who said that on the delivery of goods to the master of a ship the property immediately vested in the consignee, who was to run the risk of the voyage. So in *Snee v. Prescott*, 1 Atk., 248, Lord Chancellor Hardwicke said that if goods are delivered to a carrier to be delivered to A., and they are lost, the consignee only can bring the action, which showed the property to be in him; and he said it was the same when goods were delivered to the master of a vessel, though he allowed at the same time the right of the consignor to stop *in transitu*.

From these authorities, the following principles may be considered as established: 1. That the right to sue is in the person who has the right of possession and the right of property. 2. That *prima facie* the consignee is the owner and entitled to sue. 3. That a delivery of goods to the common carrier is a delivery to the consignee. 4. That when the consignee is the owner or agent of the owner he and not the consignor must sue.

§ 1142. *Sale established on the facts in the present case.*

In the case on trial the proof shows that the goods were sold by libelants to Dreyfus and their value charged to him on their books. They were delivered to the carrier, marked with the initials of Dreyfus and with the place of his residence, Jefferson, Texas, and consigned to Stacy & Poland at Shreveport, an intermediate port. They were insured by libelants, but the premium paid was charged by them to Dreyfus. It seems to me there is nothing wanting to a complete transfer of the property from libelants to their vendee. Here is a sale, a delivery to the common carrier, the agent of the vendee, and the goods are shipped at the risk of vendee. The only right in the goods left in libelants, after their delivery to the common carrier, is the right of stoppage *in transitu*. The effect of this right upon the question under discussion is stated by Kent, C. J., in *Ludlow v. Bowne*, 1 Johns., *supra*, as follows:

§ 1143. *What is the right of stoppage in transitu.*

"The right of stoppage *in transitu*, as between vendor and vendee, came from the court of equity. The first case in the books is that of *Wiseman v. Vandeputt*, 2 Vern., 203, in chancery. On the first hearing the chancellor ordered an action of trover to be brought to try whether the consignment vested the property in the consignee, and it was then determined in a court of law that it did. But equity thought it right to interpose and give relief, and since that time this new rule of stoppage *in transitu* has been admitted in courts of law as well as equity, between consignor and consignee, in case of insolvency of the latter and before actual delivery. This rule is not considered, however, as altering the right of property which, by the old rule of law, vested in the consignee upon delivery to the carrier, for him and at his risk. The delivery to the carrier," the chief justice goes on to say, "is a constructive delivery to the vendee, and the goods are considered in the possession of the vendee the instant they pass out of the possession of the vendor, to every other purpose but that of defeating the equitable right of reclaiming the property upon the insolvency of the vendee." The same doctrine is fully recognized in *Cox v. Harden*, 4 East, 211, in which the court says that "a delivery to the master of a general ship, under a consignment, is a delivery to those to whom and for whose use

the goods were sent, and at whose risk they were during the passage; and that the property was subject only to be diverted by the shippers' right of stoppage *in transitu*, which was deemed a species of *jus postliminii*." See, also, Hardwicke, Chancellor, in *Snee v. Prescott*, 1 Atk., *supra*. So we may consider it settled that the right of stoppage *in transitu* remaining in the vendor does not affect the right of property in the vendee. The title to the property remains in the vendee until divested by the exercise of the right of stoppage *in transitu*. But libelants claim that they are the proper parties to sue because they made the contract of affreightment with the common carrier, to whom the vendee was a stranger and who entered into no contract with the carrier. But it has been repeatedly held that the vendor in making the contract with the carrier acts merely as the agent of the vendee. *Dawes v. Peck*, 8 Term R., 330; *Coates v. Chaplin*, 2 Gale & D., 552; *Dunlop v. Lambert*, 6 Clark & F., 600.

I am of opinion on the authorities cited that the libelants have not the right to sue under the facts in this case, and while, according to some of the authorities, the suit should have been brought by Stacy & Poland, and according to others by Dreyfus, the owner, yet the great weight of authority is that the right of action is in one or the other of them and not in the libelants. The libel must therefore be dismissed at costs of libelants. Decree accordingly.

THE SCHOONER MARY ANN GUEST.

(District Court for New York: Olcott, 498-502. 1847.)

STATEMENT OF FACTS.—Action *in rem* to recover money advanced on a bill of lading. The bill of lading was indorsed to the libelant by the consignee, but the goods were seized by the sheriff on their arrival on a claim against the consignee, and never delivered to the libelant.

Opinion by BERRS, J.

This was an action for the recovery of \$1,050, with interest upon the same, money advanced by libelant to the consignee of certain packages of goods shipped by him from Philadelphia to New York. The consignee, desirous of raising that amount of money, applied to the libelant for the same upon the security of the bill of lading, which, upon the loan being made, was duly indorsed and delivered to him. There is nothing in the evidence to impugn the fairness of the transaction between the parties, and, although it appears that the purchaser of the goods was probably insolvent at the time of the sale of the goods, it does not appear that the libelant was aware of the fact.

§ 1144. *A bona fide indorsee of a bill of lading becomes owner of the goods as against seller and buyer.*

There is no doubt that if the purchaser had fraudulently induced the seller to part with his goods by representing that he was solvent when the fact was otherwise, the vendor would have a right, by a stoppage *in transitu*, to reclaim the goods. Such fraudulent purchase, as between the vendor and vendee, would not divest the owner of his right and title to the goods. But when the vendor has, for a valuable consideration, parted with the possession of the goods, and third parties have innocently and in good faith purchased them from the vendee, the title of such third person cannot be disturbed by any equities which the original owner might have possessed. 6 Metc., 68. For the convenience of commercial transactions, bills of lading have been allowed to become negotiable instruments; and upon the faith of them it is usual and

customary for commission merchants to make advances. By such indorsement of the bill of lading the holder of it becomes, as against all the world, the owner of the goods. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386; *Nathan v. Giles*, 5 Taunt., 558. The bill of lading transfers the property to the consignee; and it seems to be conceded that the assignment of it by the consignee, by way of sale or mortgage, will pass the property, though no actual delivery of the goods be made, provided they were then at sea. 2 Kent, 549; *McNeil v. Glass*, 13 Mart. (La.), 261.

§ 1145. *Where the indorsee of a bill of lading sues the vessel for failure to deliver the goods, it is no defense that the goods were seized in a suit against the consignee.*

It is no defense to the claim of the consignee that the goods have been attached or seized by virtue of any judicial process. The contract of the carrier is that he will deliver the goods in good order and condition to the shipper or to his assigns (the dangers of the seas only excepted). He thus guaranties to protect the right of possession of the shipper and his assigns. He had the right to the possession of the goods as against the sheriff, and could have interposed in the replevin suit and had an immediate trial of the right of the sheriff to take them from his possession. 2 R. S., 432, §§ 13, 16, 17. The libellant is, upon the proofs and the law, entitled to a decree in his favor for the value of the goods claimed by him and his costs, and the cause must be referred to a commissioner to report upon such value. (a)

HALL v. RAILROAD COMPANIES.

(18 Wallace, 567-578. 1871.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

STATEMENT OF FACTS.—Hall & Long had shipped cotton by a railroad company, and in its transit it was burned. This suit was brought in their name for the use of certain insurance companies who had insured the cotton. There was a demurrer and judgment in the court below for the defendant. The question was whether an action would lie in the name of the owner upon the common law liability of the carrier.

§ 1146. *As between carrier and insurer the ultimate liability for loss is upon the former.*

Opinion by MR. JUSTICE STRONG.

It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty.

§ 1147. *An insurer who has paid a loss is subrogated to the rights of the insured.*

Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is

entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner.

§ 1148. — *such insurer may sue carrier in the name of the insured.*

Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, sec. 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance. In *Gales v. Hailman*, 11 Penn. St., 515, it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart v. Western R. Co.*, 13 Metc., 99, it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers. *Rockingham Mutual Fire Ins. Co. v. Bosher*, 39 Me., 253; *Peoria Ins. Co. v. Frost*, 37 Ill., 333; *Connecticut Mutual Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn., 265. And such is the English doctrine, settled at an early period. *Mason v. Sainsbury*, 3 Doug., 60; *Yates v. Whyte*, 4 Bing. N. C., 272; *Clark v. Blything*, 2 Barn. & Cress., 254; *Randal v. Cockran*, 1 Ves. Sr., 98.

§ 1149. *A carrier is not an insurer; his liability rests on other grounds.*

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case,

the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of indemnity relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved or presumed to be the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter who has paid a loss is entitled to recover what he has paid by a suit in the name of the assured, against a carrier who caused the loss.

Judgment reversed, and the cause remanded for further proceedings.

McKINLAY v. MORRISH.

(21 Howard, 343-353. 1858.)

APPEAL from U. S. Circuit Court, Northern District of California.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This is the case of a foreign vessel having been libeled in a port of the United States when about to leave it; her master having refused to pay for the damage said to have been sustained on a shipment of soap, made at Liverpool, to be carried to San Francisco, California, *via* Honolulu. The shipment was made by Matthew Steele & Son. It was said in the bill of lading to be in good order and condition, and the undertaking was to deliver it so to Messrs. McKinlay, Garriock & Co., or to their assigns.

The consignees libeled the ship, alleging that, though they were always willing to receive the shipment in good order, the master of the ship had not made it, and that they had refused to receive it on account of the injury it had sustained from a want of proper care in loading, storing, landing, re-landing and re-storing the soap, and owing to the careless, negligent and improper manner of storing it under the deck of the ship, which was open and leaky, through which water passed, and damaged it to the amount of \$9,500. The respondent meets the charges by a direct denial of them, averring if the soap had been in any way injured, it may have been from causes beyond his control by any care whatever, and should be attributed to causes or perils excepted to, as they were expressed in the bill of lading, *viz.*: "all and every danger and accident of the seas and navigation of whatsoever nature." The respondent also declares that his ship was, at the time of her sailing from Liverpool, in good, tight and strong condition, well manned, and that her cargo was well dunnaged and stowed; but that, in the course of passage to Honolulu, she encountered heavy storms and gales, which strained and caused her to leak, and

had compelled him to throw overboard a part of the cargo, for the preservation of the rest of it, and of the vessel; and that during the passage he had used every precaution to preserve the cargo that was within *his* power and that of his officers and crew.

§ 1150. *Where a libel containing express allegations is met by express denials, testimony inapplicable cannot be introduced.*

The libel and answer are directly at issue, and no answer can be made more responsively to the charges in a bill than this is. According, then, to the rules of pleading in admiralty, there is no necessity for doing so, nor are we permitted to consider much of the testimony in this record. When litigants make their case in express allegations and by express denials of them, and then introduce testimony inapplicable to the issues they have made, it is not a part of the case, unless as it shall inferentially bear upon other evidence properly in it, upon which the parties rely for the determination of their controversy. This case furnishes as apt an illustration of the rule just mentioned as can be given. The libelants put their case upon bad and careless stowage, etc., of the soap, and upon leaks in the deck of the ship, through which water passed and damaged it. The respondent denies both; but he goes on to state that his ship was tight and strong for the voyage when he left Liverpool, and both parties question the witnesses as to that fact; though the libelants had not charged that their goods had been injured from that cause, and had not put in issue at all the soundness and seaworthiness of the ship for the voyage she was about to make. This same point of pleading was before this court in the case of *Lawrence v. Minturn*, 17 How., 100, 110, 111 (§§ 463-470, *supra*), which was as learnedly argued, and as deliberately decided, as any other case in admiralty has been in our time. This court then said: "We find the conduct of the master in making the jettison to have been lawful; and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners. The libel alleges the loss of the goods to have been through the mere carelessness (just as the libel in this case does) and misconduct of the master and mariners. We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libelants have at the hearing so much insisted upon, and what we think is the main question in this part of the case, *the sufficiency of the ship to carry the cargo*. It is no doubt the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owner does not amount to negligence or want of skill of the master and mariners. There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let in the libelant to prove unseaworthiness of the vessel." And in the next paragraph of that opinion, page 111, it will be seen that the rule of pleading in such cases was not enforced only upon the ground that the inquiry in that case necessarily led to an examination whether the *jettison was occasioned by the negligence of the master in overloading the ship*.

§ 1151. *Irregularities of pleading in admiralty discouraged.*

It was a nice distinction, but a true one, and it will have its influence hereafter upon other cases having the same difficulties as that had. It has been adverted to, to warn the profession that the irregularities of pleading in admiralty, now too frequently occurring, having attracted our attention, and will be treated hereafter according to the rules and practice for pleadings and proofs in admiralty cases. Without doing so, the jurisdiction of admiralty may often

be practically extended to controversies not belonging to it; and though that may be inadvertently done, it will not be the less mischievous.

§ 1152. — *testimony confined to points at issue.*

With this rule in view, we will not examine much of the testimony in the case before us, though it was made much of the argument of the respective counsel representing the parties. It excludes from the merits of the case all in the record relating to the storm in the Bay of Biscay, the leak which it caused and the repair of it. Both parties have treated it, by their pleadings, as having in no way caused any damage to the soap; also, the storm which afterwards tried the seaworthiness of the ship to the utmost, when she was weathering Cape Horn, without any diminution of it, except so far as to inquire if it could have been that the seas which she then shipped had damaged the soap, by the water passing through the seams of a deck imperfectly calked. And we exclude, also, all that testimony made up of the opinions of supposed experts in regard to the causes of the alteration in the quality of the soap, excepting such of them as are sustained by facts which have the character of legal proof.

§ 1153. — *want of proper care in stowing considered accordingly.*

By treating the case in this way the controversy becomes exclusively one upon the alleged want of proper care in stowing, etc., the soap; and upon the charge made against the captain of the ship that he had negligently allowed the seams of her deck to be in an open and leaking condition, by which water had passed through them upon the soap. Our examination of the case has been made accordingly. It will be found to coincide with the admissions made in his argument by the learned counsel of the appellants. Two of his points were, that the injury or change in the quality of the soap was not owing to the effects of the gale occurring in the Bay of Biscay, shortly after the ship left Liverpool, though it had produced a leak; next, that the heavy weather on the passage around Cape Horn did not produce any leak nor do any injury to the tightness of the ship, reserving, however, the charge that the water which she then shipped had passed through the leaks in her deck, and damaged the soap. Then, after stating other propositions of obligation upon the ship, before she could be released from liability, and omissions of duty by the captain, and the proofs which were necessary to excuse them, which he contended had not been made, the case was put altogether upon bad stowage, and the leaks in the deck, as both had been alleged in the libel.

First, as to the stowage. Two witnesses were examined, both of them professing to know how soap in boxes should be stowed for a long passage. They say that the stowage was improper, on account of the boxes having been placed or piled in tiers in one part of the ship, and that they were stowed up to the main deck, and not chocked. One of them added that regard should be had, in stowing, to the nature of the goods to be stowed; that soap should not be stowed in so solid a bulk as this was, but should have been distributed more over the ship. Waterman, another witness, who had never seen the ship, and of course knew nothing of the stowage, merely said that soap stowed twenty-five tiers deep, he should think was badly stowed, and would be apt to be injured. Such is the whole of the testimony to prove bad stowage in this case, unless the opinions of other witnesses, expressed in the course of their examination, without any facts having been given by them to sustain their opinions, are taken as evidence. On the other hand, Nicholson, a man of more than thirty years' experience as a nautical man, who visited the ship by the invitation of the port warden, to examine the soap, and who went into the hold for

that purpose, says, in answer to the question, "How was the cargo stowed?" "Some of the boxes appeared to me to be restowed. I do not think the upper part was the original stowage. There were a great number of them in sight, and the cargo seemed to me to be very well stowed." Noyes, who was called upon, as port warden, to survey the ship, and two days afterwards to survey the cargo, says the soap was stowed in the after part of the ship, abaft the after hatch. It was all stowed together, and well stowed. Then Lowry, the stevedore who discharged the cargo of the ship, who saw her hatches opened, says the soap was well stowed. There are differences between the witnesses as to the stowage of the soap, but not contradictory assertions. As to credit, they stand alike. But there is a distinction in their declarations, which, with us, is conclusive. The three first named speak of the manner of stowage, with reference to the effect which might be produced upon soap in boxes, stowed in a vessel in tiers, as these boxes were. Without a word of proof from themselves, or from any one else, or from Mr. McCulloch, the chemist, who was called upon by the libelants to analyze the soap as it then was, to show the correctness of the apprehension or opinion of the witnesses that, from the composition of soap, it was liable to deterioration from being stowed in a mass in the hold of a vessel, and without any evidence that it was customary to stow soap in boxes differently. The other three witnesses speak of it as a nautical stowage, and, without any qualification, say that the soap was well stowed. Our conclusion is, that the soap was not injured as a consequence from having been stowed as it was.

§ 1154. *Imputation considered of negligence in exposing to a leaking deck.*

We proceed to the consideration of the second charge in the libel. It is also an imputation of negligence upon the captain of the ship. It is that the soap had been injured by the deck having been allowed by him to remain in an open and leaking condition, whereby the water thrown or falling on it passed through upon the soap beneath. It is indefinite as to the time when the leaking of the deck occurred, and uncertain as to the extent of it, but determinate enough to suggest the kind and quantity of testimony which is necessary to sustain such charge in the circumstances under which it has been made. The seaworthiness of the ship when she began the voyage not having been questioned in the libel, it must be taken that she was tight in her deck when she left Liverpool, and, if she became otherwise afterwards, that it must have occurred when she was at sea. There is no direct proof of it in the record, nor any cause, from tempest or storm, from which such an injury to the ship can be presumed. The burden of proof of such an allegation is upon the libelants, and the testimony to sustain it must be positive, or so violently presumptive as to be sufficient, by the rules of evidence, to supply the want of direct proof. Here there is no proof, positive or presumptive, when, where, or from what cause, the leaking of the deck happened, or had been made. None that it had been, or might have been, occasioned by any straining of the ship from the storms which she had encountered on her passage. Indeed, that is disclaimed. None that the oakum with which her decks were calked had washed out of the seams of it, or that it had shrunk so as to leave them open. And it was only suggested that they were opened by the heat of a long summer passage, and that they could have been recalked after.

The suggestion is in opposition to the proofs in the case. The ship sailed from Liverpool on the 26th of September, staunch and tight, and arrived at Valparaiso on the 26th or the 27th of January following, just four months and a

day from the time of her sailing. The slight injuries which she suffered from the storm in the Bay of Biscay and those encountered off Cape Horn were repaired at Valparaiso. Thence she went to Honolulu, on the 28th of February, where she was twenty-four days, and calked there her top sides and waterways, and she arrived at San Francisco on the 7th June, having had fine weather all the way from Valparaiso. But it is proved that the soap could not have been injured from any leaks in her top sides or waterways, as the tiers of boxes next to them on either side were in a better condition than those which had been piled further off. These dates show that the ship had not a longer passage to Valparaiso than is usual at the time of year when she was making it; also, that it had been made through different latitudes, without encountering any great continuous heats — certainly not such as could have had the effect to displace or shrink the calking of the deck into leaking, which is not denied to have been good and tight when the ship left Liverpool. It is not probable that such an exposure for so short a time had forced her deck seams. Besides, it has not been shown by any reliable testimony that there had been, at any time when the ship was on her way to Valparaiso, any leaking from her deck, or any such afterwards, until her arrival in San Francisco, from which by any possibility the soap could have been injured in the way and to the extent it was represented to have been by some of the witnesses, who expressed the opinion that there had been leaks in the deck of the ship, through which salt water had leaked upon the soap. Indeed, it appears to us that all of the witnesses who said so, did it rather by way of inference from the calking which another witness said had been done to the ship, and from the condition in which the soap was, than from an examination of the ship. The witness Goodsell, more relied upon than any other witness to prove the leaks in the deck, does not do so satisfactorily from the usual examination made by shipwrights when they are called upon to ascertain such a fact. He says: "I found the poop deck, lately calked, leaking on larboard side — six on starboard and one seam about half on the starboard side, to main deck. I *should think* that the waterway seams, plank-shear seams, and one or two seams inside to main deck, or main deck, *looked* as if water had run down into the hold of the ship on both sides." He adds, he went into the hold of the ship and examined the under part of the deck. "I saw *indications* of the deck having leaked in the wake of the seams I have been speaking of; *they looked* as if they had leaked all along, but more abaft than forward of the main deck." This is very uncertain testimony; more of opinion than fact in it, even as to the calking of which he speaks, and the result of all that he says concerning the seams below the deck has more of inspection in it than of examination. The difference between them will readily be recognized from the positive language of two other witnesses, who say they examined the seams of the deck below with their knives, and found them hard; one of them adding, it is impossible for a man to tell, after two or three weeks, whether a vessel is newly calked, without trying her seams. Lowry, the stevedore who discharged the cargo, upon being asked if he had seen any traces of salt water in the top of the boxes of the soap, or on the ceiling of the deck, answers that he had not, but that he saw some places marked with chalk by some persons; that he tried them with his knife, and found them perfectly tight. Such is the testimony in the case, concerning the charge in the libel that the soap had been damaged by leaks in the deck of the ship, which her captain had neglected to have calked. In our opinion, it is altogether insufficient. Noyes, the port warden, who surveyed the ship, says

he could find no leaks over or above where the soap was, that he could discover. He also saw no traces of the deck having been recently calked. Indeed, there is not a witness who has said that there were leaks in the deck. Several express the opinion that there were, from the discoloration of the boxes on them outside, and from that of the soap in them. Goodsell ventures further than any other witness to cause such an impression; but his language is: "I should think," and it "looked" to him as if water had run down into the hold from the waterway seams, the plank-shear seams, and one or two seams inside, to deck or main deck. This conjectural way of speaking by a witness must yield to the positive declarations of Nicholson, Lowry and Noyes.

Having determined that the soap had not been injured by bad stowage or leaking from the deck, we will now briefly state to what causes its altered condition should be attributed. We have concluded that its discoloration and dampness are to be found in the acknowledged facts and proofs in the cause. The shipment was made at Liverpool on the 21st June, and was on board of the ship for a year, less fourteen days. After the shipment and stowage, the ship remained all of the summer at the dock in Liverpool. She sailed on the 26th of September. From that time the ship's hatches were closed until her arrival at Honolulu, in February. They were then opened for the purpose of discharging a part of the cargo which had been shipped for Honolulu. To do that it was necessary to remove about three hundred boxes of the soap from their stowage, and to land them. They were taken to the ship, restowed as they had been at first, and it does not appear by any evidence that it had been perceived at Honolulu by any one that this upper tier so removed had been injured, or that the boxes had then any appearance of water having leaked upon them. The ship sailed from Honolulu and arrived at San Francisco on the 7th June. From the day of her sailing, the 26th September, she was at no time within such a temperature of heat as would of itself have impaired the quality of the soap. From England, in 10° north of the equator, the average temperature from the time of her sailing is 62°. Ten degrees north and south of the equator the average temperature for the months of September and October 81°.

The average temperature in November is about 41°, and that of Valparaiso is about 62°. These averages of temperature are taken from the most approved charts, and are decisive that the soap has not been injured by the temperatures through which the ship passed on her passage to Valparaiso. From that port the ship came to Honolulu, a distance not much short of six thousand miles, in the most favorable weather, without encountering heavy seas or head winds. She made that distance in the usual time, forty-five or fifty days. Honolulu is in the latitude of 21° 19' north, longitude 157° 52' west. Nor are the temperatures such between Valparaiso and Honolulu as could have produced any change in the condition of the soap. From Honolulu the usual run to San Francisco is from fifteen to twenty days. As a general rule, the course of ships bound from the first to San Francisco would be to the northward of it, to be sure of good winds. In the absence, then, of other probable causes, to account for the change in the quality of the soap, we must resort to the proofs on the record, and from them we have concluded that the soap was injured by the temperature of the ship's hold, or what is called the sweat of the ship, which no mode of ventilation, consistent with safe navigation, has yet been thought sufficient to prevent. In this particular the ship was not more liable from defective construction to this vapor than merchant vessels ordinarily are. Her hatchways were good, the covers for them are not complained of, her hatchbars and tarpaulins were

sufficient, or they are not denied to have been so; and it has not been suggested that they were not all applied to cover the hatchways, and to protect the cargo from seawater and rain. Nor is this sweat in ships any mystery to practical seamen. They term it to be vapor emitted from the mixed cargoes of ships by the heat of the hold of a ship, cast off sometimes only in fumes, at other times in steam, which shows itself in the latter case sometimes in drops of water in the same way as rain is produced from vapor. Several of the witnesses—all of them were accustomed to the sea—say that the sweat of this vessel caused the discoloration of this soap. Besides, it was a second-class article, differing originally in color from a first-rate article of the same kind. It is true that the chemist who analyzed it says that it had been made of good materials, and was well saponified, and he says that sweat is a mere *evolution* of water in a state of vapor; and that the boxes could not have been stained in that way, and that they were stained by some external means. But the proofs in the case show that there was no leakage in the deck by which water could have passed upon them; it must yield to the declarations of those witnesses better acquainted than he is, from their professional acquaintance with the effects of the sweat of the soap upon these cases. We unhesitatingly ascribe the discoloration and dampness of the soap to the rocking of the ship, the nature of the compound of soap, and to the long agitation of the soap in the boxes to which it had been subjected in a boisterous passage. The devaporation of water from the vapor of the soap itself, with which it is cleansed in the making, heated by the sweat of the ship, would be concentrated in the boxes, upon the soap, and would discolor it and make it damp, without any sensible diminution of its weight; and we are confirmed in this conclusion by the witnesses who examined and weighed it, having testified that the boxes were of the same weight marked upon them when they were shipped at Liverpool.

§ 1155. *Consignees of cargo may maintain libel in their own name for injury to cargo.*

We feel bound to notice one point made in the argument of the cause by the counsel of the appellees, which is not an open question in this court. It was, that the appellants had no legal title to maintain their libel. In the case of *Houseman v. The Schooner North Carolina*, 15 Pet., 40, the same objection was made. This court said: "An objection has been taken to the right of the appellee to sue in his own name, as agent for the consignees, or to sue at all, as his power of attorney from them bears date after the libel was filed; and it is also objected that J. & C. Lawton, the consignees, had no right to institute proceedings to recover more than their proportion of the cargo shipped on their own account. No authority has been produced in support of these objections, and we consider it as well settled in admiralty proceedings that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best; that the power of attorney, subsequent to the libel, is a sufficient ratification of what he had done in their behalf, and that the consignees have such an interest in the whole cargo that they may proceed in this case, not only for what belonged to them and was shipped on their account, but for that portion also which was shipped by Porter as his own, and consigned to them." The same conclusion was repeated in 17 How., *Lawrence v. Minturn*, without any qualification, as we understand that case. In the first as well as in the second of these cases, the point was put on the interest which a consignee has in the consignment, as consignee, and not as owner of any part of it; that, from the nature of the contract of a bill of lading, the

consignee had a right to sue, in a court of admiralty, for any breach of it. Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found upon that right, there are none that he may sue in a court of admiralty in the United States. When that case, however, occurs in this court it will be decided; and we now merely remark that, from our examination of most of the cases in the common law reports, upon the facts of those cases, we have been brought to the conclusion that there is no rule of general application as to when the consignor or consignee should bring the suit at common law, but that it will always be important to consider in whom the right of property, and sometimes in whom the right of possession, was vested at the time of the breach of the contract or neglect of duty which is complained of.

We direct the affirmance of the decree from which this appeal was taken.

MR. JUSTICE NELSON dissented.

STILES v. DAVIS.

(1 Black, 101-107. 1861.)

ERROR to U. S. District Court, Northern District of Illinois.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the 3d of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the 16th of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit. The court below charged the jury that any proceedings in the state court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnished, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

§ 1156. *When goods are seized on the transit the carrier is not in default for yielding to custody of law.*

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's

officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of *Drake on Attachment*, 2d edition. This precise question was determined in *Verral v. Robinson*, 5 Tyrw., 1069; S. C., 4 Dowl., 242. There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property. Lord Abinger, C. B., observed that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Banks' property, it was not in the custody of the defendant in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

§ 1157. — *in such case the remedy of the shipper is against the attaching officer or plaintiff causing the attachment.*

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification, if the plaintiff could have maintained a title and right to possession in themselves. Judgment of the court below reversed, and *venire de novo*, etc.

WELLS v. MAINE STEAMSHIP COMPANY.

(Circuit Court for Maine: 4 Clifford, 228-237. 1874.)

STATEMENT OF FACTS.—The respondents as common carriers undertook to transport packages of liquor from New York to Portland, Maine, and deliver them to a railroad for transport into New Hampshire. The steamer landed the goods in the freight shed of the respondents at Portland, where they were seized by the sheriff without warrant, but a warrant was afterwards procured and the liquor and packages were judicially condemned and destroyed for alleged violation of law. The owners of the liquor libeled for the value in the district court, but the libel was dismissed and an appeal taken to this court.

§ 1158. *Common law rule as to common carriers stated, with its exceptions.*

Opinion by CLIFFORD, J.

Courts of justice are reluctant to admit any exception to the rule of the common law, that common carriers are bound to deliver goods intrusted to their care for transportation from one port or place to another, according to

the terms of shipment, unless prevented by the act of God, the public enemy, or by the act of the shipper. Common carriers, whether by land or water, contract in such case for safe custody, due transport and right delivery of the merchandise, and the shipper, consignee or owner of the goods contracts to pay the freight and charges as stipulated in the contract of shipment. There are reciprocal duties, and the law, in the absence of any repugnant or irreconcilable stipulation, creates reciprocal liens for their enforcement. *The Eddy*, 5 Wall., 481 (§§ 968-976, *supra*); *The Bird of Paradise*, 5 Wall., 548 (§§ 959-967, *supra*). Exceptions to the rule, that the carrier is bound in all events to fulfil the contract of shipment, do exist, as admitted by all the authorities, as where the loss of the goods or the failure to transport and deliver the same, arises from the act of the shipper, or from natural causes or irresistible force, over which the carrier has no control, and which could not be avoided by the watchful exertions of human skill and prudence. *The Niagara v. Cordes*, 21 How., 7 (§§ 438-450, *supra*). Such exceptions, it is admitted, exist, and the respondents contend that the carrier is also excused from liability for such failure to perform his contract if he is prevented from fulfilling the same by the law of the jurisdiction where the contract was to be performed. Different views are entertained by the appellant, and he insists that the carrier is the insurer of the goods intrusted to him for such a purpose, and that he is liable in all events, if he fails to fulfil the contract of shipment, unless he was prevented from so doing by the act of the shipper, or by the act of God or the public enemy.

FURTHER STATEMENT OF FACTS.—Before proceeding to discuss the propositions of law presented by the libelant, it may be well to refer to certain other matters of fact as necessary to a correct understanding of the rights of the parties. Due shipment of the liquors is admitted, and it appears that the steamer, with the liquors on board, arrived here on Saturday, October 19, in the same year, and that the sheriff, or his deputy, seized the same on the same day, and also that the treasurer, on the Monday following, which was the next mail day, notified the libelant of the seizure, and advised him that if he wished to reclaim the merchandise he must apply to the sheriff. Other correspondence ensued between the same parties, which shows to the entire satisfaction of the court that the libelant was seasonably apprised of the legal proceedings for the forfeiture of the liquors, and that he has no just right to complain that the respondents were guilty of any negligence in affording him prompt information in that behalf. Separate examination of the several objections taken by the libelant to the defenses of the respondents will not be attempted, as all those not founded on the charge of negligence, already shown to be groundless, may be condensed into three classes, which will cover the whole series of the other objections. They are as follows: 1. That the obligation of the common carrier to keep safely, duly transport and rightly deliver goods intrusted to his care admits of no exception, unless he is prevented by the act of God, the public enemy, or by the act of the shipper. 2. That the municipal court had no jurisdiction either to enter the decree of condemnation or to order the liquors to be destroyed. 3. That the law of the state under which the proceedings took place, and under which the decree and order were entered, was unconstitutional and void.

§ 1159. *Where goods are taken from carrier by legal process, he is excused; qualifications of this rule.*

Where the property is taken from the carrier by legal process, and the carrier gives due notice of the taking to the shipper, owner or consignee, as the case

may be, the respondents contend that he is discharged, and the decision of the supreme court in the case of *Stiles v. Davis*, 1 Black, 101 (§§ 1156-57, *supra*), appears to be an authority for the proposition. Clearly, it was decided in that case that goods seized by a sheriff under an attachment are in the custody of the law; that where goods are attached in the hands of a common carrier, to whom the goods have been delivered for transportation, the carrier is not justified in giving them up to the consignee while the proceeding in the attachment is pending, and that that rule holds good even where the merchandise is attached for the debt of a third person, and in a suit to which the employer of the carrier is not a party, for the reason that the right of the sheriff to hold the merchandise is a question of law, to be determined by the court having jurisdiction of the attachment suit, and not by the will of the carrier or his employer, and that the remedy of the consignee, if he can show title in himself, is not against the carrier but against the officer who has wrongfully seized the goods, or against the plaintiff in the attachment suit, if he directed the seizure. Different views, in one or two respects, are expressed by the supreme court of Massachusetts in the case of *Edwards v. White Line Transp. Co.*, 104 Mass., 159, and that court decided in that case that it is no defense to an action against a common carrier for a breach of his contract to deliver goods that they were taken from him by an officer under an attachment against a person who was not the owner of the goods attached; but the court admit in the same case that the rule would be otherwise if the goods had been the subject of proceedings *in rem*, or the attachment had been against the person who was the true owner of the goods. Unquestionably, the case before the court comes within the first branch of the admission by that court, and, therefore, that decision is an authority in opposition to the views of the libellant, as expressed in the first class of his propositions, as the liquors in this were the subject of proceedings *in rem*, and, by the very terms of the admission, remained in the custody of the law from the time they were seized to the time when the order that they should be destroyed was executed.

Support to the rule, as modified by the decision of the supreme court of Massachusetts, is found in several English cases, and in the works of text-writers of high authority, to a few of which reference will be made. *Barker v. Hodgson*, 3 Maule & S., 270; *Wynn v. Canal Co.*, 5 W. H. & G., 440; *Verral v. Robinson*, 2 Crompt. M. & R., 496; *Davis v. Cary*, 15 Ad. & Ell. (N. S.), 425; *Chit. Car.*, 276; *Anglesea v. Rugeley*, 6 Ad. & Ell. (N. S.), 114; *Abb. Shipp.* (5th Am. ed.), 705.

Qualified as stated, the rule finds abundant support in the aforementioned cases, and the broader rule, as laid down by the supreme court in the case of *Stiles v. Davis*, also finds unequivocal confirmation, if any it needs, from very high authority. *Bliven v. Railroad*, 35 Barb., 191. It was decided in that case that it is a defense to a common carrier, for the neglect to deliver the goods intrusted to him for transportation, that the goods were taken from his custody by the authority of the law, exercised through regular and valid proceedings; that the bailee in such a case must be able to show to the court that the proceedings were regular and valid, but that he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process or seizing the goods was correct in law or fact. Subsequently the case was removed to the court of appeals, where the judgment of the supreme court was affirmed, the court holding unanimously that when property is taken from a common carrier by legal process, and he gives notice thereof, he is dis-

charged from all obligation to deliver the same to the shipper, owner or consignee.

§ 1160. *Where liquors are seized the carrier is excused from responsibility on giving notice thereof.*

Regular notice of the seizure was given in this case by the respondents, and I am of the opinion that they are discharged from any obligation to deliver the liquors to the next carrier or to the libellant, whether the rule laid down by the supreme court of the United States is applied to the case, or the modified rule as assumed by the supreme court of Massachusetts, unless it can be shown that the municipal court had no jurisdiction of the case, or that the act of the legislature under which the seizure and condemnation took place was unconstitutional and void. S. C., 36 N. Y., 407. Prosecutions against persons for manufacturing liquors in violation of law, or for keeping drinking-houses and tippling shops, or for being common sellers of intoxicating liquors, must be by indictment; but the express provision of the state statute applicable to the case is, that in all other prosecutions under the statute, judges of municipal and police courts and trial justices shall have jurisdiction by complaint, original and concurrent with the supreme judicial court. Rev. Stat. 1871, p. 307. Intoxicating liquors, kept and deposited in the state, intended for unlawful sale therein, and the vessels in which they are contained, are declared contraband, and forfeited, by the law of the state, to the cities, towns and plantations in which they are so kept, at the time when they are seized by virtue of that statute. Id., p. 304. Such liquors, it is admitted, may be seized under a warrant duly issued by competent authority.

Seizure under a legal warrant being admitted to be lawful, it follows that seizure in the like case may be made without warrant, as the same section of the statute provides that, in all cases where an officer under that statute is authorized to seize intoxicating liquors or the vessels containing the same, by virtue of a warrant therefor, he may seize the same without a warrant, and keep the liquors in some safe place for a reasonable time until he can procure such a warrant. Id., p. 304. Unquestionably the liquors in this case were seized in the first place under that provision, nor is there any reason for doubt that a warrant was obtained in a reasonable time, nor that the liquors in the mean time were safely kept in some proper place. When liquors and vessels are so seized it becomes the duty of the officer immediately to libel the liquors and vessels, and to file the libel with the magistrate before whom the warrant is returnable, setting forth their seizure, and describing the liquors and their place of seizure, and that they were deposited, kept and intended for sale within the state in violation of law, and pray for a decree of forfeiture. All these requirements were strictly fulfilled, and it appears that the magistrate, as required by law, fixed a time for the hearing, and issued a monition and notice of the libel to all persons, citing them to appear at the time and place appointed and show cause why the liquors and the vessels should not be forfeited. Due notice was given, and, no one appearing as claimant, the decree of forfeiture was entered, and the order passed that the liquors and vessels should be destroyed. By the terms of the statute it is provided that, if no claimant shall appear, such magistrate shall, on proof of notice, declare the same forfeited to the city, town or plantation in which they were seized. Viewed in the light of these proceedings, it is clear that the magistrate had full jurisdiction of the case; and the statute further provides that liquors so seized, and the vessels containing them, shall not be taken from the custody of the

officer by a writ of replevin or other process while the proceedings herein provided for are pending, and that final judgment in the proceedings shall in all cases be a bar to all suits for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention of the liquors. Rev. Stat. 1871, p. 307.

§ 1161. *Whether seizure of liquors was unconstitutional and void in the present case.*

3. Enough has already been remarked to show that the theory of the libelant cannot be sustained unless it can be held that the statute of the state under which the seizure, condemnation and destruction of the liquors took place is unconstitutional and void. Much discussion of that topic cannot be required, as the negative of the proposition has been decided by the supreme court of the state, and by the supreme judicial court of Massachusetts. *State v. McCann*, 59 Me., 385; *State v. Miller*, 48 Me., 581; *Jones v. Root*, 6 Gray, 435; *Mason v. Lothrop*, 7 Gray, 355. Attempt is made to distinguish the case before the court from the cases cited, upon the ground that the officer, in making the original seizure, searched the premises where the liquors and the vessels were deposited by the carrier; but it is a sufficient answer to that suggestion that the record contains no evidence whatever to support the theory. Unsupported by evidence as the theory is, the suggestion may well be dismissed without further remark. Three counter suggestions are made by the respondents which are entitled to weight, and which, under different circumstances, would receive much more consideration.

1. That the decree being a decree *in rem* against the liquors and vessels is, in view of the statute of the state, a complete bar to the whole claim of the libelant for damages for the non-delivery of the goods. 2. That the decree *in rem* having established the allegation that the liquors were deposited in the state and intended for sale in violation of law, it follows that the carriers were prevented from fulfilling the contract of shipment by the act of the shipper, owner or consignee. 3. That the contract of the common carrier is always subject to the implied condition that he may lawfully comply with its terms, and that if its performance subsequently becomes unlawful, without his fault, that he is not required to violate the law of the jurisdiction to complete his undertaking. *Atkinson v. Ritchie*, 10 East, 534; *Story, Bailm.*, § 120; *Edson v. Weston*, 7 Cow., 278; *Bradstreet v. Heron*, 1 Abb. Adm., 209 (§§ 799-802, *supra*); *Touteng v. Hubbard*, 3 Bos. & P., 301; *Morgan v. Insurance Co.*, 4 Dal., 455.

Much weight is certainly due to these several propositions, but having come to the conclusion to rest decision of the case upon the prior grounds mentioned, it is not necessary to express any decided opinion upon those propositions.

Decree affirmed, with costs.

BAZIN v. THE STEAMSHIP COMPANY.

(Circuit Court for Pennsylvania: 3 Wallace, Jr., 229-242. 1857.)

STATEMENT OF FACTS.—Defendant contracted with plaintiff to ship certain goods from Liverpool to the United States by steamer City of Manchester, or such other steamer as should sail in her place on the 6th of September, or, failing in that, to ship on the first steamer after that date. Defendant on the 30th of August shipped part of the goods on the steamer City of Philadelphia. The

remainder of the goods were shipped by the City of Manchester. This last lot came to hand, but those forwarded by the City of Philadelphia were lost, and this suit was brought to recover their value.

§ 1162. *What is a maritime contract.*

Opinion by GRIER, J.

The objection of the respondents' counsel, that the contract is not a maritime contract, cannot be supported. The case presents a bill of lading by which defendants bind themselves to carry goods received at Havre, and deliver them in Philadelphia. It is a contract for a maritime service, and it would be difficult to say what is a maritime contract if it be not one. If it had been merely an agreement by respondents with libelant that if he would send goods by their line they would receive and forward them for a certain consideration, and the breach of the agreement was in refusing to receive or transport the libelant's goods at all, or for the consideration stipulated, then this first objection of the respondents would apply. But when the respondents have received the goods on board their vessel, and given a bill of lading to transport them across the ocean, it can hardly be called a preliminary agreement to a maritime contract, and not the contract itself.

The case then presents these two questions on the merits: 1st. Are respondents liable? 2d. If so, what is the rule of damages, and how is their amount to be ascertained?

§ 1163. *If a carrier in disregard of his contract changes the vessel and the time of shipment he becomes insurer of the goods carried.*

The reason given by the answer why the City of Manchester was named in the contract may possibly have been the true one, or that assigned by the libel, to wit, that the libelant "directed his agent in France to send his goods by the City of Manchester," which was advertised to sail on the 6th of September, because he knew her to be a safe and reliable vessel, and under skilful management. But we need not search for any reason, "*stet pro ratione voluntas.*" The libelant may, in fact, have had no better reason than that he believed the City of Manchester to be a *lucky vessel*, or he may very justly have preferred a tried boat and crew to a new iron steamer, whose officer or whose compass had not been tested by a trip across the ocean. Reason or no reason, he had a right to have his contract fulfilled according to its stipulations, and the result has shown that, if such had been the case, his goods would have arrived safely. If the goods had been sent by the Manchester, the risks excepted in the bill of lading would have been borne by the libelant. For them he was his own insurer, and the carrier of those not excepted. If the carrier changes the vessel and the time of dispatching the goods, he has substituted different risks from those stipulated by the parties, and should be held as insurer against all loss from whatsoever cause. The loss to libelant is a result of defendant's breach of contract.

§ 1164. *What are the "accidents of the sea."*

But, assuming that the libelant had no good reason for desiring his goods to be sent by a particular vessel, and that the insertion of the name of the City of Manchester was merely *pro forma*, to fill up the usual blanks in a printed bill of lading, is there any evidence whatever that the goods were not injured in consequence of any accident excepted in the bill of lading? The respondents aver that the ship was seaworthy in every way; the libelant denies the fact in his replication. The testimony of the captain shows his steamboat to have been *new*, made of iron, tight and stanch, well rigged and manned. The

only account given of the loss of the vessel was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate, we should have been in Philadelphia in five days. The steamer was wrecked. We backed off the point of Cape Race and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest. She struck in a dense fog; the sinking of the vessel and the damage done resulted from her striking the cape."

Here, then, we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness *both seem* to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an "*accident of the sea*," within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass; and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape or a continent, has neither the skill nor the prudence to be intrusted with such a command; and for want of such an officer the vessel is not seaworthy.

§ 1165. *The burden of proof as to how loss of goods occurred is on the carrier.*

The loss of the goods committed to a carrier, and in possession of his servants, puts the burthen of proof on him to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading. The respondents have not alleged or proved any one fact tending to relieve them from responsibility. That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog cannot be received as a plea to discharge the carrier. Yet for anything that appears, such is the case before us. If there were any circumstances tending to lead to a contrary conclusion, they are not in evidence in the case.

§ 1166. *The measure of damages for loss of goods through breach of carrier's contract.*

The rule of damages in these cases is that the carrier shall pay for goods not delivered their net value at the port of delivery. He is not liable for any speculative or possible profits which the owner might have anticipated in his peculiar business. Thus, suppose the carrier liable for non-delivery of a hundred barrels of flour at Philadelphia on a given day, and on that day flour is worth \$5 a barrel, the amount of the owner's damage is clearly just \$500, because he could have bought a hundred barrels of flour and supplied his loss for \$500. The owner cannot be allowed to show that he was a baker, and could in a few weeks have cleared \$10 a barrel by manufacturing his flour into bread. The sum of money which represented the net value of the lost articles, with interest till paid, is all that can be recovered from the carrier when goods have been lost in the course of transportation. And as the owner would have paid freight as a deduction from the net value of his flour, so when the carrier pays its value he will be entitled to have his freight deducted, if it has not been paid. In all cases when the article to be delivered has a definite market value, the

application of the rule is without any difficulty. The libelant keeps a variety store in Philadelphia. The eighteen cases contained a selection of ten thousand articles of perfumery, etc., etc., to be found only in such shops. They are retailed generally at one hundred per cent. profit on the original cost in Paris. But few, if any, of these numerous trifles have any known wholesale or market value in Philadelphia, nor could libelant have supplied himself with the lost goods most probably in the Philadelphia market at any reasonable price. How, then, are we to arrive at a rule of damages to ascertain the amount of loss to libelant for the non-delivery of his articles? Certainly not as contended by his counsel, by taking the original cost, adding expenses and charges of transportation, and seventy-five per cent. "for loss of anticipated profits."

If these articles, like most other goods and wares, had a known value in market here, for which they could be purchased, the original cost and charges of transportation would have nothing to do with the calculation. But as such is not the case in the present instance, we must inquire what was the original cost and what the charges of transportation, etc., in order to arrive at their value here; or, more properly, what would it cost to get other goods of precisely the same value in place of those lost. Now we may assume (as nothing is pretended to the contrary) that a bill for the very same sort of articles which Bazin has purchased could be filled in Paris for the same sum of money. In less than sixty days every article not delivered here by the carrier could be put in Bazin's shop for the same price which he has paid for them. But he will have lost only the interest of his money for sixty days longer. How much profit he might have made by retailing them, or what the amount of "*anticipated business profits*," being matters not capable of certain ascertainment, cannot make a part of the consideration. Legal interest is all that the law knows as the damage for detention of money. As the goods lost, therefore, have no market value here, and could not be purchased in our market, their value must be ascertained by adding costs and charges, and sixty days' interest on this sum. From this amount deduct freight, which is unpaid, and add interest on the balance till judgment. If counsel can agree upon the amount of damages calculated on these principles, the decree will be entered for such amount; if not, the case will be referred to a master to report.

HARRISON v. STEWART.

(Circuit Court for Maryland: Taney, 485-492. 1844.)

STATEMENT OF FACTS.—The ship Charles was advertised in 1849 to sail from Baltimore to San Francisco. The libelants contracted with her owners to carry certain goods, a bill of lading was given and the goods were delivered. Afterwards the owners concluded to abandon the voyage to San Francisco, and proposed to send the engaged cargo by the Andalusia, that was about to sail to that port. Libelants refused to accede to this arrangement, and insisted that the ship Charles should carry the goods or that her owners should pay for them, and filed this libel upon the refusal of the ship-owners to do either.

§ 1167. *A contract to carry goods by sea is a maritime contract and of admiralty jurisdiction.*

Opinion by TANEY, C. J.

This case involves some questions of much commercial interest, and has been fully argued by counsel; some preliminary points, however, which have been suggested in the argument, are, I think, free from difficulty. For it is very

clear that under the decisions of the supreme court, the contract created by signing the bill of lading was a maritime contract, and within the jurisdiction of the court of admiralty.

§ 1168. *A refusal to carry goods according to contract without good excuse subjects the carrier to damages.*

It is equally clear that the ship-owners were bound to convey the goods to the port of destination on the ship Charles, unless prevented by some event beyond their control; and having refused to perform the voyage without any legal justification, they are liable to damages for their breach of contract. And as the libelants were the owners of the goods, and the consignee nothing more than their agent, they are the proper parties to this suit, and entitled to recover the damages they have sustained.

§ 1169. — *measure of damages proper under such circumstances stated.*

The material question upon this appeal is whether the damages awarded by the district court do not fall short of the amount which, in point of law, they are entitled to recover. In forming an opinion upon this subject, it is necessary, in the first place, to examine upon what grounds damages are to be given, and by what rule they are to be estimated. And it is proper to state, with precision, the principles upon which the judgment of the court is founded, in order that the decision in this case may not be misinterpreted or misunderstood. It appears that after the respondents had determined that the ship Charles should not proceed to San Francisco, they offered to forward the goods by the Andalusia, without any additional cost or risk to the shippers; that this ship was quite equal in her character and qualities for this voyage to the ship Charles; and upon the refusal of the libelants to accept this proposition, the respondents offered to return the goods. But this was also refused; and the goods have since remained in the warehouse of the respondents, subject at all times to the order of the owners, if they chose to receive them.

Under such circumstances, there can be no just reason for awarding to the libelants damages to the amount of the value of the goods. Damages to that amount are given as a compensation to the owner when the property is withheld from him against his consent, or has been lost by the misconduct of the defendant; but in this case the shippers have not lost their goods, nor have they been detained from them for a moment against their consent. The legal right to them remains, and has always remained, in the libelants; the goods themselves have always been within their reach and subject to their control, since the voyage was abandoned; and as they have not lost the property or possession of the goods by the conduct of the ship-owners, there would seem to be no justice in compelling the respondents to pay them their value. The ship-owners are not bound to buy them because they have broken their contract; but are bound to make compensation for the damage sustained by its non-performance. Neither can the opportunity which offered of shipping the goods by the Andalusia, without any additional cost or risk to the libelants, be used as a bar or in mitigation of damages. The shippers were not bound to seek or accept any other mode of conveyance; it was the duty of the ship-owners to transport the goods in the manner specified in the bill of lading; and that contract required that they should be carried to the port of destination in the ship Charles; nothing could excuse them from the performance of that duty but some unforeseen event which they had not the power to control; and if they failed to perform it, it is no excuse to say that the libelants might have accomplished the same object by another ship or another contract. The shippers had a right to the

A faithful execution of the contract they had made, and to rely upon it, and were under no obligation to look further or accept any other contract as a substitute for it.

Under this contract the respondents were bound to deliver these goods to the consignee of the libelants at the port of San Francisco, and the damage which they have sustained is the difference in the value between the goods in the port of Baltimore, in the hands of the libelants, and the price they would have commanded if the respondents had fulfilled their agreement. This is the amount of loss which the breach of contract occasioned, and is, therefore, the amount of compensation which ought to be awarded to them. It is upon this principle that the case of *Bell v. Cunningham*, 3 Pet., 85, was decided by the supreme court, and the rules there laid down are equally applicable to contracts of this description. The case of *Smith v. Condry*, 1 How., 23, depended upon different principles; it was a case of collision; the owners of the cargo were owners of the injured vessel, and might have forwarded the cargo by another ship, if they supposed the market would be better by an earlier arrival at the port of destination; if there was any loss, therefore, from the delay, it was occasioned by the acts of the owners of the goods. The owners of the offending vessel had no right to take possession of the cargo and forward it to its destined port; the injury which they had done was the amount to which they had damaged it, and diminished its value by the collision at the time and place where it happened.

The remaining inquiry is, would the goods, if delivered according to the bill of lading, have commanded a higher price than they were worth in Baltimore when the voyage was abandoned? In determining this question, we must take into consideration the time when the vessel ought to have sailed and the ordinary length of the voyage. She was advertised to sail "positively," about the 20th February, 1849, and she was bound to sail on or near that day. The language of the advertisement does not confine her to a precise day, and it would depend upon the usage of trade to determine what delay was admissible; but in the absence of evidence as to usage, the language of the advertisement would not justify a delay of more than a few days, for it is upon the faith of this promise that the merchant must be presumed to have shipped his goods to a market known to be subject to sudden and great fluctuations, and if he sustains a loss by the unreasonable delay of the vessel, he is justly entitled to compensation.

It is, however, not necessary to pursue this inquiry; for if the *Charles* had sailed on the day mentioned in the advertisement, she could not, upon any reasonable calculation, have arrived at San Francisco until late in June. Captain Hugg describes the state of the market from May, 1849, until near the close of the year, during which time he was in California or on that coast; and Captain Codman describes it, in like manner, from the 18th of August to the end of that year. They are both evidently men of much intelligence and observation, and fully acquainted with the matters of which they speak; and they both describe the market at San Francisco as in a state of great depression during the whole time they were respectively acquainted with it, and testify that the goods proposed to be shipped by the libelants, at the prices mentioned in the invoice, must have resulted, not in a profit, but in a heavy loss.

It is very true that Mr. Finley thinks otherwise; his testimony has been taken under the act of congress, *ex parte*, since the decree was passed in the district court, and he states that if the *Charles* had sailed at the time for which she

was advertised, and arrived in the usual period of such a voyage, he could have sold these goods for an hundred per cent. profit on the invoice price, but he does not mention any period in the spring of 1849 when the market became suddenly depressed. The testimony of Captain Hugg certainly applies to a period antecedent to that at which the Charles could possibly have arrived, and Captain Codman, who arrived there in August, found the market in the same state of depression described by Captain Hugg; and, although all of the witnesses agree that the market of San Francisco has been subject to sudden and violent fluctuations, there appears to have been nothing but a continued glut and depression of price from May, 1849, to the close of that year, so far as concerned articles like those contained in the libelants' invoice.

It may be that Mr. Finley, having remained in California ever since he went there in the spring in 1849, may have confounded in his memory prices which may have prevailed at an earlier period of the spring with the prices of the period of which we are speaking; at all events, it is incumbent upon the libelants who claim the damages to prove that they have sustained damage; the court cannot presume the fact. Upon this point there is a direct conflict between the testimony of Mr. Finley and that of Captain Hugg, a witness equally respectable and entitled to equal credit; and the testimony of the latter is also supported by that of Captain Codman — not only by the state in which he found the market, but also by the character of the population he describes, and the unsuitableness of the goods mentioned in the invoice to such a class of persons as, at that time, composed the population of San Francisco. The testimony of Mr. Finley cannot outweigh this proof that no actual loss was sustained.

In relation to the prices that might have been obtained for those goods at Coquimbo, or other ports usually touched at in the Pacific, it is sufficient to say that there is no evidence upon this subject; Mr. Finley, as well as the other witnesses, must be understood as speaking of the market of San Francisco. And if his testimony is to be understood as referring to other ports, and to be correct as to prices there, it could not alter the judgment of the court. The contract of the respondents was to deliver the goods at San Francisco; there is no engagement to stop or deliver them at other ports. Their value at that port is, therefore, the true test; and profits that the shippers might have made, by ulterior speculations, and by shipping them from San Francisco to other places and better markets, are too remote to be taken into consideration in estimating the damages arising from a breach of this contract.

The decree of the district court must, therefore, be affirmed, with costs.

SCHMIDT v. STEAMSHIP PENNSYLVANIA.

(Circuit Court for Pennsylvania: 4 Federal Reporter, 548-552. 1880.)

STATEMENT OF FACTS.—Damages were claimed in this case for a wrongful refusal to deliver goods at the end of the transit to the holder of the bill of lading. The carrier alleged stoppage *in transitu* by the sender, but it was adjudged upon the facts that there could be no rightful stoppage *in transitu*.

Opinion by McKENNAN, J.

The opinion of the late district judge, who decided this cause, so concisely and accurately states the law by which it must be governed that I do not propose to add anything to it.

§ 1170. *Rule of damages stated.*

The ordinary measure of damages between vendor and vendee for breach of a contract for the sale of goods is the difference between the contract price and the market price at the time and place of delivery, for the reason that this is the actual loss sustained by the vendee. But here the respondent was in possession of the libellant's goods, which were wrongfully withheld from him, whereby he was disabled from performing a contract for the sale of them, and the sale of them was defeated. Of this sale the respondent was duly notified, when a delivery of the goods was demanded, and by its refusal to deliver them took the risk of a renunciation of the purchase by the complainant's vendee. Whatever sum the complainant would have realized by this contract in excess of the market price of the goods at the time of their delivery, when he had the power to dispose of them, is clearly the amount of his actual loss which was caused by the respondent's act. The goods were withheld from the complainant until the 5th of March, 1878, and for the difference between their market price at that time and the price for which they had been sold to Keene he is entitled to a decree. This difference amounts to \$1,961.57, for which sum, with interest from March 5, 1878, and costs, a decree will be entered in favor of the libellant.

THE NIAGARA.

(Circuit Court for New York: 16 Blatchford, 516-537. 1879.)

STATEMENT OF FACTS.—A ship with a cargo of fine table salt and arsenic was so badly stowed that some of the casks of arsenic broke, and the contents contaminated the salt so that it was impracticable to distinguish what was injured from what was not, and the salt was sold as manure. Other facts are stated in the opinion of the court.

Opinion by WAITE, C. J.

It was conceded upon the argument in this court that the arsenic was badly stowed, and that the ship was liable to the extent it could be shown the salt had been actually impregnated with the poison. The whole controversy here has been in respect to the amount of damages. On the part of the ship, it is claimed that the sacks which had come in contact with the arsenic should have been separated from those that had not, and that the good should have been sold as sound, the others only being condemned. Undoubtedly a very large part of the cargo was free from taint when it arrived. If a careful inspection had then been made, and pains taken to keep such of the sacks as had been exposed to contamination from such as had not, it is clear that a separation might have been made of the good from the bad, which would have insured safety. But, unfortunately, this was not done. Whether designedly or not, the consignees were kept in ignorance of what had occurred on the voyage, and an inspection of the ship delayed by her officers and agents until bulk had been broken and a large number of the impregnated sacks mixed with others, that were probably sound, in such a way that it was impossible to distinguish the one from the other. Confessedly, all the sacks of the Marshall brand which came out of the main hatch on the 17th, and all the sacks of the Ashton brand which came out on the 19th, were taken from around the main-mast and from the other places that had been most exposed to the poison. No attempt whatever was made on the 17th to confine the arsenic to the places in which it then was. In fact, no attention at all was paid to it until complaint came from the

lighterman. Even then notice could not have been given that the powder which was the cause of the complaint was arsenic, for the delivery clerk who was sent by the consignees of the ship to check out the cargo was not made acquainted with the facts until Monday, when the consignees of the salt came to stop further deliveries. It was then clearly too late to make an absolutely reliable separation. The evidence shows beyond all question that the poison had become mixed with the salt in some of the sacks in quantities sufficient to endanger life, and that after the dust had been knocked or brushed off the outside of the sack, as it easily could be, there was no way of telling what had become impregnated and what had not, except by an expensive chemical analysis. When, therefore, the consignees of the salt became aware of the dangers to which it had been exposed and stopped further deliveries, the commercial character of their property, as a superior article of fine salt for the table and other domestic uses, was necessarily gone. The consignees of the arsenic had told the consignees of the salt that there was arsenic enough scattered about the ship during the voyage "to poison a nation," and from two to three hundred sacks, that were known to have been exposed to contact with the poison, had been mingled indiscriminately with fifteen hundred, or thereabouts, which might have been sound, without any way of distinguishing the good from the bad. The tiers, as they had been piled in the ship, were broken up, and the poisonous dust, which in some places stood half an inch thick upon the outside of the sacks, had been suffered to fall where it would, without any attempt whatever at confinement.

§ 1171. *Carelessness of the carrier held to extend to spoiling the whole shipment for domestic use; and damages computed accordingly.*

Clearly, under such circumstances, there was no way of insuring absolute safety except to condemn the whole. It matters not that persons might have been found who, tempted by the hope of gain, would pay for the property more than it was worth for fertilizing purposes, and run the risk of selling it for domestic uses. To have exposed a single sack to sale for such uses would be a gross wrong, unless it was known to be entirely free from danger. The public safety required that no risks should be taken. A mistake could not be tolerated, and as the ship alone was at fault for putting the property in such a condition that absolute certainty in this particular was not attainable, it is but just that she should be charged with the difference between its value, according to the commercial character to which it had been reduced by her gross and palpable neglect and that which it originally had. Human life is not to be needlessly exposed to danger. But it is useless to proceed further. This whole subject was carefully considered by the learned district judge, and I agree fully with the views expressed in his elaborate opinion filed below. Let a decree be prepared in favor of the libellant for the amount of the decree below, with interest on the actual amount of the loss from the date of that decree until the present time, and also for the costs in both courts.

JACKSON v. THE JULIA SMITH.

(Circuit Court for Michigan: 6 McLean, 484-487. 1855.)

Opinion by WILKINS, J.

STATEMENT OF FACTS.—The libel and evidence in this case exhibit a contract of affreightment, entered into at Chatham, Canada West, between the libellant and the vessel, on the 8th of June, 1854, for the transportation and delivery of

a quantity of tobacco at Garden Island, near the Port of Kingston. It is further shown that the tobacco was duly shipped and that the vessel departed on her voyage,— but that it was not transported and delivered according to contract, having been intercepted at Detroit in consequence of the cargo having been landed at that place in supposed violation of the revenue laws of the United States. Damages are claimed for the breach of contract in not delivering the cargo at Garden Island.

It is in proof, as matter of defense, that on the 9th of September, 1853, one George S. Lester was the owner of the vessel; and that under contract of sale with one James Reeve of Canada, he then gave him the *exclusive possession* of the same, and that this exclusive possession continued in the said James Reeve until the 11th of June, 1854, three days subsequent to the contract of affreightment made with the libellant. It is also in proof that, while the possession continued, the vessel was employed in the coasting trade between different ports in the province of Canada, and that at the time the contract of affreightment was entered into, she was under the command and control of James Bruce, as master, holding his appointment from the said Reeve. That when the tobacco was shipped at the Port of Chatham, Bruce, the master, contracted for a stipulated compensation to deliver the same in good order to her consignees at her port of destination.

It is conceded that the contract of sale between Lester and Reeve was broken by the latter — that the vessel was not paid for; that in order to avoid being seized by Lester under process she kept in foreign waters, and that on the 11th of June, 1854, while lying at anchor in the British channel of the Detroit river, she was forcibly brought into the jurisdiction of the state of Michigan, and Lester having sued out from the appropriate court a writ of replevin, she, *with her cargo*, was taken possession of by the sheriff of Wayne county, and against the will of her master was brought into the port of Detroit and sold and delivered to the respondent. Her cargo was discharged at the wharf, and being seized by the revenue officers of the United States, was sold and bought in by Lester, who alleges that he now holds the same subject to the order of the owners.

§ 1172. *The master may, by contract of affreightment, bind the vessel, though proving faithless to the owner thereof who gave him possession.*

Under the circumstances disclosed, the possession of Reeve was not tortious. His neglect or refusal to carry out his contract with Lester did not affect the character of his possession, especially as to third parties not privy thereto. He had possession with Lester's consent, and was therefore clothed with power to use her in trade as long as that possession continued. Bruce was her lawful master, and at the time of the contract of affreightment rightfully represented and could bind the vessel. It is not, as was contended, the case of a vessel stolen, or where the possession had been fraudulently obtained. She was delivered to Reeve at the time of the contract of sale, and his failure to fulfil his engagement did not make his possession unlawful *ab initio*, or vitiate the contracts of the vessel while the possession continued. Such a rule would be destructive of all maritime confidence, and place the shipper in a foreign port on inquiry as to title, which is not necessary, and would, in most cases, be impracticable. Ostensible ownership, with present undisputed possession, confers authority and is sufficient to bind the vessel. The rights of seamen and shippers cannot be affected by the unknown private contracts of other parties claiming interest in, or controverting her title. As long as she navigates and

sails from port to port in the business of commerce, her captain speaks her voice and binds her by his contracts.

§ 1173. *Damages for non-delivery stated.*

The cargo never having been delivered, the next question is, What shall be the measure of damages? Where goods regularly shipped are not delivered according to contract, the carrier is bound to make good to the shipper the actual loss which he has sustained; or, in other words, to place him in as good a position as he was as to his property when the contract was made. In this admeasurement of damages, the court has nothing to do with the antecedent or subsequent relation which Lester bore to the vessel. The contract of affreightment was with the Julia Smith. Whether or not Lester had a right to retake the vessel, and whether the damages accrued in the exercise of a legal right, are not now subjects of consideration. The vessel is deemed responsible, and must make good to the libellant his loss consequent on the failure to perform the contract. Making good the loss clearly embraces the value of the property shipped at the port of Chatham at the time of the contract — there being no proof of loss consequent upon the non-delivery to the consignees at Castle Island. The court cannot go beyond this principle. The expense incurred by the libellant in visiting Detroit, in search of his property, and in the legal steps taken by him to recover the same, are not considered as proximate to the non-delivery at the port of destination. The landing of the goods without manifest was not the act of the vessel, and should not enhance the damages in this suit. Either the present owner or Reeve may be responsible for this expenditure in another form of action, but as it was not necessary for the libellant, who held the security of the vessel, to prosecute or defend, the damages in this procedure cannot include his expenses in endeavoring to recover the cargo.

It is decreed that the clerk take proofs as to the value of the cargo at Chatham on the 8th of June, 1854, which sum with interest from that time is to be recovered from the vessel libeled.

THE MARY.

(District Court for Massachusetts: 1 Sprague, 51-54. 1843.)

STATEMENT OF FACTS.— Libelants shipped a quantity of specie for the purpose of purchasing a return cargo. A part of the specie was used by the master in procuring necessary repairs, and the question was, whether the libelants were entitled to interest on the specie from the time they would have had the benefit of it, if it had been carried to its destination.

§ 1174. *Interest allowed on specie shipped to purchase a return cargo where the master used part to pay for necessary repairs.*

Opinion by SPRAGUE, J.

I am of opinion that the libelants are entitled to such interest. The owner of the cargo is under no obligation to keep the ship in repair; but in certain cases the law allows the master, from necessity, to sell a part of the cargo without the consent of the shipper, in order to enable the vessel to prosecute the voyage. But in such case the shipper is to be compensated, and the measure of compensation is to be such as to place him in as good a situation as he would have been in had the property of some other shipper been taken instead of his. This is the general rule, and it is manifestly founded both in justice and policy. In conformity to this principle, it is well settled that the shipper is entitled to be paid for his property at its full value at the port of destina-

tion, deducting certain necessary charges. This, it is supposed, will afford him an indemnity, because, with the money thus paid to him, it is presumed that he can replace the articles taken, or purchase others of equivalent value, at his election. But it is obvious, that, in order to afford him an indemnity, payment should be made to him at the port of destination. He cannot otherwise be placed in as good a situation as he would have been in had the goods of some other shipper been taken. His purpose was to place his cargo in that port. There he needed it to carry forward his enterprise. To refuse this to him, while the other shippers have their parts of the cargo carried forward and delivered at the port of destination, would by no means place him in as good a condition as they, and would clearly violate the fundamental principle by which compensation is to be made. As he had a right to have the goods shipped delivered to him at the port of destination, so has he the right to have that which, without his consent and for the benefit of others, has been substituted for the goods, delivered to him at the same place. And if this be not done, he is entitled to compensation for the injury sustained thereby.

§ 1175. — *but profits, which might have accrued on the homeward cargo, disallowed.*

What shall be the measure of such compensation? The libel asks that it may be the profits which would have been made on the homeward cargo. But this was abandoned at the argument, and very properly. The law cannot go into a speculation of contingent profits, and it presumes that the shipper might have substituted other funds for a return cargo, if he saw fit. Interest is the established measure of damages for the non-payment of money. The shipper might waive his right to payment at the port of destination. But there is nothing in this case from which such waiver can be presumed, unless it be that the adjustment of the general average was not made up until since the arrival of the vessel here. But I do not think that sufficient to warrant a presumption that the shippers voluntarily relinquished their right. They were not personally at Porto Cabello; and it does not appear that any offer of payment was made to their correspondents or consignees. It must be inferred that the captain had no funds, or means of making payment, at Porto Cabello; and as the parties all resided here, the adjustment was properly left to be made by themselves, after the return of the vessel.

I have discussed this case as if the goods of the libelants had been sold. But it is proved that the five-franc pieces passed as currency, and were money at Porto Cabello. If this makes any difference, it strengthens the claim, bringing it more directly within the case of *Sims v. Willing*, 8 Serg. & R., 103, and the remarks of the author in 2 Phill. Ins. (2d ed.), p. 131. All the authorities cited at the bar tend in some degree to sustain the positions above taken. In many of them, and particularly in the case of *The Packet*, 3 Mason, 255, such taking of the property of a shipper is regarded as a *forced loan*. And surely as much compensation should be made by the law in case of a *forced loan* as is ordinarily allowed when the lending has been voluntary.

Judgment accordingly.

THE JOSHUA BARKER.

(District Court for New York: Abbott's Admiralty, 215-221. 1848.)

STATEMENT OF FACTS.—Libel *in rem* for failure to deliver goods shipped. The vessel capsized at the wharf before sailing, and the flour was taken out and sold without communicating with the consignees.

§ 1176. *The peremptory sale of damaged goods by the carrier without taking the owner's directions is a conversion.*

Opinion by BETTS, J.

The answer admits that the flour was taken out of the bark at Albany, after her disaster, and immediately sold, and that the sale was made without authority from the libelants. It is matter of notoriety that communication could have been had with the owners of the flour at New York in a few minutes, by telegraph, and their instructions thus taken on the subject; and also, that the regular mail conveyance by steam from Albany to New York and back is made within forty-eight hours, while, by the ordinary running of the steamboats, a special messenger could have obtained orders in New York and returned with them to Albany within twenty-four hours. Under these circumstances, the acts of the claimants, in making peremptory sale of the flour at their own discretion, immediately on the bark being raised, was, in respect to the rights of the libelants, unnecessary and wrongful. The libelants were accordingly entitled to charge the claimants with the full value of the flour laden on the vessel and not delivered at the port of destination, as tortiously disposed of by them. No case of necessity for the sale being shown by the claimants, the fact in proof, that subsequently to the sale they demanded of the libelants the allowance of an account against them, amounting to \$1.173.15, arising upon prior distinct transactions, before they would pay over the proceeds of the flour, indicates that the claimants assumed the power to dispose of the flour at their own discretion, and, having its avails in hand, to force the libelants to a settlement of antecedent dealings between them, as a condition to their accounting for the conversion of the property. Common carriers cannot coerce payment of debts in that manner out of property committed to them for conveyance. This would be an abuse of the bailment, amounting to a trespass. They have not power, in any emergency, to sell the entire bailment, so as to give a purchaser title to it against the bailor or shipper. *Arnold v. Halenbake*, 5 Wend., 33. Upon the general principles of mercantile law the libelants are entitled to the full value of the property at the port of delivery. *Watkin v. Loughton*, 8 Johns., 213; *Amory v. McGregor*, 15 id., 24; *Bracket v. McNair*, 14 id., 170; *Gillingham v. Dempsey*, 12 Serg. & R., 188; 12 Barn. & Ald., 932. And the wrongful disposal of it also justifies imposing interest on carriers. See same cases. Interest is the appropriate recompense in case of loss of property by the fault or misconduct of another. 17 Pick., 1; 21 id., 559; 1 Metc., 172; *Stevens v. Low, Hill*, 132.

§ 1177. — *measure of damages for failure to deliver goods under such circumstances.*

The exceptions raise the question whether the libelants can demand more than the value of the flour at the time it might have been reasonably delivered at New York if it had not been sold. This point becomes material, because between the 9th of October, when the bark, in her ordinary course of navigation, might have reached New York, and the 15th, the time of her actual arrival after being raised, the price of flour was materially enhanced. The commissioner reports the difference upon this shipment to amount to \$200.50. The delay of the vessel in this case was merely temporary. The accident did not disable her from completing her voyage, and it was well known, when the flour was taken out and sold, that the bark was uninjured, and that she could be immediately dispatched to her port of destination. The interruption was no more than a circumstance which prolonged her voyage.

The delivery of the flour at New York on the 15th could incontestably have been made within the undertaking of the claimants, and the libelants must then have accepted it, subject to compensation for the injury it had received. Carriers by water are liable for the actual value of goods withheld or lost, without legal excuse, computed at the time when the goods might have been delivered at the place of destination. *Arthur v. The Cassius*, 2 Story, 81; *House v. The Lexington*, 2 N. Y. Leg. Obs., 4. The arrival of the vessel herself (she not having made intentional deviation) on which the goods were laden would ordinarily be received as satisfactory evidence of the time at which the delivery might reasonably have been made. Casualties which should retard the arrival beyond the usual period would not vary the rule so as to enable the consignee to charge the carrier upon the footing of a wilful or unreasonable delay. Accordingly, when the goods are sold, or applied to the necessities of the ship during the voyage, the measure of compensation to the owner is the clear net value at the port of destination, as the market stands on the failure of the ship to deliver the goods; with the privilege, however, to the owner to take the sum for which the goods actually sold. *Abbott on Shipp.*, 455. And the inquiry as to value does not seem, from the authorities, to turn at all upon the consideration whether, without the accidental delay, the goods would have come into a better market. In a case of tort, the owner, doubtless, might have taken either period for fixing his damages; that at which the wrong was done and his property destroyed or converted, or that at which he might have had possession of it but for the wrongful act; and where he has notice he might be compelled to declare at once his election. But I do not pursue that question, because the laches of the claimants prevented the libelants insisting upon having the property delivered to them in its then condition, which could have been easily and safely done in a few hours; and also, because the arrival of the vessel, notwithstanding her misadventure, was in a reasonable time after the flour was laden on board; and the libelants are, accordingly, entitled to take the time of her arrival as that at which the value of her cargo, put on board, shall be determined.

I think that the finding of the commissioner, that the flour was worth in New York, on the 15th of October, \$4,841, is justified by the proofs. In addition to the deduction of \$350, admitted by the libel and answer to be properly allowable, the freight from Albany to New York, amounting to \$70, is also to be deducted as composing in part the value of the flour at New York. The libelants will therefore take a decree for the balance, of \$4,421, with interest thereon from October 15, 1847, to the date of the final decree, together with their costs to be taxed.

§ 1178. *Allowance of costs.*

Costs will not be allowed to either party upon the exceptions. They are not allowed against the claimants, because the report is in the alternative, and does not fix definitely the sum with which they are chargeable, and because they are not allowed by it the freight to which they are entitled. And costs are not allowed against the libelants, because the claimants are defeated upon the merits of the exceptions to the report, and because the refusal of the commissioner to allow the freight was the consequence of the inadvertent admissions of the claimants in their own answer.

Decree accordingly.

THE MARY J. VAUGHAN AND THE TELEGRAPH.

(District Court, Southern District of New York: 2 Benedict, 47-52. 1867.)

STATEMENT OF FACTS.—By a collision on the Hudson river a cargo of barley on a canal boat, shipped in Canada for New York, was lost. Judgment having been rendered against the offending vessels, the question arises: What is the measure of damages—the value at the place of shipment or the value at the place of delivery?

§ 1179. *Measure of damages where a contract to deliver goods is broken.*

Opinion by BLATCHFORD, J.

The law is well settled, that, in case a contract to deliver goods is broken, the party is entitled to recover the full value of the goods at the place of delivery. And such value is to be computed in the currency prevalent at such place. This was the rule applied by Judge Shipman, in the case of *The Patrick Henry*, 1 Ben., 392, cited in this court for the libelants. If, in this case, the action was on the bill of lading of the barley, for its non-delivery at New York, the proper rate of damages would be \$1.70 per bushel.

§ 1180. *Measure of damages where a loss of goods in transitu occurs from collision or other tort.*

But, in cases of loss of cargo by collision or other tort, the rule is equally well settled that the value of the lost property at the time and place of its shipment is the measure of damages. In case of illegal capture as prize, where the property is wholly lost to its owner, the damages allowed are only the prime value, or invoice price, and interest, and no supposed profits or allowance of damages, on the basis of a calculation of profits. *Murray v. The Charming Betsey*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Cranch, 458; *The Schooner Lively*, 1 Gall., 315, 324-327; *Del Col v. Arnold*, 3 Dal., 333; *The Anna Maria*, 2 Wheat., 327; *The Amiable Nancy*, 3 id., 546, 560. The same rule of damages has been established by the supreme court for collision cases. In *Smith v. Condry*, 1 How., 28, a collision occurred in the port of Liverpool. The plaintiff offered to prove, at the trial, that his vessel was laden with salt, and was so delayed in her voyage by the collision that the salt was worth considerably less at her port of destination, when she arrived there, than it would have been worth if she had not been so delayed, and claimed to recover such difference as damages. The court excluded the evidence, and the supreme court held that the evidence was properly excluded, and that, in cases of loss by collision, the injured party could not recover for the loss of probable profits at the port of destination, and that the value of the property at the place of its shipment was the measure of compensation. That was the rule adopted by this court in the case of *Adams v. The Ocean Queen* (before Judge Shipman, November, 1866), where the commissioner, in assessing the amount of damages caused to the cargo of a vessel by a collision, took as the measure the price it would have brought at the port of destination, instead of the price paid at the port of shipment. This court held that the proper measure was the value of the property at the port of shipment, with interest at the rate of six per cent. per annum from the time of the collision. The circuit court, on appeal (September, 1867), affirmed this decision. As the commissioner, in the present case, did not adopt, as the measure of damages, the value of the barley at the port of shipment, in the currency then and there prevalent, the first exception of the claimants to his report is allowed. The second, third, fourth, fifth, sixth, seventh and eighth exceptions of the claimants to his report necessarily fall with

the allowance of their first exception, and no decision is necessary as to the points involved in those exceptions. They are neither allowed nor disallowed, but are ordered to be stricken from the record.

§ 1181. *Rule as to the currency in which damages are to be reckoned. Exchange and legal tender.*

The damages computed on the principles above set forth will amount to a certain number of dollars in the money of the United States, and the decree will be for that number of dollars. The case will stand the same as if the barley had been shipped from England, in which event the value of the barley there, in sterling money of Great Britain converted into the coined money of the United States at the commercial value of such sterling money at the time in such coined money, would be the legal measure of damages, the only difference in the present case being, that as the currency prevalent in Canada is the coined money of the United States, it does not require to be converted into such coined money. The rule is the same as if the action were one for the breach of a contract to deliver the like quantity of barley at a foreign port, whether in England or in Canada, or for the breach of a contract for the payment of money, made abroad and to be performed abroad in a foreign currency. In a case of the latter description, this court has held that the proper rule of damages is the commercial value of the foreign money in the coined money of the United States, without any allowance for any premium on such coined money. *The Blohm*, 1 Ben., 228. The fact that under the act of February 25, 1863 (12 U. S. Stat. at Large, 345), the debtor can discharge a judgment entered for the amount of damages so ascertained by paying it in the United States notes or legal tender currency, without any allowance for any depreciation in the value of such currency or notes, cannot affect the question as to the proper measure of damages, or the proper mode of computing them. A debt contracted in the United States before such notes were made a legal tender, and payable in the United States, can be discharged by such notes, dollar for dollar, according to the tenor of the contract. Such is the law, and the privilege of so discharging any judgment which may be entered in this case for damages, computed on the principles herein set forth, is one which the debtor is entitled to as an incident of the bringing of the suit in this forum. The creditor, if he comes into this jurisdiction to bring his suit, must accept the right to sue with the incident.

The ninth exception of the claimants must be allowed, as the proper rate of interest was six per cent. per annum, and not seven. An order must be entered disposing of the exceptions as above stated, and referring the case back to the commissioner to ascertain the damages on the principles above set forth, and report the same to the court.

ROSENFELD v. THE EXPRESS COMPANY.

(Circuit Court for Louisiana: 1 Woods, 181-187. 1871.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The petition alleges that on the 1st day of September, 1865, at Alletytown, in the state of Texas, the plaintiff, being the owner of certain packages and cases of wool and cotton cards, intrusted the same to the defendant, to be transported to the city of New Orleans, there to be delivered to plaintiff or his order. That, on the 4th of September, 1865, at Houston, Texas, the plaintiff, being the owner of twenty-two other boxes of cotton cards, intrusted them through his agent, A. Cramer, to the defendant to be transported

to New Orleans, and there delivered to the order of said Cramer. That the defendant, notwithstanding its obligation to deliver said packages and cases to the plaintiff, has, although demand therefor has been made by plaintiff, neglected and refused to deliver the same to him, to his damage in the sum of \$20,720, for which amount, with interest and costs, the plaintiff demands judgment.

The answer admits all the averments of the petition, except as to the value of the goods shipped, and sets up by way of defense: 1. That the defendant transported the goods duly to said city of New Orleans, and there delivered them to one G. Lewis, who was the owner of the same, and who had full authority to receive them. 2. The said goods were only worth \$4,500.

On the trial of the cause, to maintain the issue on its part, defendant offered evidence tending to show that Gustave Lewis and L. Cowan were the owners of said goods, and that the same were delivered to said Lewis, and that he had authority to receive the same; but the defendant did not offer to prove that the goods were delivered to Lewis upon the order of the plaintiff or by his authority. The evidence so offered was objected to by the plaintiff, and the question of its admissibility was argued on both sides with ability and research. The rule of law is claimed by defendant to be this: If property committed to a common carrier has been delivered by it to the rightful owner who is other than the consignee, upon a suit brought by the latter, the title of the property may be inquired into, and the carrier is not concluded by the receipt or a bill of lading. On the other hand, it is asserted by plaintiff that to contend that the common carrier can dispute the title of the party who employs him, being *pro hac vice* the agent of the shipper, is to assume a ground altogether at variance with his confidential position and duties toward his principal, subversive of his trust, destructive of good faith, and opposed to the policy and reason of the law which protects and advances the interest of the employee.

§ 1182. *A common carrier cannot dispute the title of his bailor, but may deliver goods to real owner if demanded.*

After an examination of all the authorities cited on either side, I am satisfied that the rule upon which the question is based is this: In general, the carrier is not permitted to dispute the title of the person who delivers goods to him, and on his own motion set up an adverse title in another. But if an adverse claim has been set up by the real owner, and suit either brought or threatened, or even demand made for the goods, and they have been delivered to him, the carrier may show these facts, and they will constitute a good defense to an action by the consignor.

§ 1183. — *authorities on this point reviewed.*

In *Wilson v. Anderton*, 1 Barn. & Ad., 450, Littledale, J., says: "If the suitor brought an action against the defendant as bailee, the latter might show that on being threatened by an action by a person who had title to the goods, he (the bailee) had delivered them." In *King v. Richards*, 6 Whart., 418, the court uses this language: "It may be correct enough to hold that, when the real owner does not appear and assert his right, the carrier or bailee shall not be permitted, of his own mere motion, to set up as a defense against his bailor such right for him; but it would be repugnant to every principle of honesty to say that after the right owner has demanded the goods of the bailee, he shall not be permitted, in any action brought against him by the bailee of the goods, to defend against his claims by showing clearly and con-

clusively that the plaintiffs acquired the possession of the goods tortiously or feloniously, without having obtained any right thereto." "As a general rule, a bailee cannot set up a right of property in a third person to defeat a recovery by his bailor, but this rule is subject to many exceptions; the defendant in such suit may show that the property has been taken from him by the process of law, or by a person having a paramount title. Nor are these the only exceptions. We are strongly disposed to think that the right of the true owner may be set up in all cases when upon his demand the property has in fact been delivered to him before the commencement of the suit."

Mr. Angell, in his treatise on the Laws of Carriers, sec. 335, says: "If the goods are by the real owner taken from the possession of the carrier, will it afford an excuse for non-delivery to the bailor? In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, and such is clearly the rule when an adverse claim is merely asserted by the carrier of his own mere motion." Mr. Justice Story, in his commentaries on Bailment, sec. 582, says: "Another excuse which may be asserted under certain circumstances is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action, growing out of his contract. And this is emphatically the rule when that adverse claim is not asserted by the superior claimant himself, but is merely asserted by the carrier of his own mere motion."

Chancellor Kent, in his commentaries, vol. II, p. 567, lays down the rule thus: "The depositary is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears to be the right owner. The bailee has a good defense against the bailor if the bailor had no valid title, and the bailee on demand delivers the goods to the rightful owner." So, in *Shelbury v. Scotsford*, 1 Yelv., 22, it was held that to a promise to redeliver a horse to the plaintiff, the defendant might plead that the horse was taken from him *vi et armis* by the true owner. In *Sheridan v. New Quay Co.*, 4 Com. B. (N. S.), 619, Mr. Justice Willes, delivering the judgment of the court, says: "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner before the defendants had parted with the goods. The same would have protected them against the real owner if they had delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the *pseudo* owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him."

This subject is discussed, and the rule as above stated recognized, in the following cases: *Floyd v. Bovard*, 6 Watts & S., 75; *Harker v. Dement*, 9 Gill, 7; *Lowremore v. Berry*, 19 Ala., 130; *Bliven v. Hudson River R. Co.*, 36 N. Y., 403; *Fisher's Digest*, title "Bailment," vol. 1, p. 570; *Edson v. Weston*, 7 Cow., 280. The same rule seems to have been adopted by the Civil Code of this state. Secs. 2949 and 2959 of the Revised Code of 1870, declare that "the depositary must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it." "He cannot require him who made the deposit to prove that he was the owner of the thing; yet if he discovers that the thing was stolen, and who the owner of

it is, he must give him notice of the deposit, requiring him to claim it within due time. If the owner receiving due notice neglects to claim the deposit, the depositary is fully exonerated in returning it to the person from whom he received it."

§ 1184. — *but voluntary delivery to another without demand or claim of title does not discharge the carrier.*

Counsel for both parties admit that the jurisprudence of this state and the civil law is in harmony with the common law upon the question under consideration. Taking the rule as I have stated it to be the law settled by the authorities, should the evidence offered by the defendant and objected to by plaintiff be admitted? The evidence is of course offered to sustain the defense as set up in the answer. This, as stated by defendant, itself does not set up adverse title in another, and a demand for the property by such adverse claimant; but construing the answer most strongly against the pleader, the defense seems to be a voluntary assertion of title in another by the common carrier, and a voluntary delivery of the property, without any demand or claim whatever of title by the party to whom it was delivered. The answer, according to the authorities cited, is bad on general demurrer, and evidence for the purpose of sustaining it must be excluded, for if defendant proved precisely what it has alleged, it would avail it nothing.

§ 1185. *Measure of damages where carrier improperly delivered goods to wrong person, who afterwards restored them.*

The defendant then being without proof to sustain the main defense on which it relied, there must be a finding and judgment for the plaintiff for the amount of damage actually sustained by him as the result of the wrongful act of the defendant. The law gives actual compensation for the loss actually sustained. Thus if, by the breach of contract by the defendant, the plaintiff entirely lost his goods, the measure of his damages would be the value of the goods. But suppose, in violation of its duty and contract, the defendant had delivered the plaintiff's goods to a person not entitled to them, and that person, on demand of plaintiff, had at once, and without costs and charges, turned them over to the plaintiff, no court or jury would give him damages for the full value of the goods. His damages would be merely nominal, and he would be awarded nominal damages.

"Another species of property," says Blackstone (Com. II, ch. 29, p. 438), "acquired and lost by suit and judgment at law, is that of damages given to a man by a jury as a compensation and satisfaction for some injury sustained." "Every one," says Lord Holt, "shall recover damages in proportion to the prejudice which he hath sustained." *Ferrer v. Beale*, 1 Ld. Raym., 692. Damages — "*Damna* in the common law," says Lord Coke, "hath a special signification for the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." Co. Lit., 257a.

In this case the evidence clearly establishes that, after the delivery of the goods named in the petition had been made by the defendant to the said G. Lewis, Lewis accounted for the proceeds to the plaintiff to his entire satisfaction. This is proven by the testimony of two witnesses, and is not successfully contradicted. After the plaintiff had thus received the proceeds of the sale, with what show of justice can this court award him damages against the defendant for their full value? He has, in effect, received his goods from the person to whom the express company delivered them. He can only ask this court to give him compensation for the defendant's breach of contract — *to recompense*

him—to make him whole—to put him in the same plight as if the express company had performed its contract by the delivery of the goods to him. The goods having been accounted for to him to his satisfaction, his damage is only nominal. Nominal damages will compensate him, and the court awards him nominal damages.

PAGE v. MUNRO.

(Circuit Court for Massachusetts: 1 Holmes, 282, 283. 1873.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—This is a libel *in personam* to recover freight according to the bill of lading on a cargo of yellow pine lumber, shipped by Edward Kidder & Sons at Wilmington, to be delivered at Boston to defendants upon payment of freight at the rate of \$10 per thousand feet. The lumber arrived and was delivered to the defendants in good order.

In defense, the answer sets up a verbal agreement to receive and load this particular cargo, and alleges that this contract was made under a false representation. The amended answer alleges unreasonable delay in the delivery in consequence of unnecessary and culpable delays of the vessel in Port Norfolk, and that she failed to make quick dispatch, because she was sent to sea with rotten, old and unseaworthy sails, and was delayed unreasonably thereby; and that the master so negligently and carelessly conducted the voyage that the vessel was greatly delayed.

§ 1186. *On a libel for freight, delay is no defense without resulting damage shown.*

It is not necessary to consider the evidence upon the issue of unreasonable delay in the delivery of the cargo, for there is no evidence in the case that sufficiently establishes the proof of any resulting damage to the defendants by reason of such delay. The general rule is, undoubtedly, that the carrier who unreasonably delays to deliver merchandise, such as is ordinarily bought and sold in the market, is responsible for a fall of price; and the measure of damages is the difference in the market value at the time of the actual delivery and the time when the merchandise, by reasonable diligence, should have been delivered. The Success, 7 Blatch., 551. The defendants allege in their answer that there was such a fall in price and depreciation in the value of the lumber. They have proved only that they lost the sale of a portion of the lumber to the parties to whom they had contracted to sell. But they have not attempted to prove that the lumber was not as valuable when they received it as when they expected it. The libelants have proved that there was no depreciation in the market value. The evidence does not negative the hypothesis that the defendants may have made a profit by the delay. The decree of the district court was on the ground that there was no proof of actual damage; and the defendants have not availed themselves of the opportunity afforded them by the appeal to supplement the evidence on this point by proof of actual depreciation of value.

Decree of district court affirmed, with interest and costs.

§ 1187. *Injunction restraining carrier.*—A common carrier may be restrained from transporting in furtherance of an infringement of patents. *American Cotton Tie Supply Co. v. McCready*, 17 Blatch., 291.

§ 1188. *Maritime jurisdiction under bill of lading.*—The contract created by the signing of a bill of lading for the carriage of goods by sea is a maritime one, and within the jurisdiction of the admiralty. *Harrison v. Stewart*, Taney, 485 (§§ 1167-1169). And see *Thatcher v.*

McCulloh, Olc., 365 (§§ 986-989); *The Maggie Hammond*, 9 Wall., 435 (§§ 437-437); *The Huntress*, Dav., 82 (§§ 871-876); *supra*, §§ 232, 527. And see COURTS; MARITIME LAW.

§ 1189. **Remedy against carrier; parties.**—The vessel may be held liable for the non-execution of a contract by a bill of lading entered into by the master; and it matters not whether the vessel is employed by the general owner, or be let by a charter-party or parol agreement on condition that the hirer shall have the whole control of her. *The Phebe*, 1 Ware, 263.

§ 1190. If the vessel be thus proceeded against for the fault of the master in not fulfilling the contract evinced by a bill of lading, the general owner may contradict the bill of lading by parol testimony, he being a stranger to the contract and intervening as a third person for his own interest. *Ibid.*

§ 1191. It is only those contracts which the master makes in such capacity that specifically bind the ship and affect it by way of lien or privilege in favor of the creditor. *Ibid.*

§ 1192. A suit *in rem*, unlike a suit *in personam*, need not charge a ship as a common carrier, although in such case proof is necessary that the vessel is employed as a common carrier. *The Pacific*,* Deady, 17; *S. C., Seller v. Steamship Pacific*,* 1 Oreg., 409.

§ 1193. A shipper, who loses goods through the master's fault and within the scope of the master's duty, has a remedy against the owner and also the ship. *The Waldo*,* 4 Law Rep., 382.

§ 1194. The holder of a bill of lading has a threefold remedy for the non-delivery of goods — against the master on his undertaking, or personally against the owners, or against the vessel *in rem*. *The Schooner Leonidas*, Olc., 12, 15.

§ 1195. The cashier of a bank to whom bills of lading have been indorsed may libel the vessel for wrongful delivery, in his own name. *The Thames*,* 14 Wall., 93 (§§ 859-864); and see § 739. And *prima facie* the consignee under a bill of lading may sue the carrier for non-delivery in his own name. *Lawrence v. Minturn*, 17 How., 100 (§§ 463-470); and see § 312.

§ 1196. One who has made advances upon the consignment may sue for non-delivery as consignee. *Vose v. Allen*, 3 Blatch., 289 (§§ 841-843). See § 723.

§ 1197. An insurance company which has accepted an abandonment and paid the loss may sue the carrier *in rem* in admiralty. *The Keokuk*,* 1 Biss., 522; *The Planter*, 2 Woods, 490 (§§ 159-162). See § 130.

§ 1198. The owner of goods may elect whether to proceed against one or the other, where both carrier and insurer are liable by reason of a loss. *Kentucky Marine, etc., Ins. Co. v. Nashville R. R.*,* 3 Am. L. T., 79.

§ 1199. An insurance company cannot recover from a common carrier losses which it has been compelled to pay for insured goods transported by the carrier, without proof that the losses occurred through the carrier's negligence or default. *Ibid.*

§ 1200. Where the plaintiff was the master of a vessel which he rigged at his expense and for which he held a bond from the builder, in whose name she was registered, to convey on payment of a balance due for building, it was held that he had an insurable interest in her freight, and his agent in making application for insurance rightly described him as owner. *Simmes v. Marine Ins. Co.*, 2 Cr. C. C., 618.

§ 1201. **Pleadings, defenses, etc.**—In a suit *in rem* it is not necessary to charge the defendant in the libel as a common carrier; otherwise where the suit is *in personam*. *The Pacific*,* Deady, 17; *Seller v. Steamship Pacific*,* 1 Oreg., 409.

§ 1202. The burden of proof as to the value of goods injured or not delivered lies on the shipper. *Ibid.*

§ 1203. A consignor, failing to take a bill of lading, must prove the amount of his consignment in an action against the carrier for short delivery. *Manning v. Hoover*, Abb. Adm., 188 (§§ 856-858).

§ 1204. In an action for a balance due upon the non-delivery of goods by a carrier, the bill of lading need not be produced. *Newell v. Nixon*, 4 Wall., 572.

§ 1205. A common carrier, through whose fault a loss has occurred, cannot set up in defense to an action *in rem* by the insurer, who has paid the loss, that the latter was not legally bound to indemnify the insured for the loss sustained, and therefore has no cause of action. *Amazon Ins. Co. v. S. B. Iron Mountain*, 1 Flip., 616.

§ 1206. Private contracts between the shipper and strangers for the purchase and sale of the goods do not affect the question of the carrier's liability for delivering them in a damaged condition. Nor is it material what disposition the shipper has made of the goods since the breach of contract occurred. If he holds them for a better market it is at his own risk, and the rise or fall in price upon such speculation does not affect the rule of damages as against the carrier. *The Ship Compta*,* 5 Saw., 137.

§ 1207. An arrangement between underwriters and shippers, whereby the former pay the loss upon an agreement that the latter shall repay them whatever may be recovered from the

vessel upon a libel charging the vessel with liability for such loss, cannot be set up in defense by the carrier. The Centennial,* 7 Fed. R., 601.

§ 1208. Liability of carrier vessel considered where goods are destroyed or materially injured, and the owners of the vessel become bankrupt and obtain their discharge in bankruptcy. Cause of action *ex contractu* and *ex delicto* here distinguished, as to interposing a bar to the suit. *Dusar v. Murgatroyd*, 1 Wash., 15.

§ 1209. Damages, how assessed.—Damages assessed according to value at place of shipment where the voyage had not been completed and had hardly been commenced, and where the delay was the true cause of loss. *The Alice*,* 12 Fed. R., 496.

§ 1210. Where goods are injured on the vessel at the port of shipment, the fair measure of damages is the difference between the prime cost and charges, and the sales at such port; the profit which might have been realized at the port of destination is not to be considered. *Dusar v. Murgatroyd*, 1 Wash., 13.

§ 1211. Where goods are delivered in a damaged condition, the damage recoverable is the difference between their market value if sound and their value in their unsound condition—both values to be computed as of the time when the goods were or should have been delivered. *The Ship Compta*,* 5 Saw, 137; *The Gold Hunter*, Bl. & How., 300 (§§ 527-531).

§ 1212. Damages assessed and rule determined by price actually produced, where cotton ties were damaged by negligent exposure to chemicals which formed part of the cargo. *Hamilton v. Bark Kate Irving*,* 5 Fed. R., 630. And see *The Bark Colonel Ledyard*, 1 Spr., 530 (§§ 499-501).

§ 1213. Damages allowed where goods were delivered in a damaged condition. Auction sale, not being unobjected to for unfairness, taken as a basis for valuation. An extortionate charge of the carrier included in damages recoverable. *Pendall v. Rensch*,* 4 McL., 259.

§ 1214. Damages computed where the *status* of civil war rendered it impossible for the carrier to complete his undertaking and the goods were lost by his subsequent negligence as bailee for hire. *Caldwell v. Southern Express Co.*, 1 Flip., 85; S. C., 3 Cent. L. J., 416 (§§ 150-155). See §§ 126, 127.

§ 1215. Damages for loss of costly wearing apparel are not to be measured by an auction price as for second-hand clothing; but by its worth to the owner and the cost of replacing it. *The Oregon*,* Deady, 179.

§ 1216. Rule of damages for conversion of household goods, more or less worn, and having no established market price. *Marsh v. Union Pacific R. Co.*, 3 McC., 236 (§§ 977-980).

§ 1217. Consequential damages cannot be claimed for a delay in delivery where no notice of urgency to the carrier and no special contract is established. The rule is to allow the difference in the market value at the time of the delivery and the time when the goods should have been delivered. *The Golden Rule*,* 9 Fed. R., 334. For damages caused by deviation and delay, see, also, *The Boston*, 1 Low., 464 (§§ 816-820); *Rowe v. Steamer City of Dublin*, 1 Ben., 46 (§§ 838, 839).

§ 1218. Where a cargo of flour was damaged by water, owing to a collision on the Mississippi river, about sixty miles below Cincinnati, and it was shown that flour so damaged could have been sold for a higher price at Cincinnati than at New Orleans, its place of destination, it was held that the measure of damages was the difference between the price of good flour and damaged at Cincinnati, the nearest market for flour, and that, under the circumstances, it was an error of judgment to forward it to New Orleans. *Seaman v. Steamboat Crescent City*, 1 Bond, 105.

§ 1219. Damages for the loss of a cargo, for which the owners sent the vessel to a foreign port, is the price paid with such a sum as would represent the fair net freight from the port of shipment, or the goods' increased value at the port of discharge, and not the cost of the voyage. *The Glaucus*, 1 Low., 366.

§ 1220. If a master, in violation of his duty, takes a cargo to a port other than the port of discharge under the charter-party, where it might have been safely landed, and sells it, the measure of damages is the actual value thereof at the port of discharge at the time when the same might have been there landed, deducting all duties and charges and the freight for the voyage, as if the cargo had been duly landed. *Arthur v. The Schooner Cassius*, 2 Story, 81.

§ 1221. Damages for non-delivery of gold coin are the value of the coin estimated in the currency of the country in which the port of delivery is situated, and where the suit is brought. *The Ship Patrick Henry*, 1 Ben., 292.

§ 1222. On a shipment of British "sovereigns," under the usual bill of lading for a certain sum as freight in pounds sterling, the contract is to deliver articles of freight, not a promise to pay money; the measure of damages for failure to do which is the value of the sovereigns in currency at the port of delivery, less the freight, also computed in currency. *Ibid.* And see *King v. Shepherd*, 3 Story, 349 (§§ 532-537).

§ 1223. Where goods were damaged during transportation on board ship, and were received

by consignees on the understanding that the loss was to be made good to them, and the consignees sold the goods with the assent of the master, the sum realized at the sale may be treated as the value of the goods in their damaged state. *The Columbus*,* Abb. Adm., 97.

§ 1224. Sale by auction, or an appraisement, with notice to the ship-owner, should be had of damaged cargo in order to bind the latter, and not a private sale, where the consignees had a damaged cargo upon their hands. *Crosby v. Grinnell*,* 9 N. Y. Leg. Obs., 231.

§ 1225. Evidence of the value of similar fruit on a next succeeding consignment held admissible in fixing the damages. *The Steamship Colon*,* 10 Ben., 888.

§ 1226. A rebate of duty which the consignee obtains because of damage to goods by the carrier is not to be considered in computing the damage recoverable by the consignee against the ship. The market price of a merchantable commodity at the place of delivery should furnish the test of value; but the rate of duty, though an element in fixing such market value, is not a criterion. *The Bark Eroë*,* 9 Ben., 191.

§ 1227. Commissioner's report sustained as to damages, against exceptions alleging incorrectly that the report was general and did not give the rules on which it was based. *The Ship Sabioncello*,* 8 Ben., 90.

§ 1228. Upon facts showing that green sugar suffered by drainage on the voyage from bad weather, the ship-owners were held responsible only for the value of sweepings which were sold by the crew. *The Brig Gomez de Castro*,* 10 Ben., 540.

§ 1229. A bill for the amount of damage, made out by the consignees after an appraisal, and presented, may be taken to show, as against them, the difference in the market value of sound and damaged goods at that time. *The Bark Eroë*,* 9 Ben., 191.

§ 1230. Remedies by common carrier.—A common carrier may maintain an action *in rem* for damage to goods for the safe and sound delivery of which he is responsible. *The St. John*, 7 Blatch., 320.

§ 1231. If a master sells a portion of the cargo in a foreign port to relieve the vessel's necessities, suit for indemnity will lie, in case the ship or owners fail to respond, against the owners of the residue, to contribute ratably towards the demand. *The Schooner Leonidas, Olc.*, 12, 15.

§ 1232. In a suit by a master for damage to his cargo by a collision, held, that the liability of a carrier is not diminished by the absence of a bill of lading, and that his right to recover depends upon the fact of his possession as carrier at the time of the accident. *The Gen. McCullom*,* 9 Ben., 31.

§ 1233. Where such damaged cargo was abandoned to the insurers, and the consignee agreed to take it on a deduction from the price agreed upon, the difference being paid to the shipper by the insurer (there being no opportunity for an auction sale), this, with the testimony of experts, was held sufficient evidence of the damage to the cargo. *Ibid.*

§ 1234. Where a decree had directed a steamboat and steam-tug to each contribute to the owners of a vessel which the tug was towing, and to the owners of the cargo, one-half of the damage occasioned by a negligent collision of the steamboat and steam-tug, it was held that the steamboat was not bound to contribute more than one-half of the damage, although the value of the tug was less than one-half of the damages. *The City of Hartford and The Unit*, 11 Blatch., 290.

§ 1235. Where it is found impossible to tell to what extent carrier and shipper contributed to the loss, the damages may be equally divided between them. *Snow v. Carruth*,* 1 Spr., 324.

§ 1236. Where, to the carrier's libel for freight, the respondent sets up in defense damage done to the goods exceeding such claim for freight, the libel will be dismissed with costs. *Bearse v. Ropes*,* 1 Spr., 331.

§ 1237. Where, in a suit *in personam* for freight, the respondent's answer admits that the contract was made with the master, no objection to his right to sue can be made. *Hus v. Kempf*,* 10 Ben., 231.

§ 1238. Tender made after suit is brought for freight should include interest and costs, and the money should be deposited in court. *Ibid.*

§ 1239. What is a sufficient tender to avoid payment of costs, where a libel in admiralty is brought to recover freight? *Dedekam v. Vose*, 3 Blatch., 44 (§§ 518, 519).

§ 1240. A note given by one of two joint ship-owners, not partners, for a balance due upon non-delivery of cargo is enforceable against the other, who, with knowledge of the same, buys out the former owner's share and assumes the vessel's liabilities. *Newell v. Nixon*, 4 Wall., 572.

§ 1241. Miscellaneous points.—In an action to recover insurance on a cargo, the fact that the bill of lading stated that the cargo belonged to the plaintiff and another jointly does not estop the plaintiff from proving himself the person solely interested. *Maryland Ins. Co. v. Rudon*, 6 Cr., 388.

§ 1242. Steamers, each of which was owned by a different corporation, and whose accounts were kept separate in respect to both earnings and expenses, together formed a "line" with a common agent, who issued bills of lading as agent of the "line" for goods shipped upon each steamer. *Held*, that the agent, while the common agent of all, acted for each steamer separately, and that for goods shipped upon a particular boat only the owner of that boat was liable. *Citizens' Ins. Co. v. Kountz Line*, 10 Fed. R., 768 (Agency, §§ 213, 214).

See, also, *V.* as to controversies between consignee and carrier respecting freight.

VII. CONNECTING CARRIERS.

SUMMARY — *Liability of carrier beyond his own route*, §§ 1243-1248. — *Special contract, bill of lading, etc.*, §§ 1249, 1250. — *Delivery to succeeding carrier*, §§ 1251-1256. — *Continuous transportation of animals*, § 1257.

§ 1243. Presumption is that one of connecting carriers is liable only for his own route and for safe storage and delivery to the next carrier. Circumstances here considered; and *held*, that the first carrier assumed no responsibility for losses occurring beyond his own route; also, that the arrangement between the connecting carriers themselves did not constitute them partners, either as among themselves or with reference to the public. *Insurance Co. v. Railroad Co.*, §§ 1258-1261.

§ 1244. An arrangement between connecting carriers in the nature of a partnership or mutual agency may be shown to charge one for losses beyond his own route. But such arrangement or a special contract by one carrier to transport over other lines must be established by proof; and the naming of a through rate and knowledge of the destination of freight are not enough. *Stewart v. Terre Haute & I. R. Co.*, §§ 1262-1264.

§ 1245. A railroad company may contract to transport goods beyond its own terminus, though the presumption favors regarding each carrier as only a forwarder beyond his own line. Such a contract may be inferred from the terms of a through way-bill, the charge of through rates and other circumstances. Under such a contract, connecting roads, in transporting to the final point, may be treated as agents of the contracting carrier, and for a loss or injury occurring on a connecting road the contracting carrier may be sued. *Railroad Company v. Pratt*, §§ 1265-1272.

§ 1246. That part of the shipment lost or injured was loaded on a connecting road does not, under such circumstances, excuse the contracting carrier. *Ibid*.

§ 1247. A railway company may contract for through transportation by connecting lines, unless prohibited by its charter; and such prohibition will not be presumed where it so contracts. Where a through contract is made by the first carrier, and a subsequent carrier refuses to transport over his route, except upon more onerous stipulation, to which the shipper's agent is compelled to accede on the spot, the first carrier will not be relieved from his contract obligations and must answer for loss or injury on the connecting road accordingly. *Railroad Company v. McCarthy*, §§ 1273-1276.

§ 1248. In construing a written contract as a through contract or the reverse, surrounding circumstances will be regarded, and the court will interpret the contract accordingly. *Myrick v. Michigan C. R. Co.*, §§ 1297-1302.

§ 1249. Special notice limiting liability of connecting carrier *held* not to constitute a contract with the shipper, where unsigned and printed on the back of the receipt. *Railroad Company v. Manufacturing Company*, §§ 1277-1284. And see § 1256.

§ 1250. Bill of lading construed as a whole, which bill was given by a railroad carrier on behalf of itself and preceding and subsequent carriers in a continuous route; and *held* that a clause therein expressly stipulating for non-liability "for loss or damage by fire, from any cause whatever," was available to the contracting carrier, where the goods were lost by accidental fire and without negligence before reaching the contracting carrier's road. *Railroad Company v. Androscoggin Mills*, §§ 1285-1287.

§ 1251. Where the preceding carrier, in a continuous railway route, places the goods within the control of the subsequent carrier, and the latter receives them for transportation, expecting no further orders, the subsequent carrier's duty attaches for the safety of the goods; and the deposit of the goods, properly addressed, at a particular place, agreed upon by the two carriers, for such transportation, is tantamount to delivery with notice to the latter. *Pratt v. Railway Company*, §§ 1288-1290.

§ 1252. By a contract of connecting carriers, goods which the one brought by water to a certain point were received by the other and delivered by land at the terminus. Goods delivered by the former were stored on Sunday in the warehouse of the latter to be carried next

day. The goods thus deposited were destroyed by fire. *Held*, that whether the Sunday laws were thus violated or not, the former carrier, who had been compelled as agent of the connecting carrier to pay for their loss, was not thereby debarred from recovering for their loss in the warehouse of the latter. *Powhatan, etc., Co. v. Appomatox R. Co.*, §§ 1291-1293.

§ 1253. A connecting carrier should, in the absence of special contract to the contrary, carry safely and deliver to the next carrier in the route. Safe storage at the end of his route, without an attempt to deliver over, is not sufficient to relieve him. *Railroad Company v. Manufacturing Company*, §§ 1277-1284.

§ 1254. Railroad charter construed not to furnish an excuse for not attempting to deliver over. Provision against responsibility as common carrier for goods on deposit at the depot "awaiting delivery" does not refer to goods which the railway should forward by the next carrier in route to their final destination. *Ibid*.

§ 1255. If goods are to be transported and delivered to a connecting carrier, the first carrier is not discharged while awaiting delivery to the second, unless he has given notice to such carrier or is absolved by the terms of a special contract with the shipper. *Ayres v. Western Railroad Co.*, §§ 1294-1296.

§ 1256. Exemption from giving the usual notice to the connecting carrier, or from delivering to him goods which were to be forwarded beyond one's own route, is not shown by a railway receipt given to the shipper which purports a non-liability for goods "after their arrival at their place of destination," etc., especially if this stipulation was printed on the back of the receipt. *Ibid*.

§ 1257. Duties considered of a carrier of live stock to provide proper accommodations for their necessities on a continuous transportation. *Myrick v. Michigan C. R. Co.*, §§ 1297-1302. [NOTES.—See §§ 1303-1315.]

INSURANCE COMPANY *v.* RAILROAD COMPANY.

(14 Otto, 146-159. 1881.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The cotton, for the recovery of the value of which this action was brought against the St. Louis, Vandalia, Terre Haute & Indianapolis Railroad Company, the defendant in error, was, at the time of shipment, owned by Adolphus Meir & Co., of St. Louis, who, for a valuable consideration, have assigned to the St. Louis Insurance Company, the plaintiff in error, all their claim on account of the said loss. The parties having, by proper written stipulation, waived a jury, the case was tried by the court, and judgment given for the railroad company. The facts set forth in a special finding, covering many pages of the printed transcript, so far as they are deemed essential to a clear understanding of the case, are as follows:

The Erie & Pacific Despatch Company, a Kansas corporation, having agencies in different cities of the Union, and whose business it was to solicit and forward freights over trunk railroad lines between St. Louis and New York, received the cotton in question from Meir & Co., under agreements for its transportation to Liverpool, for a through rate, expressed in English money. No direction was given as to the route over which it should be carried to the seaboard, nor were any bills of lading then executed.

The St. Louis Transfer Company, having received from the despatch company the warehouse receipts, and having been engaged by it for that purpose, hauled the cotton to East St. Louis, and there delivered it, on account of that company, to the defendant, taking receipts therefor. By the dray tickets of the transfer company the cotton was consigned by the despatch company to C. G. Meir & Co., London. The defendant had not, on previous occasions, issued bills of lading for freight shipped over its line by the despatch company, nor did it do so for any part of these shipments. But, in accordance with its custom, it made a way-bill for the cotton to Indianapolis. The cotton was carried

maintenance of rates; and that the railway company should give to the despatch company at all times as low rates as were given to any other line running over the road of the former, and would prorate any rate on east-bound freight, made by authority of the road leading from the point, provided that road was authorized to make through rates over the Erie Railway; and that they would prorate all losses, damages and rebates that were prorated with any other line running over that railway.

It was further stipulated in that agreement, that, in consideration of the mutual benefits to be derived by the parties, the railway company should pay to the despatch company a commission on west-bound freight of fifteen per cent. of their gross earnings, as per their way-bills, on first, second and third-class freight, and ten per cent. on their gross earnings, as per their way-bills, on fourth and special class freight from certain points to certain other designated points. On east-bound freight the despatch company was to receive from the railway company ten per cent. of their gross earnings, as per their way-bills, on first, second and third class freight, and eight per cent. of their gross earnings, as per their way-bills, on fourth-class freight, from certain named places, and on freight from certain places, competing points on the Atlantic & Great Western Railroad, provided such freight originated from points off of said line; it being understood that no commission should be paid on freight originating at such stations.

With the defendant the despatch company had a parol agreement, which was the same in substance as the written one with the Erie Railway Company. It had no power, however, to contract for or fix any rate on the carriage of goods over the road of the defendant, except as authorized by the latter. In all cases of freight, ocean bound, from the west, over the Erie Railway, shipped by or consigned to the care of the despatch company, the latter was treated as the consignee in New York, and the freight was held subject to its order. The railway company was ready to deliver the Meir cotton as it arrived in Jersey City, and as directed by the despatch company.

What were the relations which the railroad companies sustained towards each other during the same period? In the year 1873, and prior thereto, the companies owning or operating the various railroad trunk lines between St. Louis and New York had an arrangement between themselves, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to New York, fixing through rates, which were divided among the several roads constituting a through line. According to an estimate of distances the goods were to be carried by each road upon the basis of the shortest line. Losses occurring on through shipments, if not located, were prorated as between the companies themselves, in the same ratio as the freight moneys; but if located, were, as between the railroad companies, to be paid by the one on whose road the losses occurred. The joint tariff was published and put into the hands of railroad agents for their guidance in making contracts, and was also distributed to shippers and to the public generally. The title page of that tariff was: "Joint rates of transportation from St. Louis *via* Toledo, Wabash & Western; Ohio & Mississippi; Chicago & St. Louis; St. Louis, Vandalia, Terre Haute & Indianapolis; Indianapolis & St. Louis; St. Louis & Southeastern; and St. Louis, Belleville & Southern Illinois Railroads." In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. The railroad companies collected

the freight from the consignees, divided it among themselves, and paid to the Erie & Pacific Despatch Company for its services so much per cent. on the gross freights for pound freight, and sixty cents a bale on cotton, each road settling separately with that company for its dues.

It is further stated, in the special finding, that on all shipments from St. Louis to New York by the railroad companies over which the Meir cotton was carried, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage at Jersey City, whether the goods were to go to New York proper or were foreign bound. These transfer and lighterage charges were included in the through rate named by the defendant. On shipments by that route from New York to St. Louis the defendant collected the freight money from consignees, and, retaining its proportion, accounted for the residue to the next road in the line, which in like manner deducted its share and accounted in the same way to the next, and so on to the beginning of the line. On shipments from St. Louis to New York city proper the Erie Railway collected the freights from the consignees, and in like manner settled with the next preceding carrier, and so on, in the inverse order of the transportation, to the first carrier. These settlements between the roads were made periodically upon accountings between them. Upon shipments to foreign ports, the despatch company collected from the ocean steamer the full amount of the inland freight, and paid the same to the Erie Railway Company, which settled with the preceding carriers.

§ 1259. *General question of liability, in case of loss by fire on a connecting road.*

The general question presented by this case, as will have been observed, relates to the liability of the defendant in error for the value of certain cotton, part of shipments made in January and February, 1873, at St. Louis for Liverpool, and which having passed over its road, thence over the lines of other railroad companies, was destroyed by an accidental fire in Jersey City while in the custody of the Erie Railway Company for delivery to an ocean steamer for further transportation.

The positions taken on behalf of the plaintiff in error are in substance these: That the original contracts of transportation between Meir & Co. and the despatch company were in parol, became complete when the parol agreements were made, and, consequently, for the ascertainment of the rights of the parties, reference cannot be made to bills of lading subsequently issued; that in no event can Meir & Co. be held bound by the special conditions in the bills of lading, whereby not only the despatch company and its "connections" were relieved from liability for loss of the cotton by fire, but all legal responsibility was limited to that company in whose actual custody it was when the loss occurred; that the defendant, with the other companies over whose road the cotton passed, jointly formed a continuous and connected line, and a partnership of common carriers for the route between St. Louis and New York City; that the despatch company, by virtue of its relations with the other companies, including the defendant, was the agent of the carriers, and of each constituent member thereof, in the transportation of freight over their line, and the delivery of the cotton was, in law, a delivery to that line of carriers, and not to the despatch company, which it was composed; that, consequently, the destruction of the cotton by fire while in the custody of the Erie Railway Company, one of the corporations alleged to constitute

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gence of other carriers. Whether the defendant should undertake for the safe transportation of goods beyond its own line was not a matter left, in any degree, for the determination of the despatch company, and was not within any authority it had. The liability of the defendant for the safe carriage of the cotton, after its delivery to the next succeeding carrier on the prescribed route to New York, must, therefore, depend upon the inquiry whether the defendant, in any form, assumed, or held itself out to the public as assuming, any such responsibility. The legal proposition involved in this inquiry was considered by this court in *Railroad Co. v. Manufacturing Co.*, *supra* (§§ 1277-84, *infra*). Speaking by Mr. Justice Davis, we there gave our sanction to the rule, adopted in most of the courts of this country, that the carrier, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. This principle was subsequently recognized in *Railroad Co. v. Pratt*, 22 Wall., 123 (§§ 1265-72, *infra*), although in that case the way-bill or receipt of the carrier was held to import an undertaking for the safe carriage of the goods as well over its own line as over the lines of other carriers. Was there, we then inquire, in the present case, a special contract or undertaking by the defendant to carry beyond its route? A careful consideration of the facts set out in the finding satisfies us that there was no such contract or undertaking. The defendant received the cotton without executing bills of lading therefor. It had never given bills of lading for goods shipped by the Erie & Pacific Despatch Company. Its custom was to make a way-bill only over its own road. That course was pursued in this case, and defendant only collected and received pay for carrying to Indianapolis. It is true, the way-bills upon their face indicated that the cotton was consigned to C. G. Meir & Co., London. But that circumstance is not, of itself, controlling or conclusive. The reference in the way-bill to the consignees was mere description to show the ultimate destination of the cotton. Each way-bill, executed by the defendant, purported to be nothing more than a "manifest of freight from St. Louis to Indianapolis," and fails to show an undertaking by it to transport beyond the latter city.

§ 1261. *Arrangement here between carriers did not involve a partnership arrangement.*

A special undertaking to carry beyond its terminus cannot be implied, against the defendant, from the arrangement already referred to, between the despatch company and sundry railroad companies whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies. Such an arrangement did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons. Each company bore the general expenses of its own route, and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies gave each one no greater amount than perhaps it would have earned had the despatch company contracted with each, separately, for the transportation of the cotton. The arrangement in question was one simply of convenience both for the shipper and carrier. Under it Meir & Co. were enabled to contract, at St. Louis, for a through rate for the transportation of the cotton by the despatch company. The latter, in order to meet its obligations to the owners of

the cotton, used the road of the defendant, receiving from the latter nothing more than its way-bill to Indianapolis, which showed upon its face the proportion of the aggregate pay to which the defendant would be entitled. The defendant received compensation only for transportation over its road, and settled separately with the despatch company. It undertook, and was only bound, to transport over its own line and deliver to the succeeding carrier. That duty was discharged, and the loss occurred while the cotton was held by another carrier. The mere fact that it joined with other companies in establishing a through rate from St. Louis to New York, to be divided between themselves, upon the basis, not of expenses incurred, or investment made, but of distance simply, although competent as evidence, does not, of itself, imply an undertaking to transport beyond its line, or to become bound for any default or negligence of other carriers.

In view of the conclusion thus indicated, it is unnecessary to determine the rights of the plaintiff in error as against the despatch company, or to inquire whether the detention of the cotton in Jersey City, under the circumstances disclosed in the record, was negligence upon the part either of the despatch company or of the Erie Railway Company, or of both. Nor need we inquire whether the destruction of the cotton, by an accidental fire, was, in a legal sense, the result of its detention in Jersey City, for an unreasonable length of time without delivery to the ocean steamship. Those questions are not material upon the present issues. Upon the whole case the law is for the defendant.

Judgment affirmed.

STEWART v. TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

(Circuit Court for Missouri: 1 McCrary, 812-816. 1880.)

Opinion by MCCRARY, J.

STATEMENT OF FACTS.—In July, 1877, the plaintiff shipped upon defendant's railroad two hundred and forty-eight head of cattle, at East St. Louis, consigned to Rankin & Thompson, at Buffalo, New York. The defendant's line of railroad extends only as far east as Indianapolis, Indiana, and the cattle would, in order to reach Buffalo, pass over the defendant's line and that of several connecting lines. It is admitted that the cattle were transported with safety, and without unnecessary delay, over the defendant's road, and delivered to a connecting railroad to be taken on towards their destination; but it is claimed by plaintiff that after the cargo passed beyond the defendant's road there was delay in the transportation, by which he is damaged, and for which the defendant is liable; this, upon the ground that the defendant agreed to transport the cattle over the entire route to Buffalo. The plaintiff having closed his evidence in chief, the defendant moves for judgment, on the ground that the plaintiff's proof does not establish a contract to carry through to Buffalo, but only a contract to carry over its own line and deliver to the next carrier.

The facts proved by plaintiff, so far as they bear upon the question of the character of the contract, are as follows: Plaintiff informed the agent of the defendant at East St. Louis that he desired to ship a lot of cattle to Buffalo, and inquired of said agent whether the defendant was shipping and would take the cattle for shipment. The agent replied that they were shipping at that time, and could take the cattle; and in answer to an inquiry by the plaintiff, informed him that the through rate to Buffalo was \$70 per car. The plaintiff thereupon agreed to ship over defendant's road, and did so. The freight was paid at the end of

the route to the last shipper, as was customary in such cases, and each of the lines over which the shipment passed received its proportion, the defendant receiving payment only for the carriage to Indianapolis. There was no written contract, but a memorandum was made by the defendant's agent showing the number of the cars on which the cattle were shipped, the name of the shipper, the number of cattle, the names of the consignees, and the destination.

§ 1262. *When a common carrier is liable only for his own route.*

Plaintiff had been in the habit of shipping over defendant's line to points beyond its terminus; and the arrangements made in this case were similar to the previous transactions. Does this evidence establish a special contract on the part of the defendant to carry through to Buffalo? The supreme court of the United States has twice laid down the rule that, in the absence of a special contract, the carrier in such a case is liable only to the extent of his own route, and for the safe storage and delivery to the next carrier. *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *infra*); *Railroad Co. v. Pratt*, 22 Wall., 123 (§§ 1265-72, *infra*). And the same doctrine prevails in most of the states, as will be seen by reference to the following, among other cases: *Darling v. Railroad*, 11 Allen, 295; *Notting v. Railroad Co.*, 1 Gray, 502; *Burroughs v. Railroad Co.*, 100 Mass., 26; *Railroad Co. v. Berry*, 68 Penn. St., 272; *Root v. Railroad Co.*, 45 N. Y., 524; *Babcock v. Railroad Co.*, 49 N. Y., 491; *Converse v. Transp. Co.*, 33 Conn., 166; *Perkins v. Railroad Co.*, 47 Me., 573; *Bank v. Transp. Co.*, 23 Vt., 209; *Bimtuall v. Railroad Co.*, 32 Vt., 673; *Express Co. v. Rush*, 24 Ind., 403; *McMillan v. Railroad Co.*, 10 Mich., 119; *Hoagland v. Railroad Co.*, 39 Mo., 451; and *Coates v. Express Co.*, 45 Mo., 238.

§ 1263. — *special contract to transport beyond, how proved.*

It is clear that the first carrier may, by special contract, bind himself to carry freight over his own and other lines to its final destination; but upon the question, What will amount to proof sufficient to establish such a contract? there is more difficulty. In the case of *Railroad Co. v. Pratt*, *supra*, Mr. Justice Hunt discussed the question whether there was evidence enough in that case tending to prove a special contract to carry through to justify the court in submitting the question to the jury. This question was decided in the affirmative, but whether the evidence would have been regarded by the court as sufficient to establish the special contract, had that been the question, does not appear. It is well settled that where there is any competent evidence tending to establish the fact in controversy, it is proper to go to the jury. Where a jury is waived, as in this case, the court is to determine not only the competency but the sufficiency of the evidence. In the case of *Railroad Co. v. Pratt*, *supra*, the following material facts appeared, which are not established in the present case: "First, the agent of the railroad company expressly agreed to furnish the plaintiff two good stock cars to carry his horses to Boston; second, that on previous shipments the cars furnished by such agent had always carried the horses through to Boston, and that the arrangements made by such agent had always been recognized by the other roads; third, at the time of the shipment a way-bill was made out, which showed that the horses were to be 'transported by the Ogdensburg & Lake Champlain Railroad Company (the company sued) from Pottsdam Junction to Boston *via* Concord.'" It was held that these facts, in connection with the further fact that the plaintiff had been for many years in the habit of transporting horses over defendant's road to Boston, and that a rate for the whole route was agreed upon and paid, would justify the jury in finding that there was an engagement to carry the horses through to

Boston. It does not appear from the report of that case whether the first carrier was paid the price agreed upon for transportation over the whole route, but I infer that such was the case from the remark of the court that the "receipt of the entire pay affords a fair presumption of an entire contract."

§ 1264. — *rules applied to the present case.*

In the present case the question is whether a special contract on the part of the defendant to carry through to Buffalo is established by proof that the cattle were delivered to defendant; that its agent knew of their destination; and that he named the price to be charged for carrying through to Buffalo, the price having been paid at the end of the route, and to the last carrier. The fact that the defendant gave the through rate with knowledge of the point of destination is most relied upon by plaintiff. Ordinarily, men contract with reference to the use or disposition of their own property, and do not undertake to control that of others. It follows, I think, that a contract by which one carrier agrees to carry freight over a railroad belonging to and under the control of another, being out of the usual course, must be established by something more clear and definite than by proving the fact that such carrier has named a through rate. It is commonly known that it is the duty of a railroad agent to inform himself and advise all inquirers as to the rates of fare and freight to distant points, and it would be a hard rule that would make the giving of this information equivalent to an agreement to carry to all such distant points. If it had appeared in evidence that there was an arrangement between the several lines comprising the through route by which each was the agent of all the others to solicit and ship freight over the combined through line, the case would have been very different, and I think that such proof would have been sufficient to make out a *prima facie* case for the plaintiff. This for the reason that in such a case each of the several companies may be regarded as operating the whole line as if it was its owner, and therefore its contracts would be presumed to run to the destination of the freight anywhere upon such line, unless the contrary should appear. But, in the absence of any further showing, the naming of the through rate and knowledge of the destination of the freight are not enough. Motion sustained.

RAILROAD COMPANY v. PRATT.

(22 Wallace, 123-136. 1874.)

ERROR to U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Pratt sued the railroad company for damages caused by the loss by fire of two car-loads of horses. Defendant had undertaken their transportation over certain other connecting roads and their delivery in Boston. One car-load only was taken over defendant's road, the other car being loaded at its termination, but the same rate was charged for each. The loss occurred on one of the connecting roads. There was a verdict for the plaintiff.

Opinion by MR. JUSTICE HUNT.

The several causes of error assigned present four separate principles, and we will consider the questions which they raise in their order. The questions may be thus stated: *First.* As to the power of the railroad company to contract as a common carrier for the transportation of property beyond the terminus of its own road.

§ 1265. *A railroad company may contract to transport goods beyond its own terminus.*

The distinction between the liability of a carrier in carrying goods upon his own line, and in forwarding them when the duty to carry is at an end, is well defined. In the language of Mr. Justice Davis, in *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-1284, *infra*), "It is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond." What constitutes a sufficient delivery to the succeeding carrier is often a difficult question, but we have no occasion to embarrass ourselves with it here.

§ 1266. — *but a carrier's liability is limited to his own line in absence of special contract.*

The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line, although there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine. A discussion on this point is unnecessary, as the judge on the trial held the rule as we have stated it, and as was most favorable to the defendants. He charged the jury that the defendants were only liable upon a contract to be proved that they had assumed a liability beyond that imposed by law.

The defendants were an incorporation organized under the general railroad law of the state of New York. They possessed the powers given to corporations generally and were subject to the corresponding liabilities. New York, Laws of, 1848, p. 221; 1850, p. 211.

§ 1267. *State authorities favor right to contract to carry beyond terminus.*

Assuming the case to stand upon the general principles applicable to the question, the doctrine that a railroad company may subject itself to the obligations of a carrier beyond its own line has been distinctly held in the state of New York, where this contract was made; in the state of Massachusetts, where its performance was to be completed, and in Vermont, where the alleged injury occurred. *Bissell v. Michigan, etc., R. Co.*, 22 N. Y., 258; *Buffett v. Troy & Boston R. Co.*, 40 id., 168; *Root v. Great Western R. Co.*, 45 id., 524; *Burtis v. Buffalo & St. Lawrence R. Co.*, 24 id., 269; *Hill Manuf'g Co. v. Boston & Lowell R. Co.*, 104 Mass., 122; *Feital v. Middlesex Railroad*, 109 id., 308; *Noyes v. Rutland & B. R. Co.*, 27 Vt., 110; *Morse v. Brainerd*, 41 id., 550; *Railroad Co. v. Manufacturing Co.*, 16 Wall., 324 (§§ 1277-1284, *infra*); *Evansville & Crawfordsville R. Co. v. Androscoggin Mills*, 22 Wall., 594 (§§ 1285-1287, *infra*). In the case of *Burtis v. Buffalo & St. Lawrence Railroad*, *supra*, it was held that this principle applied to connecting roads extending beyond the limits of the state. The single exception to this holding, so far as we are aware, is in the state of Connecticut, where the contrary has been held by its supreme court. *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn., 166; 22 id., 502. This case, however, does not stand upon the general principle only. By the statutes of New York (Statutes of 1847, 299, § 9; 2 R. S. (5th ed.), 693, § 67) it is enacted as follows: "Any railroad company receiving freight for transportation shall be entitled to the same rights and subject to the same responsibilities as common carriers. Whenever two or more railroad companies are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become

liable to pay any sum by reason of the neglect of any other company or companies, the company paying such sum may collect the same of the company by whose neglect it became so liable." This statute is declared by Rappallo, J., in *Root v. Great Western R. Co.*, 45 N. Y., 524, to be declaratory merely. We do not see that there is room to doubt the power of the company to make the contract in question.

§ 1268. *Evidence of such contract considered; way-bill, through rates, etc.*

Second. Was there evidence in this case that the Ogdensburg & Lake Champlain Railroad Company did contract as a common carrier to transport this property beyond its own terminus over other roads to Boston? The weight, the force or the degree of the evidence is not before us, if there was competent evidence on which the jury might lawfully find the existence of the contract alleged. *Dirst v. Morris*, 14 Wall., 484; *Mills v. Smith*, 8 id., 27. Both the authority of Graves, the station agent, to make the contract, and the evidence of Pratt and others of the making of the contract, were questions of fact for the consideration of the jury. If the jury have found in the plaintiff's favor on these points, upon evidence legally sufficient to justify it, this court cannot interfere with their findings. The evidence on both these points may properly be considered at the same time. Pratt testified that he had for many years been in the habit of transporting horses over the defendant's road to Boston, to the number of two hundred a year, and that Graves had been the station agent at Potsdam for five or six years; that nearly a week before the present shipment, Graves engaged to give him on that day two good stock cars to carry his horses to Boston, and that the cars furnished by Graves had always come over these roads and delivered the horses in Boston, and that the arrangements made by him were recognized by the other roads; that Graves' office was in the Potsdam freight-house, and that he paid the freight through, sometimes at Potsdam and sometimes at Boston; that, on this occasion, he agreed with Graves upon the price through to Boston, viz., \$85 a car, and that a way-bill was made out for the horses and cars to Boston at the price mentioned. Other witnesses give testimony in corroboration, which it is not necessary to refer to. Graves testified that he was the station master at Potsdam, and that the cars were billed from Potsdam to Boston, via Concord, as per bill; that the price agreed upon was not paid in advance, but it might have been.

The way-bill was headed thus: "Way-bill of merchandise transported by Ogdensburg & Lake Champlain Railroad Company from Potsdam Junction to Boston via Concord, March 28, 1868." It describes the two cars with horses, and as consigned to Pratt & Brigham, at Boston. We see no sound objection to the admission of this way-bill as evidence. If a written contract, it was not only evidence, but the best evidence, of what the contract was. It was exhibited to Pratt before the cars were started, as a part of the transaction. If not a contract, it was an act done, and a declaration made, by the agent in the very act of transacting the business, and as a part of it, which brought it within the principle of the *res gestæ*. This evidence shows that the oral engagement was "to carry his horses to Boston," not to carry to Rouse's Point and thence to forward to Boston, but "to carry" as well and as fully over the Vermont & Massachusetts roads as over the Ogdensburg road.

Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. This practice had been continued for years, and the jury had the right to hold the contract to be the same, without refer-

ence to pre-payment or post-payment. The jury were justified in inferring that, where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordinarily, the jury may say, make or collect his own charges, and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract. The language of the way-bill is quite expressive. It describes "merchandise transported . . . from Potsdam to Boston." Transported or carried are equivalent terms, and quite distinct from the idea of forwarding. Whether looked upon as a contract, or as a declaration or an admission simply, the way-bill furnishes evidence that the Ogdensburg company undertook to carry the horses to Boston. In *Root v. Great Western R. Co.* (*supra*), in speaking of the contract to transport as a common carrier over other lines, the court say: "Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through."

§ 1269. *Connecting roads held to be agents of the contracting road.*

We think there was competent evidence before the jury that the company undertook to carry this property to Boston, and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendants, for whose faults they are responsible.

§ 1270. *Carrier should furnish safe vehicles; and the fact that shipper knew them to be defective does not excuse railway.*

Third. The loss, it is contended, arose from the defective condition of the car in which the horses were placed, whereby it was exposed to danger from fire. It is said that Pratt was aware of the defective condition of the car; that he voluntarily made use of it, and that the risk of loss by its use thus became his and ceased to be that of the company. The judge charged the jury that it was the duty of the carrier to furnish suitable vehicles for transportation; that if he furnished unfit or unsafe vehicles he is not exempted from responsibility by the fact that the shipper knew them to be defective and used them; that nothing less than a direct agreement by the shipper to assume the risk would have that effect. There was a conflict in the testimony upon the point whether other cars were to be had. Pratt testified that he was compelled to take these cars or wait with his horses for a week. The station agent testified that there were other cars which Pratt might have had if he preferred them. The authorities sustain the position taken by the judge at the trial.

In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344, 383 (§§ 220-242, *supra*), Mr. Justice Nelson says: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and servants or agents in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties." To this effect are the *New York* and *Massachusetts* cases before cited. In *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *infra*), it was declared that the court did not intend to relax the rule by which the liability of carriers was established. In *Railroad Co. v. Lockwood*, 17 Wall., 357 (§§ 1379-1400, *infra*), the following, among other propositions, were reiterated and established by the unanimous judgment of the court: 1st. That a common carrier cannot lawfully stipulate for exemption from responsibility when such

exemption is not just and reasonable in the eye of the law. 2d. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

The judge at the trial in this case might have gone much further than he did, and have charged that if the jury found the company to have been negligent and careless in furnishing cars, they would not be relieved from responsibility, although there had been an agreement that they should not be liable therefor.

§ 1271. *Miscellaneous points as to admission of evidence considered.*

Fourth. It is contended that there was error in the admission of evidence on the trial. The admission of the way-bill we have considered, and we think it was properly admitted. When the plaintiff, Pratt, was on the stand as a witness the following question was put to him: "In these acts of Graves in furnishing cars and making agreements for transportation through to Boston, as testified by you, for whom did he assume to act?" This question was objected to by the defendants, and the objection was overruled. We think this question was erroneous in its form, and that, as insisted by the defendants, he should have been asked to state only what was said and done. The error was, however, harmless. That Graves was acting for the Ogdensburg company was disputed by no one. All that had been testified to showed it. Graves himself testified that he was so acting, and there was no evidence or pretense to the contrary, either on the trial or the argument. The question is as to the effect of his acts, and not as to whether he acted for the company. His authority has not been repudiated by the company at any time or in any form. We have often held that we will not reverse a judgment on account of an error which clearly appears to have produced no injury.

Two suggestions are made by the counsel for the plaintiffs in error which require consideration. The first is that the rules of the Vermont Central road forbade the use of combustible material in the cars on their road, and that if known to the plaintiffs, and the contract were made in reference to them, the presence of this material in the car while on their road was a bar to the action. The answer to this suggestion is, first, that there is no competent evidence of such contract and agreement; and second, that the contract was made with the Ogdensburg road alone. The shippers were strangers to the rules as well as to the owners of the Vermont road. Their dealings were with the Ogdensburg road only, one of whose agents aided in putting the litter into the car, and the rules of which company were not violated by that act.

§ 1272. *Receiving part of the shipment on the connecting road does not exonerate the contracting carrier.*

The second suggestion is that some of the horses injured were not placed in the cars till they were at Rouse's Point, beyond the terminus of the defendant's road. The contract was in substance for transportation over the Ogdensburg road of all the horses. For the convenience of the shipper he was allowed to put them on board at different points. This was an incidental circumstance merely, and does not affect the contract. If it receives the full price for the transportation of all the property from Potsdam to Boston it is evidently to the advantage of the company if it escapes the danger incident thereto for a portion of the distance. The power to contract for the whole distance of all the horses, and the making of such contract, and the receipt of the compensation specified, fix the rights of the parties. The precise details of its performance are not essential.

Judgment affirmed.

maintenance of rates; and that the railway company should give to the despatch company at all times as low rates as were given to any other line running over the road of the former, and would prorate any rate on east-bound freight, made by authority of the road leading from the point, provided that road was authorized to make through rates over the Erie Railway; and that they would prorate all losses, damages and rebates that were prorated with any other line running over that railway.

It was further stipulated in that agreement, that, in consideration of the mutual benefits to be derived by the parties, the railway company should pay to the despatch company a commission on west-bound freight of fifteen per cent. of their gross earnings, as per their way-bills, on first, second and third-class freight, and ten per cent. on their gross earnings, as per their way-bills, on fourth and special class freight from certain points to certain other designated points. On east-bound freight the despatch company was to receive from the railway company ten per cent. of their gross earnings, as per their way-bills, on first, second and third class freight, and eight per cent. of their gross earnings, as per their way-bills, on fourth-class freight, from certain named places, and on freight from certain places, competing points on the Atlantic & Great Western Railroad, provided such freight originated from points off of said line; it being understood that no commission should be paid on freight originating at such stations.

With the defendant the despatch company had a parol agreement, which was the same in substance as the written one with the Erie Railway Company. It had no power, however, to contract for or fix any rate on the carriage of goods over the road of the defendant, except as authorized by the latter. In all cases of freight, ocean bound, from the west, over the Erie Railway, shipped by or consigned to the care of the despatch company, the latter was treated as the consignee in New York, and the freight was held subject to its order. The railway company was ready to deliver the Meir cotton as it arrived in Jersey City, and as directed by the despatch company.

What were the relations which the railroad companies sustained towards each other during the same period? In the year 1873, and prior thereto, the companies owning or operating the various railroad trunk lines between St. Louis and New York had an arrangement between themselves, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to New York, fixing through rates, which were divided among the several roads constituting a through line. According to an estimate of distances the goods were to be carried by each road upon the basis of the shortest line. Losses occurring on through shipments, if not located, were prorated as between the companies themselves, in the same ratio as the freight moneys; but if located, were, as between the railroad companies, to be paid by the one on whose road the losses occurred. The joint tariff was published and put into the hands of railroad agents for their guidance in making contracts, and was also distributed to shippers and to the public generally. The title page of that tariff was: "Joint rates of transportation from St. Louis *via* Toledo, Wabash & Western; Ohio & Mississippi; Chicago & St. Louis; St. Louis, Vandalia, Terre Haute & Indianapolis; Indianapolis & St. Louis; St. Louis & Southeastern; and St. Louis, Belleville & Southern Illinois Railroads." In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. The railroad companies collected

the freight from the consignees, divided it among themselves, and paid to the Erie & Pacific Despatch Company for its services so much per cent. on the gross freights for pound freight, and sixty cents a bale on cotton, each road settling separately with that company for its dues.

It is further stated, in the special finding, that on all shipments from St. Louis to New York by the railroad companies over which the Meir cotton was carried, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage at Jersey City, whether the goods were to go to New York proper or were foreign bound. These transfer and lighterage charges were included in the through rate named by the defendant. On shipments by that route from New York to St. Louis the defendant collected the freight money from consignees, and, retaining its proportion, accounted for the residue to the next road in the line, which in like manner deducted its share and accounted in the same way to the next, and so on to the beginning of the line. On shipments from St. Louis to New York city proper the Erie Railway collected the freights from the consignees, and in like manner settled with the next preceding carrier, and so on, in the inverse order of the transportation, to the first carrier. These settlements between the roads were made periodically upon accountings between them. Upon shipments to foreign ports, the despatch company collected from the ocean steamer the full amount of the inland freight, and paid the same to the Erie Railway Company, which settled with the preceding carriers.

§ 1259. *General question of liability, in case of loss by fire on a connecting road.*

The general question presented by this case, as will have been observed, relates to the liability of the defendant in error for the value of certain cotton, part of shipments made in January and February, 1873, at St. Louis for Liverpool, and which having passed over its road, thence over the lines of other railroad companies, was destroyed by an accidental fire in Jersey City while in the custody of the Erie Railway Company for delivery to an ocean steamer for further transportation.

The positions taken on behalf of the plaintiff in error are in substance these: That the original contracts of transportation between Meir & Co. and the despatch company were in parol, became complete when the parol agreements were made, and, consequently, for the ascertainment of the rights of the parties, reference cannot be made to bills of lading subsequently issued; that in no event can Meir & Co. be held bound by the special conditions in the bills of lading, whereby not only the despatch company and its "connections" were relieved from liability for loss of the cotton by fire, but all legal responsibility was limited to that company in whose actual custody it was when a loss occurred; that the defendant, with the other companies over whose roads the cotton passed, jointly formed a continuous and connected line, and constituted a partnership of common carriers for the route between St. Louis and Jersey City; that the despatch company, by virtue of its relations with the railroad companies, including the defendant, was the agent of that partnership of carriers, and of each constituent member thereof, in all contracts by it made for the transportation of freight over their line, and that the delivery to it of the cotton was, in law, a delivery to that line of carriers and to each company of which it was composed; that, consequently, the defendant was liable for the destruction of the cotton by fire while in the custody of the Erie Railway Company, one of the corporations alleged to constitute the partnership,—such

liability to be determined not by the before-mentioned special conditions contained in the bills of lading, but by the general doctrines which obtain at common law, in reference to public carriers not operating under a special contract, limiting their liability; and lastly, that the cotton was held for an unreasonable length of time in Jersey City without delivery to the Oceanic Steam Transportation Company for further transportation; in consequence of which delay, it is contended, the cotton was lost by the fire mentioned; in other words, had the cotton, after reaching Jersey City, been promptly delivered to the ocean steamer it would not have been within reach of the fire that destroyed it. It is not claimed that there was negligence in any other respect.

The first question pressed upon our attention relates to the bills of lading. It appears from the special finding that, at the time the cotton was delivered to the despatch company, there was an understanding that bills of lading should be given to Meir & Co. The latter had been, prior to 1873, large shippers of cotton by that company, and had received from it numerous bills of lading. Whether they contained any special conditions whatever is not found. Nor does it appear whether the bills of lading for the shipments of 1873 were to contain special conditions relieving the despatch company and its connections from the duties and responsibilities, or any of them, annexed by law to their employment, nor whether the bills for those shipments were similar to those given in previous years. So far as disclosed by the finding, Meir & Co., when receiving the bills in question, were silent as to their provisions. Neither when they received the bills of lading issued prior to 1873, nor those issued on the shipments in question, was attention called to their provisions. Nothing was said by the despatch company on either occasion about special exemptions or exceptions for the benefit of the carriers. In fact Meir & Co., although having abundant opportunity to do so, never read any of the despatch company's bills of lading further than to see that they correctly described the cotton and accurately stated the rate, designation and names of consignors and consignees. They were not aware, until after the loss complained of, that the bills of lading contained the special provisions under examination. And it is expressly stated in the special finding that they never "assented to said special provisions."

If the bill of lading constituted, as the circuit court held that it did, the contract of transportation with the owners of the cotton, and if the defendant is to be regarded as one of the "connections" of the despatch company, then, manifestly, the law would be for the defendant; for the bills of lading expressly limit responsibility for loss or damage to that carrier in whose actual custody the cotton might be when lost or destroyed. But, as we have seen, the plaintiff contends that Meir & Co. were not bound by those special conditions, for the reason that the bills of lading were not delivered until after the cotton was surrendered to the despatch company for transportation, and because, also, it is expressly stated in the finding that they never assented to those special provisions. Plaintiff insists that it is the settled doctrine of this court, as announced in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344 (§§ 220-242, *supra*); *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *infra*); *York Co. v. Central Railroad*, 3 id., 107 (§§ 243-248, *supra*), and in other cases, that a common carrier cannot resort to implication or inference, founded on doubtful and conflicting evidence, or on the silence of the shipper, when receiving either a bill of lading or a notice with special conditions annexed; that the carrier, in order to obtain exemption from any of the duties

imposed upon it by law, must show an express stipulation, in parol or in writing, upon the part of the shipper, assenting to such exemption; and that, in the nature of things, Meir & Co. cannot be held to have expressly stipulated for exemptions to which, the court finds, they never assented.

To this it is replied that Meir & Co. expressly stipulated for bills of lading to be given them, had abundant opportunity to examine all the provisions of those subsequently delivered, and did in fact read some portion of each one; that their failure to read all the provisions was their own fault; and, since the bill of lading contains an express notice that "in accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions," the law will not now permit Meir & Co. to plead their own negligence, or to say that its provisions were not binding upon them. Whether the one or the other of these positions is correct it is not necessary to determine, since there are other controlling questions, touching which there is entire unanimity in the court, and upon the determination of which our decision may rest.

Waiving, therefore, any expression of opinion as to whether, upon the findings in this case, the bills of lading expressed the contract between Meir & Co. and the despatch company, or as to whether the railroad company can take shelter under the special provisions to which reference has been made, and assuming, for the purposes of our decision,—as the plaintiff in error insists we must do,—that the defendant cannot claim the benefit of those provisions, we proceed to an examination of other grounds upon which it is sought to hold the defendant liable for the value of the cotton burned in Jersey City.

§ 1260. *Upon facts here presented, the first carrier did not undertake to carry beyond his route.*

The main proposition advanced upon this branch of the case by the plaintiff's counsel is that, in these transactions, the despatch company was the agent of the defendant and of the other railroad companies over whose lines the cotton was carried. If by this is meant that the despatch company was an agent of the defendant, with general authority to bind the latter by contracts for transportation, it is sufficient to say that there is no justification in the findings for any such position. It nowhere appears that the despatch company assumed to have, or that the defendant recognized it as having, any such unlimited authority. The despatch company and the defendant had, it is true, certain business relations; but those relations did not necessarily involve an agency upon the part of the former for the latter in the making of contracts for transportation. The agreement between those companies only bound the railroad company to "receive, load and unload, deliver and way-bill," such freight as was sent to it by the despatch company; and at the rates established, not by the latter, but by the defendant and other railroad companies. The despatch company could not itself make a contract, or fix any rate for the carriage of goods over the defendant's road, except as authorized by the defendant. It is expressly so stated in the special finding. So far from the despatch company being authorized to impose upon the defendant obligations for the safe carriage of goods over the lines of other carriers, the agreement of the defendant with that company was, while assuming all the risks of common carriers, "to pay all damages to or loss of property while on their line of road or in their possession." The contract obligation of the defendant to receive and transport the freight of the despatch company, at the established rates, did not impose upon the former an obligation to carry beyond its terminus, or subject it to liability for the negli-

gence of other carriers. Whether the defendant should undertake for the safe transportation of goods beyond its own line was not a matter left, in any degree, for the determination of the despatch company, and was not within any authority it had. The liability of the defendant for the safe carriage of the cotton, after its delivery to the next succeeding carrier on the prescribed route to New York, must, therefore, depend upon the inquiry whether the defendant, in any form, assumed, or held itself out to the public as assuming, any such responsibility. The legal proposition involved in this inquiry was considered by this court in *Railroad Co. v. Manufacturing Co.*, *supra* (§§ 1277-84, *infra*). Speaking by Mr. Justice Davis, we there gave our sanction to the rule, adopted in most of the courts of this country, that the carrier, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. This principle was subsequently recognized in *Railroad Co. v. Pratt*, 22 Wall., 123 (§§ 1265-72, *infra*), although in that case the way-bill or receipt of the carrier was held to import an undertaking for the safe carriage of the goods as well over its own line as over the lines of other carriers. Was there, we then inquire, in the present case, a special contract or undertaking by the defendant to carry beyond its route? A careful consideration of the facts set out in the finding satisfies us that there was no such contract or undertaking. The defendant received the cotton without executing bills of lading therefor. It had never given bills of lading for goods shipped by the Erie & Pacific Despatch Company. Its custom was to make a way-bill only over its own road. That course was pursued in this case, and defendant only collected and received pay for carrying to Indianapolis. It is true, the way-bills upon their face indicated that the cotton was consigned to C. G. Meir & Co., London. But that circumstance is not, of itself, controlling or conclusive. The reference in the way-bill to the consignees was mere description to show the ultimate destination of the cotton. Each way-bill, executed by the defendant, purported to be nothing more than a "manifest of freight from St. Louis to Indianapolis," and fails to show an undertaking by it to transport beyond the latter city.

§ 1261. *Arrangement here between carriers did not involve a partnership arrangement.*

A special undertaking to carry beyond its terminus cannot be implied, against the defendant, from the arrangement already referred to, between the despatch company and sundry railroad companies whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies. Such an arrangement did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons. Each company bore the general expenses of its own route, and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies gave each one no greater amount than perhaps it would have earned had the despatch company contracted with each, separately, for the transportation of the cotton. The arrangement in question was one simply of convenience both for the shipper and carrier. Under it Meir & Co. were enabled to contract, at St. Louis, for a through rate for the transportation of the cotton by the despatch company. The latter, in order to meet its obligations to the owners of

the cotton, used the road of the defendant, receiving from the latter nothing more than its way-bill to Indianapolis, which showed upon its face the proportion of the aggregate pay to which the defendant would be entitled. The defendant received compensation only for transportation over its road, and settled separately with the despatch company. It undertook, and was only bound, to transport over its own line and deliver to the succeeding carrier. That duty was discharged, and the loss occurred while the cotton was held by another carrier. The mere fact that it joined with other companies in establishing a through rate from St. Louis to New York, to be divided between themselves, upon the basis, not of expenses incurred, or investment made, but of distance simply, although competent as evidence, does not, of itself, imply an undertaking to transport beyond its line, or to become bound for any default or negligence of other carriers.

In view of the conclusion thus indicated, it is unnecessary to determine the rights of the plaintiff in error as against the despatch company, or to inquire whether the detention of the cotton in Jersey City, under the circumstances disclosed in the record, was negligence upon the part either of the despatch company or of the Erie Railway Company, or of both. Nor need we inquire whether the destruction of the cotton, by an accidental fire, was, in a legal sense, the result of its detention in Jersey City, for an unreasonable length of time without delivery to the ocean steamship. Those questions are not material upon the present issues. Upon the whole case the law is for the defendant.

Judgment affirmed.

STEWART v. TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

(Circuit Court for Missouri: 1 McCrary, 812-816. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—In July, 1877, the plaintiff shipped upon defendant's railroad two hundred and forty-eight head of cattle, at East St. Louis, consigned to Rankin & Thompson, at Buffalo, New York. The defendant's line of railroad extends only as far east as Indianapolis, Indiana, and the cattle would, in order to reach Buffalo, pass over the defendant's line and that of several connecting lines. It is admitted that the cattle were transported with safety, and without unnecessary delay, over the defendant's road, and delivered to a connecting railroad to be taken on towards their destination; but it is claimed by plaintiff that after the cargo passed beyond the defendant's road there was delay in the transportation, by which he is damaged, and for which the defendant is liable; this, upon the ground that the defendant agreed to transport the cattle over the entire route to Buffalo. The plaintiff having closed his evidence in chief, the defendant moves for judgment, on the ground that the plaintiff's proof does not establish a contract to carry through to Buffalo, but only a contract to carry over its own line and deliver to the next carrier.

The facts proved by plaintiff, so far as they bear upon the question of the character of the contract, are as follows: Plaintiff informed the agent of the defendant at East St. Louis that he desired to ship a lot of cattle to Buffalo, and inquired of said agent whether the defendant was shipping and would take the cattle for shipment. The agent replied that they were shipping at that time, and could take the cattle; and in answer to an inquiry by the plaintiff, informed him that the through rate to Buffalo was \$70 per car. The plaintiff thereupon agreed to ship over defendant's road, and did so. The freight was paid at the end of

the route to the last shipper, as was customary in such cases, and each of the lines over which the shipment passed received its proportion, the defendant receiving payment only for the carriage to Indianapolis. There was no written contract, but a memorandum was made by the defendant's agent showing the number of the cars on which the cattle were shipped, the name of the shipper, the number of cattle, the names of the consignees, and the destination.

§ 1262. *When a common carrier is liable only for his own route.*

Plaintiff had been in the habit of shipping over defendant's line to points beyond its terminus; and the arrangements made in this case were similar to the previous transactions. Does this evidence establish a special contract on the part of the defendant to carry through to Buffalo? The supreme court of the United States has twice laid down the rule that, in the absence of a special contract, the carrier in such a case is liable only to the extent of his own route, and for the safe storage and delivery to the next carrier. *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *infra*); *Railroad Co. v. Pratt*, 22 Wall., 123 (§§ 1265-72, *infra*). And the same doctrine prevails in most of the states, as will be seen by reference to the following, among other cases: *Darling v. Railroad*, 11 Allen, 295; *Notting v. Railroad Co.*, 1 Gray, 502; *Burroughs v. Railroad Co.*, 100 Mass., 26; *Railroad Co. v. Berry*, 68 Penn. St., 272; *Root v. Railroad Co.*, 45 N. Y., 524; *Babcock v. Railroad Co.*, 49 N. Y., 491; *Converse v. Transp. Co.*, 33 Conn., 166; *Perkins v. Railroad Co.*, 47 Me., 573; *Bank v. Transp. Co.*, 23 Vt., 209; *Bimtuall v. Railroad Co.*, 32 Vt., 673; *Express Co. v. Rush*, 24 Ind., 403; *McMillan v. Railroad Co.*, 10 Mich., 119; *Hoagland v. Railroad Co.*, 39 Mo., 451; and *Coates v. Express Co.*, 45 Mo., 238.

§ 1263. — *special contract to transport beyond, how proved.*

It is clear that the first carrier may, by special contract, bind himself to carry freight over his own and other lines to its final destination; but upon the question, What will amount to proof sufficient to establish such a contract? there is more difficulty. In the case of *Railroad Co. v. Pratt*, *supra*, Mr. Justice Hunt discussed the question whether there was evidence enough in that case tending to prove a special contract to carry through to justify the court in submitting the question to the jury. This question was decided in the affirmative, but whether the evidence would have been regarded by the court as sufficient to establish the special contract, had that been the question, does not appear. It is well settled that where there is any competent evidence tending to establish the fact in controversy, it is proper to go to the jury. Where a jury is waived, as in this case, the court is to determine not only the competency but the sufficiency of the evidence. In the case of *Railroad Co. v. Pratt*, *supra*, the following material facts appeared, which are not established in the present case: "*First*, the agent of the railroad company expressly agreed to furnish the plaintiff two good stock cars to carry his horses to Boston; *second*, that on previous shipments the cars furnished by such agent had always carried the horses through to Boston, and that the arrangements made by such agent had always been recognized by the other roads; *third*, at the time of the shipment a way-bill was made out, which showed that the horses were to be 'transported by the Ogdensburg & Lake Champlain Railroad Company (the company sued) from Pottsdam Junction to Boston *via* Concord.'" It was held that these facts, in connection with the further fact that the plaintiff had been for many years in the habit of transporting horses over defendant's road to Boston, and that a rate for the whole route was agreed upon and paid, would justify the jury in finding that there was an engagement to carry the horses through to

Boston. It does not appear from the report of that case whether the first carrier was paid the price agreed upon for transportation over the whole route, but I infer that such was the case from the remark of the court that the "receipt of the entire pay affords a fair presumption of an entire contract."

§ 1264. — *rules applied to the present case.*

In the present case the question is whether a special contract on the part of the defendant to carry through to Buffalo is established by proof that the cattle were delivered to defendant; that its agent knew of their destination; and that he named the price to be charged for carrying through to Buffalo, the price having been paid at the end of the route, and to the last carrier. The fact that the defendant gave the through rate with knowledge of the point of destination is most relied upon by plaintiff. Ordinarily, men contract with reference to the use or disposition of their own property, and do not undertake to control that of others. It follows, I think, that a contract by which one carrier agrees to carry freight over a railroad belonging to and under the control of another, being out of the usual course, must be established by something more clear and definite than by proving the fact that such carrier has named a through rate. It is commonly known that it is the duty of a railroad agent to inform himself and advise all inquirers as to the rates of fare and freight to distant points, and it would be a hard rule that would make the giving of this information equivalent to an agreement to carry to all such distant points. If it had appeared in evidence that there was an arrangement between the several lines comprising the through route by which each was the agent of all the others to solicit and ship freight over the combined through line, the case would have been very different, and I think that such proof would have been sufficient to make out a *prima facie* case for the plaintiff. This for the reason that in such a case each of the several companies may be regarded as operating the whole line as if it was its owner, and therefore its contracts would be presumed to run to the destination of the freight anywhere upon such line, unless the contrary should appear. But, in the absence of any further showing, the naming of the through rate and knowledge of the destination of the freight are not enough. Motion sustained.

RAILROAD COMPANY v. PRATT.

(22 Wallace, 123-136. 1874.)

ERROR to U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Pratt sued the railroad company for damages caused by the loss by fire of two car-loads of horses. Defendant had undertaken their transportation over certain other connecting roads and their delivery in Boston. One car-load only was taken over defendant's road, the other car being loaded at its termination, but the same rate was charged for each. The loss occurred on one of the connecting roads. There was a verdict for the plaintiff.

Opinion by MR. JUSTICE HUNT.

The several causes of error assigned present four separate principles, and we will consider the questions which they raise in their order. The questions may be thus stated: *First.* As to the power of the railroad company to contract as a common carrier for the transportation of property beyond the terminus of its own road.

at Evansville, and, until they have so arrived, neither the liability nor the exemption commences. We can, however, be asked to hold that the liability or the exemption on a portion of the route is entirely omitted from the terms of a bill of lading which provides for transportation over the whole route, and where the compensation is specified as covering the whole route, only where it so appears by the plainest language. No doubt terms might be used in a bill of lading for the transportation of cotton from Mississippi to Massachusetts, by which exemptions from liability for loss by fire while in a railroad car from Evansville northward should be made, and no such exemptions should be made while the cotton was on the deck of a steamboat. We should not, however, expect to find such provisions, and we should require them to be clearly expressed.

§ 1286. *General clause relating to loss by fire considered in connection with that preceding.*

All of the first general paragraph of the bill of lading may fairly be said to relate to the conditions upon which the transportation from Evansville northward shall be made. In its general terms we have already considered that paragraph. A new subject, however, is taken up in the next sentence. It is not only the beginning of another paragraph, with the usual space between it and what precedes it, but it is printed in red ink, while what precedes it is in ordinary black type. Its importance in the opinion of the shippers is thus manifested. Attention is called to it as involving important provisions. Dropping the reference to Evansville, and the arrival of the goods there, it uses the most general terms: "*The Evansville & Crawfordsville Railroad Company will not be liable for loss or damage by fire, from any cause whatever.*" It is an evident addition to the contract as expressed in the first clause. The railroad company there define the terms and conditions upon which they will be liable after the property has reached Evansville. While on the passage from Evansville northward, non-liability for loss by fire is twice stipulated for — once while in depots or places of transshipments, and again in general terms — the evident object and intent of the first clause is to affect this part of the route only. A new branch of the contract is then taken up, and the difference is intended to be made plain to the eye as well as the understanding. In the red-ink clause they use terms applicable to the entire contract of shipment, viz.: They "will not be liable for loss or damage by fire, from any cause whatever." No language of limitation is used. It is as if they had said, "Should damage by fire occur in this cotton during any part of the route, and from any cause whatever, this company will not be liable." It is quite unreasonable to suppose that the company here intended to guard themselves against a liability for which they had twice already stipulated that they should not be *liable*, to wit, of loss by fire after the cotton had reached Evansville. The clause in red was intended to cover the whole contract. Wherever, whenever or however they would by law be liable for a loss by fire, from that liability they intended to relieve themselves. The exemption was intended to be as broad as was the original liability.

§ 1287. *Clause of exemption by fire held to apply to the whole transportation.*

A careful reading of the bill of lading shows that the red-ink clause not only, but all that follows it, must have been understood by the parties to cover the whole route, and not to be limited to a part of the distance only. Thus, after providing an exemption from liability for loss by fire from any cause whatever, the bill of lading goes on to say, "All property shipped on this contract will

be subject to the expense of necessary repairs and remarking." Can it be doubted that, if the sacks of this cotton had required repairing or remarking from causes occurring before it reached Evansville, that it would have been a proper item of expense under this clause? "In the event of loss or damage under the provisions of this agreement (it proceeds), the value or cost at the point of shipment shall govern the settlement of the same." No one can doubt that the value at Columbus will govern the amount of a recovery under this clause. And again, the clause, "Said property to be forwarded immediately after its arrival at Evansville, . . . and to be delivered at Boston upon the payment of freight and charges," is, by its very terms, applicable to goods not yet at Evansville, when the contract takes effect. We are of opinion that the argument of the defendants in error, upon which the judgment below was based, that the exemption from liability by fire was limited to fire occurring after the cotton had been received at and shipped from Evansville, was erroneous. The exemption covers the entire route.

Judgment reversed, and judgment upon the demurrer ordered in favor of the plaintiffs in error.

PRATT v. RAILWAY COMPANY.

(5 Otto, 43-48. 1877.)

ERROR to U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The Grand Trunk Railway Company is engaged as a common carrier in the transportation of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis, and carried over its road from Montreal to Detroit. The goods reached the city of Detroit on the 17th of October, 1865, and on the night of the 18th of the same month were destroyed by fire. The defendant claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from liability before the occurrence of the fire. If the liability of the succeeding carrier had attached, the liability of the defendant was discharged. *Ransom v. Holland*, 59 N. Y., 611; *O'Neil v. New York Cent. R. Co.*, 60 id., 138. The question, therefore, is: Had the duty of the succeeding carrier commenced when the goods were burned?

§ 1288. *What constitutes delivery to a succeeding carrier in a continuous route.*

The liability of a carrier commences when the goods are delivered to him or his authorized agent for transportation, and are accepted. *Rogers v. Wheeler*, 52 N. Y., 262; *Grosvenor v. New York Cent. R. Co.*, 59 id., 34. If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit amounts to notice, and is a delivery. *Merriam v. Hartford R. Co.*, 24 Conn., 354; *Converse v. Norwich & N. Y. Transp. Co.*, 33 id., 166. The liability of the carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever the property thus comes into his possession with his assent. *Illinois R. Co. v. Smyser*, 38 Ill., 354. If the deposit of the goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received; but, when they are subject to the further order of the

owner, the case is otherwise. *Ladere v. Griffith*, 25 N. Y., 364; *Blossom v. Griffin*, 13 id., 569; *Wade v. Wheeler*, 47 id., 658; *Michigan Railroad v. Schurlz*, 7 Mich., 515. The same proposition is stated in a different form when it is said that the liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation and an acceptance by him. Auth., *supra*.

FURTHER STATEMENT OF FACTS.—The precise facts upon which the question here arises are as follows: At the time the fire occurred, the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition-wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and after they were so placed the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and from a way-bill exhibited to him by said agent he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon; that, from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined. At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor

delivered his copy of said way-bill to the checking-clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

§ 1289. *Succeeding carrier becomes liable upon receipt of goods for transportation from predecessor.*

We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated. 1. They were placed within the control of the agents of the Michigan Company. 2. They were deposited by the one party and received by the other for transportation, the deposit being an accessory merely to such transportation. 3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company and forwarded without further action of the Grand Trunk Company. 4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon and the marks upon them, "P. & F., St. Louis," were sufficient notice that they were there for transportation over the Michigan road towards the city of St. Louis; and such was the understanding of both parties.

The cases heretofore cited in 20 Conn., 354, and 33 id., 166, are strong authorities upon the point last stated. In the latter case, a railroad company and a steamboat company had a covered wharf in common, at their common terminus, used as a depot and a wharf; and it was the established usage for the steamboat company to land goods for the railroad, on the arrival of its boats in the night, upon a particular place in the depot, whence they were taken by the railroad company at its convenience for further transportation, both companies having equal possession of the depot. There was no evidence of an actual agreement that the goods deposited were in the possession of the railroad company, and the goods in question had not been in the manual possession of the railroad company when they were destroyed by fire on the Sunday afternoon following their deposit on the previous night. It was held that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad should take it thence at their convenience. The delivery to the succeeding carrier was held to be complete, and a recovery against the first carrier for the loss of the goods was reversed. In *Merriam v. Hartford R. Co.*, *supra*, it was held that if a common carrier agree that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit alone is a sufficient delivery; and that such an agreement may be shown by a constant practice and usage so to receive property without special notice.

§ 1290. *Facts considered as to delivery in a portion of the freight depot set apart for defendant.*

The plaintiff contends that the goods were not in the custody and under the control of the Michigan road, for the reason that the case states that they "are in a section of the freight depot set apart for the use of the defendant." This is not an accurate statement of the position. The expression quoted is used incidentally in stating that, when the agent of the Michigan road saw "goods

deposited in the section of the freight building set apart for the use of the defendant, destined on the line of said Central Railroad, he would call upon the agent of defendant, and, from a way-bill," obtain a list of the goods and their destination. Just how and in what manner it was thus set apart appears from the facts already recited. It was a portion of the freight-house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on to its cars at its convenience, without further orders from the defendant. We are of the opinion that the ruling and direction of the circuit judge, that, upon the facts stated, the defendant was entitled to a verdict and judgment in its favor, was correct, and the judgment should be affirmed.

Judgment affirmed.

POWHATAN STEAMBOAT COMPANY v. APPOMATTOX RAILROAD COMPANY.

(24 Howard, 247-257. 1860.)

ERROR to U. S. Circuit Court, Eastern District of Virginia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the eastern district of Virginia. All of the questions presented for decision in this case arise upon the instructions given by the court to the jury; but a brief reference to the pleadings and evidence will be necessary, in order that the precise nature of those questions may be clearly and fully understood. It was an action on the case, and the declaration contained three counts, which are set forth at large in the transcript. Among other things, the plaintiffs alleged, in the first count, that the defendants were common carriers for hire; that they, the plaintiffs, at the special instance and request of the defendants, on the 26th day of June, 1853, at City Point, in the state of Virginia, caused certain goods and merchandise to be delivered to the defendants, as such carriers, to be by them transported from the place of delivery to Petersburg, in the same state; and that the defendants, in consideration thereof, and of certain hire and reward to be paid them therefor, undertook and promised safely and securely to carry and convey the goods and merchandise to the place of destination, and there to deliver the same; and the complaint is, that the defendants, not regarding their promise and undertaking in that behalf, so conducted themselves, as such carriers, that the goods and merchandise, through their negligence and carelessness, were wholly lost to the plaintiffs. To the whole declaration the defendants pleaded that they never undertook and promised as the plaintiffs had thereof alleged against them, and upon that issue the parties went to trial.

From the evidence in the case it substantially appears that the plaintiffs were the owners of a weekly line of steamers, employed in the regular and stated transportation of goods and merchandise between the city of Baltimore, in the state of Maryland, and the city of Richmond, in the state of Virginia. Their steamboats, on the trip each way, were accustomed to stop at the intermediate place called City Point, on James river, for the purpose of landing goods to be sent to Petersburg, and also for the purpose of receiving other goods arriving from the same place to be transported to either terminus of the steamboat

route. Defendants were a railroad company, and were also engaged in the transportation of goods and merchandise over their railroad, extending from City Point to Petersburg, in the same state. For many years there had been an arrangement and contract between the parties, whereby goods and merchandise destined for transportation to the latter place were to be received by the plaintiffs in Baltimore, carried in their steamers to City Point, and there delivered to the defendants, to be by them transported over their railroad to the place of destination. Receipts for the goods were given by the plaintiffs in Baltimore, promising to deliver the same to the consignees at Petersburg, where the plaintiffs had an agent, who collected the entire freight money and paid over one-fourth part of the amount to the defendants. When the steamers arrived at City Point, the goods were landed and deposited in the warehouse of the defendants, which was situated on the wharf adjacent to the railroad.

According to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday afternoon, arriving at City Point about noon on Sunday, and there such of her cargo as was destined for Petersburg was landed and deposited in the warehouse of the defendants, and the steamer on the same day proceeded on her voyage to the place of her destination. Goods so landed and deposited remained in the warehouse until the following day, because the defendants run no merchandise train on Sundays. Usually the warehouse was opened on the occasion, and afterwards closed by the agent of the defendants; but the whole labor of landing and depositing the goods, except the opening and closing of the warehouse, was performed by the plaintiffs.

Pursuant to the regular course of the transportation, one of the steamers of the plaintiffs arrived at City Point on Sunday, the 26th day of June, 1853, about noon, with the goods in controversy on board. On the arrival of the steamer at the wharf, the goods, being destined for Petersburg, were landed and deposited in the warehouse, and the evidence shows that the whole labor of landing and depositing them was performed by the plaintiffs, except that the agent of the defendants unlocked and opened the warehouse for that purpose, and afterwards closed it, as he had been accustomed to do on former occasions. After the goods had been so deposited, the steamer proceeded on her voyage up the river, and on the same day the warehouse and all the goods were destroyed by fire. Suit was brought against these plaintiffs by the shipper of the goods, and judgment was recovered against them for a sum exceeding \$12,000, which they had to pay. Evidence was then introduced by the defendants, tending to show that the goods were deposited in their warehouse for the convenience and accommodation of the plaintiffs, upon the agreement and understanding that the goods should remain there until the following morning, and be at the risk of the plaintiffs. Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instruction. It is to the concluding portions only of the instruction that the plaintiffs now object, and for that reason the preceding part of it is omitted. Having assumed that state of the case in the introductory part of the instruction — which the evidence adduced by the plaintiffs tended to prove, and which, if found to be true, and the goods had been deposited on an ordinary working day, would have entitled the plaintiffs to recover,— the jury were substantially told by the presiding justice, in the concluding portion of the instruction, that notwithstanding the facts so assumed, still, if they found from the evidence that the goods were delivered on a Sunday, under a contract between the

parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, to wit, on Sunday, the 26th day of June, 1853, then their verdict should be for the defendants.

§ 1291. *Question as to liability for fire in unloading on Sunday.*

Had the goods arrived and been deposited in the warehouse on an ordinary working day, the preceding part of the instructions assumed that the evidence in the case would authorize a finding in favor of the plaintiffs, and the principal question is, whether the rights of the parties were varied by the fact that the goods were landed and deposited on a Sunday. It is insisted by the defendants that it does vary their rights, especially as the goods were destroyed accidentally on the day they were delivered and received. To support that theory, they refer, in the first place, to the sixteenth and seventeenth sections of the code of Virginia. By the sixteenth section it is provided, among other things, that "if a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit \$10 for each offense;" and by the seventeenth section it is provided that no forfeiture shall be incurred under the preceding section for the transporting on Sunday of the mail, or of passengers and their baggage. Most of the states have laws forbidding any worldly labor or business within their jurisdiction on the Lord's day, commonly called Sunday, except works of necessity or charity. Those laws were borrowed substantially from similar regulations in the parent country, and in some of the states were adopted at a very early period in the history of the colonial governments. Statutes of the description mentioned usually contain an express prohibition against such labor; but we are inclined to adopt the early rule upon the subject, that where the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the legislature intended that a penalty should be inflicted for a lawful act. Adopting that rule of construction, it must be assumed that all labor "at any trade or calling on a Sabbath day, except in household or other work of necessity or charity," is prohibited in the state of Virginia by the sixteenth section of the code already cited. But the defendants do not attempt to maintain that the contract between the plaintiffs and the shipper of the goods, for the transportation of the same from Baltimore to Petersburg, falls within that implied prohibition, or that the voyage of the steamer from Baltimore to Richmond was illegal. As the evidence shows, the steamer left Baltimore on Saturday, the day previous to the fire which consumed the warehouse and the goods, and it is very properly conceded by the defendants that she might lawfully, under the circumstances, proceed on her voyage to her place of destination, notwithstanding the fact that, in so doing, she had to sail on "a Sabbath day;" and if so, it clearly follows that she might stop at any intermediate place on the route. Transportation of the goods, therefore, so far as they were carried in the steamer, was a lawful act, and, in effect, it is conceded to have been so by the defendants. Merchandise trains were not run by the defendants on Sundays; and, of course, neither the contract of the shipper nor the arrangement between these parties contemplated that the goods would be carried over the railroad on that day. Shippers made their contracts with the plaintiffs for the transportation of the goods over the whole route, from the place of departure to the place of destination, wholly irrespective of the circumstances which might

afterwards attend the transfer of the goods from the steamer to the defendants, and without any knowledge, so far as appears, whether it would be accomplished on a Sunday, or on an ordinary working day.

When the shipper had delivered the goods to the plaintiffs, the contract between him and them was completed, and it is self-evident that it was one to which the Sunday laws of Virginia have no application whatever. All such contracts were made by the plaintiffs, but they were made for the separate benefit of the defendants, as well as themselves, and the arrangement between these parties had respect to the apportionment of the service to be performed in carrying out the contract made with the shipper, and the division of the freight money to be received for the entire service. Each party worked for himself, and not for the other, and the compensation for that service was to be derived from the shipper of the goods. Neither party promised to pay the other anything, but each was to receive a proportion of the freight money equal to the proportion of the service the arrangement between the parties required him to perform. Plaintiffs made the contract with the shippers in their own name, received the goods at Baltimore, transported them to City Point, and, on the arrival of the steamer there, landed the goods and deposited them in the warehouse of the defendants. On the other hand, the defendants furnished the warehouse, opened and closed it on the occasion, took the custody of the goods until the following morning, and then transported them over the railroad to the place of destination, and delivered them to the consignees. After the goods were delivered to the consignees, the agent of the plaintiffs collected the entire freight money, and paid over to the defendants such portion of it as belonged to them under the arrangement. Merchants sending goods knew only the plaintiffs in the entire transportation; but, as between these parties, each performed a separate service for himself, and had no other claim for compensation than his proportion of freight money. Had the goods been lost at sea through the negligence of the plaintiffs, it is clear that the defendants would not have been answerable either to the shippers or to the plaintiffs, because the defendants had no interest in the steamer, and the arrangement between the parties did not contemplate that they should be responsible for her navigation. Shippers, however, had a right to proceed against the plaintiffs, although the loss had occurred while the goods were in the custody of the defendants, because their contract with the plaintiffs covered the whole route; and as between them and the defendants, the latter were but the agents of the plaintiffs. Accordingly, the shippers recovered judgment against the plaintiffs, and clearly the defendants are answerable over, unless it is shown that the case is one where courts of justice will not interfere to enforce the contract. It is insisted by the plaintiffs that the labor of landing and depositing the goods was a work of necessity, within the meaning of the exception contained in the statute; but in the view we have taken of the case, it will not be necessary to decide that question at the present time.

§ 1292. *Present liability is based upon duty irrespective of delivery on Sunday.*

Suppose it be admitted that the plaintiffs violated the Sunday law in landing the goods and depositing them, and that defendants also violated the same law in opening and closing the warehouse on the occasion; still the admission will not benefit the defendants, for the reason that the cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening and closing of the

warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for a refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. Granting, however, for the sake of the argument, that those acts of labor fall within the prohibition of the statute, still their performance did not have the effect to transfer the general property in the goods to the defendants, nor to release or discharge them from the subsequent obligations which devolved upon them as common carriers for hire. Safe custody is as much the duty of the carrier as due transport and right delivery; and although the defendants were forbidden to transport the goods over the railroad, or to deliver the same on "a Sabbath day," yet they might safely and securely keep such as were in their custody, and it was their duty so to do. Irrespective of the Sunday law, the plaintiffs could maintain no action against the defendants for the service they had performed in landing and depositing the goods, for the best of all reasons, that in performing it they had worked for themselves, and not for the defendants. Nothing, therefore, can be more certain than the fact that the claim in this case is not founded upon any executory promise necessarily connected with those supposed illegal acts. On the contrary, the real claim is grounded on the obligations which the law imposed on the defendants safely and securely to keep, convey and deliver the goods, and upon their subsequent negligence and carelessness, whereby the goods were lost. To take care of the goods on "a Sabbath day," and safely and securely keep them, after the goods were received, was a work of necessity, and therefore was not unlawful, even on the theory assumed by the defendants, and the defendants were not expected to convey or deliver the goods until the following day. On the theory assumed, the defendants might have refused to open the warehouse, or to allow the goods to be deposited; and if they had done so, no action could have been maintained against them for the refusal. But they elected to do otherwise, and suffered the plaintiffs to deposit the goods; and when the warehouse was closed, all the supposed illegal acts were fully performed.

§ 1293. *Connecting carrier held liable for loss notwithstanding delivery on Sunday with his assent.*

Whatever contract or arrangement existed between the parties upon that subject had then been fully executed, and those who had been employed in landing and depositing the goods, as well as the agent of the defendants, who had opened and closed the warehouse, if the acts were illegal, had respectively become liable to the penalty which the law inflicts for such a violation of its mandate. That penalty is a fine of ten dollars; but there is no authority in any court to declare the goods forfeited, nor do we perceive any just ground for holding that the general property in the goods was thereby changed. Unless the goods be considered as forfeited, or it be held that the property became vested in the defendants, it is difficult to see any reason why the plaintiffs ought not to recover in this suit, even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse, were within the prohibition of the statute. Subsequent custody of the goods was certainly not within that prohibition; and if not, then the law imposed the obligation upon the defendants to keep the goods safely and securely until the following morning, and afterwards to transport them over the railroad to the place of destination, and deliver them to the consignees. To assume the contrary would

be to admit that a carrier, accepting goods to be transported on an ordinary working day, may set off the fact that the labor of depositing the goods in his warehouse was performed on "a Sabbath day," against all the subsequent obligations which the law would otherwise impose upon him with respect to the goods. Such a rule of law, if acknowledged by courts of justice, and carried into effect, would amount to a forfeiture of the goods, so far as the shipper is concerned, as its practical operation would be to allow the carrier, if he saw fit, voluntarily to destroy the goods, or to appropriate them to his own use.

Upon a careful examination of the numerous authorities bearing upon the question, the better opinion, we think, is, that inasmuch as the subsequent custody of the goods was not unlawful, that the obligations of the defendants, under the circumstances of this case, were not varied by the fact that the goods were deposited in their warehouse by their consent on "a Sabbath day." Great injustice would result from any different rule, and although the precise question has seldom or never been presented for decision, yet we think the analogies of the law fully sustain the rule here laid down. For these reasons we are of the opinion that the instruction given to the jury was erroneous. The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to issue a new venire.

AYRES v. WESTERN RAILROAD CORPORATION.

(Circuit Court for New York: 14 Blatchford, 9-15. 1876.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiff seeks to recover the value of certain paper destroyed by fire in the freight depot of the defendant, while in course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, and other points beyond the terminus of the defendant's road. Upon the shipment of the goods the defendant gave the shipper a receipt in the following terms: "Western Railroad Corporation, West Springfield, June 26, 1861. Received of Southworth M'fg Co., 10 cases paper, marked and numbered — 4, J. B. Cobb & Co., Cleveland, Ohio — 5, J. R. Dayton, Quincy, Ill., — 1, Ogden, Brownell & Co., Keokuk, Iowa; contents and value unknown; to be transported to —, and delivered at the — depot there, to —, on the payment of freight therefor, together with such expenses as shall be shown by vouchers to have been advanced on the same; this contract, and the responsibility of the parties hereto, being limited and controlled by the rules and regulations printed upon the back of this receipt, as also by the terms of their printed tariffs of freight; and it being also understood that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties, participating in the joint transit aforesaid, said parties are separately liable." Upon the back of the receipt there was an indorsement: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." Then follow a number of rules, among which are these: "The company will not hold itself liable, as common carriers, for articles of freight after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within twenty-four hours after being unladen from the cars, the company reserving the right of charging storage on the same, or placing the same in store at the risk and expense of the owner, if they see fit, after a lapse of time." The several parcels of goods were

marked as described in the receipt, and also marked "care of Western Transportation Co.," a corporation engaged in carrying freight upon the Erie canal. The terminus of the defendant's road was at East Albany, where the goods arrived and were unladen at the defendant's warehouse on the 2d of July; and, on the 5th of July, the warehouse took fire and the goods were consumed, without fault on the part of the defendant. It is not shown that notice of the arrival of the goods was given by the defendant to the Western Transportation Company, but it does appear, that, according to the usual course of business, an agent of the latter visited the warehouse of the defendant, to look for goods, prior to the 5th of July.

§ 1294. *When liable as carrier while goods are awaiting delivery to next carrier.*

Giving effect to the receipt delivered by the defendant to the shipper, as a special contract, which restricts the common law liability of the defendant as a carrier, and renders it liable only according to the conditions mentioned upon the face and back of the receipt, the defendant was liable as a carrier for the goods destroyed in its warehouse, while in course of transportation. The goods were to be transported by the defendant to its depot, for the purpose of delivery there to a second carrier, in the course of transportation to the ultimate destination of the goods; and, in such case, the carrier is liable as a carrier while the goods are in its warehouse awaiting delivery to the second carrier, unless it is absolved by notice of their arrival to the second carrier, or by the terms of a special contract with the shipper. *Condit v. Grand Trunk R. Co.*, 54 N. Y., 500; *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *supra*); *Mills v. Michigan Central R. Co.*, 45 N. Y., 622; *McDonald v. Western R. Co.*, 34 N. Y., 497; *Rawson v. Holland*, 59 N. Y., 611.

§ 1295. *What is "place of destination," under the special contract of a connecting carrier.*

It is not claimed that the defendant had become exonerated from liability by giving notice of the arrival of the goods to the second carrier, but it is insisted that it is exempted because of the condition on the back of the receipt, which reads, that it will not hold itself liable as a common carrier, for such articles, "after their arrival at their place of destination and unloading at the company's warehouse or depots." The argument for the defendant is, that the place of destination, within the language of the condition, is that point on the defendant's road where it is to deliver the goods to some other carrier or to the consignee. If this position is sound, doubtless the defendant was liable only as a warehouseman, and, as the goods were destroyed without fault on its part, is not liable for them. To sustain this position it is necessary to maintain that, when goods are addressed to a point beyond the line of the first carrier, consigned to the care of a connecting carrier, their place of destination is that place where the first carrier is to deliver them to the second carrier. Such a conclusion is opposed to the plain and ordinary meaning of language. The goods were shipped to Cleveland and other points further west, and the packages were marked "care of Western Transportation Company." So far as the defendant was concerned, its duty would have been discharged by delivering the goods to the Western Transportation Company, but it does not follow from this that the Western Transportation Company was the place of destination. So to hold would require the rest of the address to be disregarded. The place of destination is the place designated for the ultimate unloading of the goods, and is that point on the defendant's road, or on that of any connecting carrier,

at which the consignee is to receive the goods according to the usual course of business of the carrier. Looking at the various terms of the receipt, it is apparent that the receipt is designed to modify the liability not only of the defendant, but of the various connecting carriers who participate with it in the transportation; and, while some of the conditions are adapted to protect the defendant, many of them are inserted for the protection of the connecting carriers. It is framed to cover shipments for places on the defendant's line, and also for shipments to distant places upon or beyond the lines of connecting carriers who are to participate with the defendant in the transportation of the goods, and for whom the defendant is to act as agent in the transaction. Upon its face, the receipt provides that the defendant shall assume no liability beyond the end of its own line, and that "the parties participating in the joint transit" are to be separately liable, while the conditions upon the back of the receipt consist of "rules adopted by the several railroad corporations in regard to freight." It is framed to stand for a contract between the shipper and the defendant, and also for one between the shipper and the connecting roads who participate in the joint transit, so that both the defendant and the connecting carriers may find protection in the several conditions. This being the object in view, the meaning of the term in question seems obvious. It is used in two of the conditions only, one of which provides against liability for articles of freight "after their arrival at their place of destination and unloading at the company's warehouse," and the other that such articles "arriving at their place of destination must be taken away within twenty-four hours after being unladen." The place of destination is the ultimate destination of the goods. When this is on the defendant's road, unless the goods are taken away within twenty-four hours after their arrival and unloading, the defendant is liable only as warehouseman; when the place is upon the road of a connecting carrier, such carrier, after the twenty-four hours, ceases to be liable as carrier, and assumes only the liability of a warehouseman. This construction is consistent with the instrument as a whole, with the relations of the various parties to it, and with the nature of the transaction the receipt is intended to provide for. If the meaning of the conditions were doubtful, the construction to be given them should be one most strongly against the carrier. The conditions are designed to relax the common law liability of the carrier — a liability which the shipper has a right to insist upon, and of which he is not to be deprived without clear evidence of his assent. If the meaning of such conditions is involved in any doubt, the doubt is to be resolved in his favor. The conditions in question are satisfied by the construction which has thus been placed upon them. These conclusions lead to a decision against the defendant.

§ 1296. *Delivery of a shipping receipt referring to terms printed on the back does not constitute a special contract.*

But, if it should be conceded that the conditions upon the back of the receipt are so expressed as to refer to the warehouse of the defendant, and relieve the defendant from the obligations of a carrier after the arrival of the goods there, the same result must follow, because of the controlling authority here of the case of *Railroad Co. v. Manufacturing Co.*, 16 Wall., 318 (§§ 1277-84, *supra*). It is there held that the delivery by the carrier to the shipper, of a shipping receipt, which, upon its face, refers to conditions on the back, defining the terms of the carrier's responsibility, and its acceptance by the shipper, does not constitute a special contract between the shipper and the carrier, by which the liability of the latter is limited by the conditions on the back of the receipt.

It is unnecessary to refer to or discuss the principles or the authorities which bear upon the doctrine thus held. The case, in effect, decides that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier, modifying the liability of the latter. That this conclusion conflicts with many decisions of high authority in this country and England must be conceded; but the case furnishes a rule of plain and certain application, and sweeps away many fine and artificial distinctions which have involved in confusion the whole doctrine of notices and special contracts, as affecting the rights and liabilities of common carriers. Some of these cases have turned upon the point whether the conditions in a printed receipt were in small type or in large, and whether the receipt was taken deliberately or hurriedly, while one case in the court of last resort in this state places controlling emphasis upon the fact that the receipt was taken by the shipper in a dimly-lighted car, and holds that it was, therefore, not a contract. *Blossom v. Dodd*, 43 N. Y., 264. Another case of the supreme court of the same state holds the receipt a contract, although taken by a foreigner ignorant of the language in which it was printed, and to whom no explanation of its terms was vouchsafed. *Fibel v. Livingston*, 64 Barb., 179. See, also, *Warhus v. Savings Bank*, 21 N. Y., 543. Thus, while one man is absolved from obligation because it may be inconvenient for him to inform himself of the terms of the proposed contract, another is held. The theory, of course, is, that assent to the proposed contract is or is not implied from the circumstances of the transaction; but the cases illustrate the utter uncertainty of the test of assent, when one man who is ignorant of the language of the proposed contract is presumed to assent, while another is absolved because, from the type in which it is printed, or the light by which he is to read it, he cannot acquaint himself with its terms without more or less inconvenience. The rule held by the supreme court of the United States is capable of certain and easy application, and, if adhered to, will go far to abrogate a class of contracts to which practically the carrier is the only party.

Judgment is ordered for the plaintiff.

MYRICK v. MICHIGAN CENTRAL RAILROAD COMPANY.

(Circuit Court for Illinois: 9 Bissell, 44-53. 1879.)

Charge by **BLODGETT, J.**

STATEMENT OF FACTS.—This suit is brought to recover damages for a breach of two contracts which the plaintiff claims he made with the defendant, as common carrier, one on the 7th, and the other on the 14th of November, 1877, for the transportation of beef cattle from Chicago to Philadelphia. The allegation on the part of the plaintiff is that on the 7th of November, 1877, he delivered to the defendant at the stock yards in this city, and the defendant there accepted, two hundred and two head of beef cattle, to be transported by the defendant as a common carrier from this city to Philadelphia, Pennsylvania, and there delivered to the plaintiff or his order; that plaintiff received from the defendant a bill of lading or receipt for said cattle, and that he duly indorsed the same, to the Commercial National Bank, as security for a loan of money advanced by said bank to the plaintiff to pay for said cattle, and thereby the defendant became bound to safely transport said cattle to Philadelphia, and there deliver them to said bank or its proper agents; that the defendant failed to perform its contract and neglected and failed to deliver the cattle to the

bank or its agent, whereby the cattle were wholly lost to the plaintiff and said bank.

It is also alleged that a similar contract in all respects was made by the plaintiff with the defendant on the 14th of November, for the transportation of another lot of two hundred and two head of beef cattle, and that the defendant has failed to perform said contract in the same manner it failed to perform the first. The defendant contends: First. That it owns and operates a railroad from Chicago to Detroit, and no further, and while it received the cattle and carried them on its own line as far as Detroit, it did not undertake to transport them beyond that point, and that the obligation to the plaintiff was fully performed when it delivered the cattle to the connecting carrier at Detroit for their place of destination. Second. That even if the contract with the plaintiff was for the transportation of the cattle in question from Chicago to Philadelphia, it fully performed its undertaking in that behalf by the delivery of the cattle to the North Philadelphia Drove Yard Company, and that the loss to the plaintiff occurred through the neglect of said Drove Yard Company, for which defendant is not responsible.

It is conceded that the plaintiff did ship by the defendant's road the two lots of cattle in question; that the cattle passed over the defendant's railroad to Detroit, and from there over connecting railroad lines to Philadelphia, reaching the latter place by what is known as the North Penn. Railroad, and that the North Penn. Railroad Company delivered the cattle to the North Philadelphia Drove Yard Company, a corporation or firm owning and managing certain cattle yards in the vicinity of Philadelphia, fitted up with conveniences for receiving and yarding live stock; that the first lot of said stock arrived at the drove yards on the 11th of November, and the last on the 18th of November, and that the officers or managers of the drove yards delivered the cattle to J. and W. Blaker, without the surrender of the receipt or bill of lading which the defendants had issued to Myrick, and which Myrick had indorsed to the bank, and without the order of Myrick. The following is a copy of one of the shipping receipts given by defendant to plaintiff, the other being like it except as to date.

[*Michigan Central Railroad Company, Chicago Station, November 7, 1877.*]

Received from Paris Myrick, in apparent good order, consigned to order Paris Myrick. Notify J. and W. Blaker, Philadelphia, Pa.

<i>Articles.</i>	<i>Marked.</i>	<i>Weight and Measure.</i>
Two hundred and two (202).	Cattle.	240,000

Advanced charges, \$1,200, marked and described as above (contents and value otherwise unknown), for transportation by the Michigan Central Railroad Company, to the warehouse at ———.

This receipt can be exchanged for a through bill of lading.

Notice.—See rules of transportation on the back hereof. Signed,

WM. GEAGAN, B. Agent.

Indorsed, PARIS MYRICK.

The only rule on the back of the receipt which affects this question is rule 11, which is as follows: "Goods or property, consigned to any place off the company's line of road, or to any point or place beyond its *termini*, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent

of the consignor or consignee, and not as carriers. The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the company."

It is claimed by the plaintiff that by the terms of the shipment it became the duty of the defendant, as a common carrier, to notify J. and W. Blaker of the arrival of said cattle at the place of destination, and that no rightful delivery could be made except upon the order of Myrick and the surrender of the bill of lading, but that without the order of Myrick the cattle were wrongfully delivered to the Blakers, who sold them and converted the proceeds to their own use, whereby the cattle were wholly lost to the plaintiff and the bank which had advanced money on them.

§ 1297. *Question whether the carrier contracted to transport beyond his own terminus.*

The first question is, did the defendants make a contract to transport these cattle from here to Philadelphia? It was competent for the defendant, as a common carrier, to contract for the transportation of these cattle beyond its own terminus, and to Philadelphia. If such contract was in fact made, the carriers beyond the defendant's terminus, that is, beyond Detroit to the place of destination, became the agents of the defendant to complete the contract, and the defendant is liable for any breach of it whereby the plaintiff sustained damage. Considerable discussion has been had before the court upon the questions of law raised, whether these receipts are, or are not, a through contract or bill of lading. At first I was inclined to submit this as a question of fact to the jury; that is, to submit all the testimony, including the shipping receipts, and allow the jury to say, as a question of fact, whether the defendants did contract to transport these cattle through to Philadelphia, or not, but upon further reflection I have concluded that this is solely a question of law for the court.

§ 1298. *In construing written contracts regard is had to surrounding circumstances.*

In construing a written contract, courts have the right to hear, to a certain extent, parol evidence as to the circumstances under which a contract was made, for the purpose of putting themselves in the place of the contracting parties, and determining the purport and effect of the language used; that is, the court has the right to ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties, and the full legal purport of the contract made. Perhaps the rule asserting the right of the court to look into the surrounding facts connected with the making of a contract, for the purpose of determining its meaning has never been more lucidly stated than by Mr. Justice Caton, of the supreme court of the state of Illinois, in the case of *Doyle v. Teas*, 4 Scam., 256: "But the true rule, clearly deducible from the cases, I think, is where the language is of such a character as to show that the parties had a fixed and definite meaning which they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language, it then becomes the duty of the court to learn those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties employing the expressions, ascertain the sense in which they were intended to be used."

§ 1299. *The present shipping receipts or bills of lading held to be through contracts.*

Now, taking into consideration the circumstances, as shown in the proofs, surrounding the making of these shipping receipts or bills of lading, I come to

the conclusion, and say to you, gentlemen of the jury, that they are through contracts, whereby the defendant agreed to transport the cattle in question from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify J. and W. Blaker of their arrival. This was the undertaking on the part of the defendant with the plaintiff and with whoever might be made the assignee or holder of this contract. It thus became the duty of the defendant, if the defendant's road did not reach the place of destination of the property, to properly notify and inform each of the carriers beyond the defendant's terminus of the terms upon which that shipment was made, and each of the carriers beyond the defendant's terminus is, for the purpose of executing this contract, the agent of the defendant, and as completely bound to carry out the terms of the contract as if defendant's road extended from here to the place of destination, and the agents of the last carrier that transported these cattle are the agents of the defendant for the purpose of executing this contract and seeing that its terms were complied with.

§ 1300. *Duties of carrier of live stock to provide proper accommodations for their necessities.*

This, then, being a through contract, the only question is whether there has been a breach of it. The defendants insist that, owing to the peculiar nature of live stock as freight, it is not to be considered as ordinary merchandise; that it must be yarded, watered and fed, not only along the route, but at the terminus or place of destination, and that peculiar accommodations are required for that purpose, such as railroad companies do not usually have, and that the plaintiff knew when he shipped this stock that the railroad, at the place of destination, had no facilities of its own for caring for cattle, but that its course of business was to deliver to this Drove Yard Company, and that, therefore, the contract of carriage was completed when the delivery was made to the Drove Yard Company. Undoubtedly this kind of freight must have accommodations adapted to it, and railroad companies that become carriers of live stock may provide such accommodations themselves or may adopt those provided by other independent companies or persons. But if they adopt the yards of another they thereby make them their own for the purpose of performing their contract, the same as if they were their own depot, and the managers of the yards their servants and agents. As with merchandise they are bound to provide a depot or freight house in which the goods may be safely kept for a reasonable time, until the consignee can take them away, so in regard to cattle they must make some preparation whereby they can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment. For this purpose, as I have already intimated, the railroad company, as a common carrier, had a right to make this drove yard its warehouse or place for the storage of these cattle, and the drove yards were required to hold the cattle, as the railroad company itself would have been compelled to hold them, until the consignee called for them or until a reasonable time elapsed. The cattle being, of course, expensive to keep, they would be kept at the cost of the consignee, and the charges upon them would be additional charges to be paid whenever they were taken away; and if they were detained an unreasonable time, then, under the law pertaining to the rights and duties of common carriers, the Drove Yard Company would be entitled to sell the cattle as perishable property for their advances and charges thereon. They would not be obliged to keep them indefinitely, but they would be obliged to keep them a reasonable time, the same as a railroad company is obliged to keep

your goods a reasonable time after they arrive at the terminus in order that you may pay the charges and take them away. So that, as I have already instructed you, the defendant, by its contract, agreed to transport these two lots of cattle to Philadelphia, and deliver them to the order of Paris Myrick there, and to notify J. and W. Blaker; and it being admitted, or at least not disputed, that Myrick had duly assigned and delivered the shipping receipts or bills of lading given him by the defendant to the Commercial National Bank, to secure the advance of money, if you are satisfied from the proof that the railroad companies along the route, which transported the cattle to Philadelphia, delivered them to the Drove Yard Company mentioned in the proofs, and that the persons in charge of the said drove yard did, on the day after the arrival of each of the said lots of cattle, deliver them to J. and W. Blaker, without the order of Myrick, and that the plaintiff and the Commercial National Bank of this city thereby lost the said cattle, or the benefit of them, or the proceeds thereof, then the defendant is liable to the plaintiff in this action; it being the duty of the defendant, if it or its agents, the railroad company at the terminus, delivered the cattle to the Drove Yard Company, to accompany the cattle with the proper directions for their being delivered only to the order of Myrick, and if the railroad company failed to properly direct the Drove Yard Company, or if they had been properly directed, and the Drove Yard Company had delivered them improperly, then the defendant in either event would be liable. That is, it makes no difference whether the North Penn. Railroad Company, which made the delivery to the Drove Yard Company, made the mistake, or whether the Drove Yard Company made the mistake and delivered the property wrongfully; in either event the defendant is liable, as both these parties were agencies by which the defendant undertook to complete its contract.

§ 1301. *Usage cannot be set up to warrant a delivery, contrary to the terms of a bill of lading, so as to prejudice the holder's rights.*

It is contended by the defendant, that, by the course of business growing out of a series of shipments by the plaintiff over the defendant's line to the same destination, a usage had grown up to deliver the cattle to the Blakers upon substantially such contracts as this, and therefore defendant is not liable; and upon this point I say to you, while the parties to a contract like this may, by a long continued usage, change the mode of delivery, yet, in order to warrant a delivery contrary to the terms of the contract, it must appear satisfactorily from the evidence that the plaintiff knew that the terms had been changed at the terminus; and that in this case, if you believe from the evidence that the plaintiff assigned his bill of lading or receipt to the Commercial National Bank as security for a loan or advance of money, then no mere usage between the plaintiff and the defendant in that regard, contrary to the terms of the contract, would affect the rights of the bank as the holder of this bill of lading; that is to say, the bank had the right to have the contract executed according to its terms, unless the proof shows to your satisfaction that the bank had become cognizant of a usage by which the terms were changed, and acquiesced therein.

§ 1302. *Question of damages considered.*

Then, gentlemen of the jury, the next question for you to consider will be the measure of damages. The evidence in the case, which is undisputed, I may say, shows that Myrick, immediately upon receiving this bill of lading, that is, as soon as the two things could follow each other in the due course of business, repaired to the Commercial National Bank, where he received a discount or

advance of money to the amount of \$12,287.54 on the shipment of the 7th of November, and \$12,448.12 on the shipment of the 14th of November; and that he drew drafts on J. and W. Blaker for these respective amounts, and secured their payment by assigning and delivering these bills of lading to the bank, and that these bills of lading went forward with the drafts to the First National Bank of Newtown, Pennsylvania, for collection. The evidence in the case tends to show, and perhaps does show without dispute, that Myrick, the plaintiff in this suit, bought the cattle in question for the Blakers; that is, he was the agent of the Blakers here for the purchase of cattle; he had no interest in the cattle further than to be reimbursed for the money which he borrowed, and became responsible for, to pay for the cattle. The undisputed proof shows that he was to buy the cattle in Chicago, make drafts upon the Blakers for the purchase money, which he was to have discounted here, and pay for the cattle with the proceeds of the discount, and the drafts so made were to be secured by the transfer of the shipping receipts or bills of lading obtained from the railroad.

If you are satisfied, from the instructions that I have given, that the plaintiff is entitled to recover, his damages will be the amount of these two drafts, with interest thereon at six per cent. from the time the cattle were wrongfully disposed of; which was, in one case, by the undisputed testimony, the 12th of November, 1877, and in the other the 19th of November, the cattle having arrived in Philadelphia on Sunday in each case, and having been disposed of on the following Monday.

§ 1808. Agents in other states.—A railroad company in one state may appoint agents in other states to make contracts for freight to be carried over its road. *York Manuf'g Co. v. Illinois Central R. Co.*,* 1 Biss., 377.

§ 1804. A common carrier may, through its agents in another state, contract for the delivery of freight from such state to its place of destination. *Woodward v. Illinois Central R. Co.*,* 1 Biss., 403.

§ 1805. Contract for through transportation.—Each carrier on a through bill of lading is liable only as respects his own line, in the absence of a different understanding. Though such different understanding may be shown either by express contract or the existence of circumstances from which it should be inferred. *Harding v. International Navigation Co.*,* 12 Fed. R., 168.

§ 1806. This rule applies notwithstanding the loss occurs while goods are in charge of "lighters;" this being a service rendered by an independent carrier. *Ibid.*

§ 1807. When several carriers by water unite to complete a line of transportation and receive goods for one freight under a through bill of lading, they are liable each for damages, subject to reclamation against the carrier by whose act the damage occurred, each carrier being the agent of all the others to accomplish the transportation; and the owner of the goods is not compelled to ascertain to which one the damage is attributable. *Harp v. The Grand Era*,* 1 Woods, 184.

§ 1808. Proofs considered as showing whether or not the defendants were common carriers beyond their own route. A person allowed to be a competent witness to prove his own agency in signing bills of lading in this connection. *Pendall v. Rensch*,* 4 McL., 259.

§ 1809. Where a railroad company received goods for transportation to a point beyond its own terminus, and the plaintiff alleges that they undertook to carry the whole distance by rail, the burden is upon him to prove such undertaking. The burden in such case is not upon the carrier to account for the loss if he has delivered properly at his own terminus. *Dixon v. C. & I. R. Co.*,* 4 Biss., 137.

§ 1810. Acceptance by first carrier.—If a carrier receives goods, knowing that there are serious hindrances to their speedy transportation by a connecting line, without informing the consignor of such hindrances, and the goods are destroyed while in the carrier's warehouse waiting transportation on the connecting line, but before delivery to the latter, the carrier is liable as such and not as warehouseman, although the receipt taken by the consignor without dissent contains an unsigned printed notice that goods while in warehouse are at the

owner's risk except in case of the carrier's negligence. *Michigan Central R. Co. v. Mineral Springs Manufacturing Co.*,* 5 Ch. Leg. N., 278. See § 52.

§ 1811. *Delivery to succeeding carrier.*—A delivery of goods in freight cars by one carrier to another may be inferred from a custom to run the cars upon a Y owned by the receiving carrier, leaving them to be drawn by an engine of the latter to his transfer platform, where the contents are transferred to his own cars. *Kentucky Marine, etc., Ins. Co. v. Nashville R. Co.*,* 3 Am. L. T., 79.

§ 1812. A carrier agreeing to carry goods to a certain place and forward them by a particular route is not justified, on arriving at that place and finding that press of business would delay the discharge for a number of days, in proceeding to another place before communicating with the consignees, and thence forwarding the goods. *Strong v. Carrington*,* 11 Am. L. Reg., 287.

§ 1813. The owner of property shipped over connecting railroads can recover for a loss from the intermediate road which receives the property and fails to show due delivery at the end of its route. *Knowles v. Pittsburgh, Ft. W. & C. R. Co.*,* 4 Biss., 466. And see, as to liability of a vessel which has received goods at an intermediate port and fails to deliver at the port of destination, *Maxwell v. The Powell*, 1 Woods, 101.

§ 1814. *Collection of back freights, etc.*—Where a connecting carrier receives, in apparent good order, flour shipped through under a bill of lading, pays the back charges and transports it to the place of destination, having no connection with the previous carriers, and it afterwards appears that the flour was injured before it reached him, he may recover his freight and the back charges paid by him from the consignee without offset for the damage. Usage in water traffic by Erie canal, to pay back charges, considered. *Monteith v. Kirkpatrick*,* 3 Blatch., 279.

§ 1815. For application of rule of connecting carriers to the sale of passenger tickets, see *post*, §§ 1825, 1826; *Maskos v. American Steamship Co.*,* 11 Fed. R., 693. See, also, §§ 1817, 1478. And see, as to through transportation by express, *St. John v. Express Co.*,* 1 Woods, 612. See §§ 1530-1532.

VIII. CARRIERS OF PASSENGERS.

SUMMARY—*Right to refuse passengers*, §§ 1816-1824.—*Duty to transport; ticket holder's rights*, §§ 1822-1827.—*Treatment of passengers*, §§ 1828, 1829.—*Effect of special contract with passenger*, §§ 1830-1832.—*Liability for baggage*, §§ 1833-1844.—*Sleeping car company's liability*, §§ 1845, 1846.

§ 1816. Passengers for hire should not be refused where common carrier has room and no reasonable objection to the character or conduct of the person. But one may be refused carriage who is the agent of a rival connecting line, and whose object in coming on board is to promote its interests as against the party to whom the carrier has promised his patronage. *Jencks v. Coleman*, §§ 1847-1850; *The D. R. Martin*, §§ 1851-1853.

§ 1817. A passenger carrier's contract with a connecting carrier, to give the latter the benefit of his patronage with his own passengers to the extent of his contract, is not oppressive or unreasonable in itself. *Jencks v. Coleman*, § 1850.

§ 1818. A waiver of the carrier's right as to others similarly engaged, so as to interfere with his patronage, cannot avail. *The D. R. Martin*, §§ 1851-1853.

§ 1819. The purchase of a ticket does not entitle one to solicit rival business on the passenger carrier's vehicle, nor debar the carrier from ejecting him if he persists in his efforts. *Ibid.*

§ 1820. A common carrier may dispose of the facilities for pursuing business on his own vehicles, at his own discretion and with a view to his own profit. *Ibid.* And see § 1817.

§ 1821. Gamblers and monte-men, whose purpose in traveling is to ply their vocation, may be refused passage. *Thurston v. Union Pacific R. Co.*, §§ 1854-1856.

§ 1822. Where one is refused passage who has already paid for a ticket inadvertently sold him, the amount of fare should be tendered him, or else refunded in his suit for damages. *Ibid.*, § 1856.

§ 1823. Where a vessel contracts to carry a passenger, who advances half of the passage money, but the vessel sails without him previous to the time appointed and without his knowledge, and he takes passage by another vessel in consequence, damages may be recovered so as to make the passenger whole. Damages in this instance stated. *The Zenobia*, §§ 1857-1862.

§ 1824. Where ship-owners undertake absolutely the transportation of passengers *via* the Nicaragua route from San Francisco to New York, they cannot, on the plea of civil commo-

tions in Nicaragua, transport the passengers against their consent to the Isthmus of Panama and there leave them to shift for themselves; especially if the existence of hostilities at Nicaragua was known at San Francisco when the ship-owners sold the tickets and undertook the carriage. *West v. Steamer Uncle Sam*, §§ 1363-1366.

§ 1325. Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and the ticket contains no express restriction upon the right to transfer it, the holder of such ticket may sue the selling company for breach of contract upon the refusal of a connecting line to accept the ticket, and of the selling company to furnish either passage money or a local ticket over that line; and this right of action is assignable with the ticket, under the laws of Colorado. *Hudson v. Kansas Pacific R'y Co.*, §§ 1367-1369.

§ 1326. Otherwise where a ticket, "not transferable," is sold, for this gives other purchasers with notice no rights. *Cody v. Central Pacific R. Co.*, §§ 1370, 1371.

§ 1327. Ships carrying passengers for hire stand on the same footing of responsibility with those carrying merchandise or freight. The vessel is liable *in rem* upon a contract to carry passengers whether the contract was made with the ship-owners or with a charterer who does not control the voyage. *The Aberfoyle*, §§ 1372-1376. And see *The Steamship Hammonia*, § 1377.

§ 1328. Where the master of a vessel puts a passenger on short allowance, in violation of the passage contract, the ship will be presumed liable; and passage-money advanced may be recovered back because of failure of the ship's obligation. For wrongful acts of the master towards passengers the ship is in general liable, though not, *semble*, for acts malicious and clearly outside the scope of his authority. *The Aberfoyle*, §§ 1372-1376.

§ 1329. Where a passenger on a vessel has a dangerous and infectious disease, such as small-pox, the master may isolate him, so as to protect the others on board, having reasonable regard to such passenger's comfort and welfare; and the purchase of a state-room ticket does not secure its full privileges under such circumstances. *The Steamship Hammonia*, §§ 1377, 1378.

§ 1330. Authorities exhaustively reviewed as to stipulations by a common carrier for exemption from responsibility. A common carrier should, especially as respects his passengers, be held to responsibility for the negligence of himself or his servants, regardless of special stipulations for immunity. *Railroad Company v. Lockwood*, §§ 1379-1400.

§ 1331. One who travels with cattle, under an arrangement for carrying the animals as freight, is a passenger for hire, notwithstanding a drover's pass is called a "free pass" and he pays no fare. *Ibid.*, § 1400.

§ 1332. Where one travels on a railway with cattle under a "drover's pass" and is injured while on the train by the negligence of the company's servants, he can recover damages, notwithstanding he signs a special agreement in advance, waiving all claims for injuries or damages. *Ibid.*

§ 1333. Where, during an insurrection, a railway company accepts an army officer and his family for transportation, together with troops and ammunition, without objection, and the baggage car is destroyed with its contents by fire from some unknown cause, the carrier is liable for the baggage. *Hannibal Railroad v. Swift*, §§ 1401-1408.

§ 1334. Nor is such carrier's liability affected by these facts: that the military authorities selected the special car in which the baggage should be carried, together with camp equipments, arms and munitions, that soldiers loaded the car, and that the commanding officer locked it up; the railway company making no objection, but accepting the loaded car as part of its own train. *Ibid.*, §§ 1401-1405.

§ 1335. Placing a military guard over the car does not, *semble*, relieve the carrier of responsibility, so long as the control and management of the car and train have been left to the carrier. *Ibid.*, § 1406.

§ 1336. As to furniture and equipage accepted for transportation with baggage, where its true character is manifest and no concealment was attempted, the carrier is presumed to carry it as a common carrier of freight. *Ibid.*, § 1407.

§ 1337. The surgical instruments of an army surgeon traveling with troops are properly considered as baggage. *Ibid.*, § 1408.

§ 1338. Valuable laces contained in a trunk may be considered the reasonable wearing apparel and baggage of a Russian lady of rank, of great wealth and social position, traveling in the United States. A verdict for \$10,000, rendered in the circuit court for the loss of such baggage on a railway, will not be set aside. *Railroad Co. v. Fraloff*, §§ 1409-1417.

§ 1339. Duties of passenger carrier as to baggage stated. A passenger need not, unasked, inform the carrier of the extraordinary value of his baggage. Carrier may, by special regulations brought home to the passenger, restrict the liability for baggage carried without

special compensation to a reasonable amount. He may, also, ask the value of baggage offered. *Ibid.* See, as to carrying gold dust, *Hellman v. Holladay*, §§ 1418-1420.

§ 1840. The law imposes no fixed limit of value to baggage, but confines a passenger's right to reasonable baggage. What is reasonable baggage, as to quantity or kind, depends upon the circumstances of the case. *Railroad Co. v. Fraloff*, §§ 1414, 1415.

§ 1841. Federal legislation restricts the right of offering valuable property as baggage without notice to the carrier; but this legislation applies to carriers by water and not to carriers by land. *Ibid.*, § 1417. And see IV, 1.

§ 1842. As to the responsibility of a steamboat for a lady's hand-bag or valise, and its contents, which she keeps in her state-room, see *The Steamboat H. M. Wright*, §§ 1421-1424. *The R. E. Lee*, §§ 1425, 1426.

§ 1843. A carrier by water is liable for damage to the passengers' baggage, and the usual rule of a common carrier's liability must apply where no bill of lading or special contract is shown. *The Zenobia*, § 1357.

§ 1844. A vessel is liable in damages for acts of the master injurious to a passenger, in preventing the latter from recovering his effects in port in due season. Rule of damages for the injurious delay stated. *Ibid.*, § 1359.

§ 1845. *Semble*, a sleeping-car company is not strictly liable on the footing of either common carrier or innkeeper. *Blum v. Southern Pullman, etc., Company*, §§ 1427-1430.

§ 1846. A sleeping-car company's implied liability extends to one's clothing and personal ornaments, the usual small articles of hand luggage, and a reasonable sum of money for traveling expenses. *Ibid.*

[NOTES.— See §§ 1481-1480.]

JENCKS v. COLEMAN.

(Circuit Court for Rhode Island: 2 Sumner, 221-228. 1835.)

STATEMENT OF FACTS.—Defendants, a steamboat company, refused to permit plaintiff's agents to travel on their boats. The object of such agents in going on board was to solicit the patronage of the passengers on the boats for plaintiff's line of stage-coaches connecting with the boats. The cause of the refusal was that defendants had relations with another line of coaches by which that line should have the benefit of the patronage of the passengers as far as defendants could control it.

§ 1347. *A passenger carrier bound to carry for hire all unobjectionable persons.*

Charge by STORY, J.

There is no doubt that this steamboat is a common carrier of passengers for hire; and therefore the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff.

§ 1348. — *limitations of this rule; persons who may be excluded as reasonably objectionable.*

The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful or dissolute or suspicious, and *a fortiori*, whose characters are unequivocally bad. Nor

are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them, if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations, and may justly be refused a passage, if he wilfully resists or violates them.

§ 1349. *One may be refused carriage who travels to solicit custom for a rival.*

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage-coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage-Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives, and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport whose object was, as a

stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not. It has been also said that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such case. But certainly they may in good faith make such contracts, to promote their own, as well as the public interests.

§ 1350. *Passenger carrier's contract with connecting carrier to afford facilities for his patrons must be reasonable and in good faith.*

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretense to say that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

The court refused to instruct that, in order to justify the refusal, the jury must find that the arrangement entered into was necessary or expedient for the public interest and the interest of the proprietors, and instructed as follows: That it is not necessary for the defendant to prove that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient if it was entered into by the steamboat proprietors *bona fide* and purely for the purpose of their own interest and the accommodation of the public, from their belief of its necessity or its utility. If the jury should be of opinion that, under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regula-

tion to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. (a)

THE D. R. MARTIN.

(Circuit Court for New York: 11 Blatchford, 233-237. 1873.)

Opinion by HUNT, J.

STATEMENT OF FACTS.—On the trial before the district judge, the libelant, David F. Barney, recovered the sum of \$1,000 as his damages for ejecting him from the steamboat D. R. Martin, on the morning of October 23, 1871. On an application subsequently made to him, the district judge reduced the recovery to the sum of \$500. A careful perusal of all the testimony satisfies me that the libelant was pursuing his business as an express agent on board of the boat, that he persisted in it against the remonstrance of the claimant, and that it was to prevent the transaction of that business by him on board of the boat that he was ejected therefrom by the claimant.

§ 1351. *Duties of passenger carriers defined. The carrier is not bound to carry persons who seek to transact a rival business.*

The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish traveling conveniences for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority. Story on Bailm., § 591a; Jencks v. Coleman, 2 Sumn., 221 (§§ 1347-50, *supra*); Burgess v. Clements, 4 Maule & S., 306; Fell v. Knight, 8 Mees. & W., 269; Commonwealth v. Power, 1 Am. R'y Cas., 389. These cases show that the principle thus laid down is true as a general rule. The case of The New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How., 344 (§§ 220-242, *supra*), shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss if he allows them to be brought on board. It is the simplest justice that he should be permitted to protect himself by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission, as freight, of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

(a) There was a verdict for defendant.

§ 1352. *The waiver of a right by a carrier as to one person is no justification of another violating that right.*

That persons other than the libelant carried a carpet-bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other. But, if the service and the business had been precisely like that of the libelant, the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the claimant's boat, or to do a limited express business thereon, this gave the libelant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company, or a railroad company, may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But, if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business.

§ 1353. *A person objectionable as a passenger cannot rely upon the purchase of a ticket.*

It is insisted that the libelant could not legally be ejected from the boat for any offense, or violation of rules, committed on a former occasion. It is insisted, also, that, having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In *Commonwealth v. Power*, 7 Metc., 596, the passenger had actually purchased his ticket, and the chief justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his assistants were justified in forcibly removing him from the depot." In *Pearson v. Duane*, 4 Wall., 605, Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libelant, in this case, refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite

willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit, his removal from the boat. This was done with no unnecessary force, and was accompanied by no indignity. In my opinion, the removal was justified, and the decree must be reversed.

THURSTON v. UNION PACIFIC RAILROAD COMPANY.

(Circuit Court for Nebraska: 4 Dillon, 321-323. 1877.)

STATEMENT OF FACTS.—Action for damages by plaintiff for being refused passage on a train after having paid for his ticket. The defense was that plaintiff was a gambler, or “monte-man,” and was going on the train for the purpose of gambling, and for no other purpose.

§ 1354. *Limitation of the rule requiring passenger carrier to take all who apply stated.*

Charge by DUNDR, J.

The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business.

§ 1355. *Passenger carrier is not bound to carry those who travel for the purpose of gambling.*

Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled. Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

§ 1356. *Liability of company to excluded passenger who has purchased his ticket.*

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person, and the company desires to rescind the contract for transportation, it should tender

the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz., what he paid for the ticket, and, perhaps, necessary expenses of his detention. (a)

THE ZENOBIA.

(District Court for New York: Abbott's Admiralty, 80-96. 1847.)

Opinion by BETTS, J.

STATEMENT OF FACTS.—The libellant seeks to recover, in this action, for several distinct items of damage connected with a breach of a contract of affreightment, entered into between himself and the master of the *Zenobia*, and which, as he charges, was wilfully violated by the latter. The allegations of damage are, many of them, distinct in their nature, and require to be separately considered. The libellant shipped on board of the *Zenobia*, then lying at Whampoa, China, for transportation to this port, sundry cases of merchandise. On the arrival of the vessel here, it was found that the articles contained in a trunk belonging to libellant had become injured by being wet. The other cases passed into the custom-house, and, by the neglect of the master to make the proper entries upon the ship's manifest, the libellant was greatly delayed in obtaining their delivery to him. The vessel is undoubtedly responsible to the libellant for the safe carriage and delivery of the goods laden by him on board her, and he is entitled to recover damages for a breach of duty in this respect.

§ 1857. *Carrier by water liable for damage to passenger's baggage, on common law principles, where there is no bill of lading.*

As regards the injury to the articles contained in the trunk, the defense is that the damage was occasioned by the perils of the sea. But there being no bill of lading in the case exempting the vessel from liability for losses arising from perils of the sea, it becomes necessary for the claimants to prove that the injury arose from supernatural causes. In other words, the liability of the ship as a common carrier can only be discharged by showing that the loss was incurred from perils embraced within the meaning of the phrase, "the act of God." The cases are very numerous in which the attempt has been made to exempt the common carrier from this strict liability for losses occasioned by casualties not absolutely unavoidable; but the rule is uniform and is sanctioned by authority too strong to be questioned, that to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 Kent, 597. In the absence of an exemption to be gathered from the contract of affreightment, the carrier cannot excuse a loss, resulting in any degree from the influence of human means, excepting only a loss from the force exerted by a public enemy. Numerous cases upon this subject are collected and discussed in *McArthur v. Sears*, 21 Wend., 190. See, also, *The Reeside*, 2 Sumn., 567 (§§ 451-454, *supra*); 1 Conn., 487; *Story on Bailm.*, §§ 512, 531; *Whitesides v. Russell*, 8 Watts & S., 44. Any act of omission, neglect or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defense here relied upon. It is in proof, on the part of the libel-

(a) The verdict was for actual damages and costs.

ant, that the trunk was stored in the long-boat, and that such storage was not proper for freight of that description. The vessel must therefore be held responsible for the injury received by the contents of the trunk.

§ 1358. *Liability of vessel for misconduct of master as to passenger.*

There is also a demand for damages because of the misconduct of the master in the preparation of his manifest, and in thwarting the libelant in his efforts to obtain the delivery of his goods in this port. How far these particulars, if proved with all the aggravations charged in the libel, might afford substantive ground of action, I do not now examine or decide. The testimony does not present a case requiring such decision. But the delay of the master in presenting a proper manifest, so that the libelant could pass his property through the custom-house, is a neglect of his duty as master; and damages naturally incident to any failure of duty towards the shipment on the part of the master fall properly within the responsibility of the vessel. She is bound for the safe carriage and due delivery of the cargo; and acts of misconduct by the master, which are injurious in either respect to the shipper, will subject her to make adequate recompense to the freighter. The liability of the vessel upon this score is, however, limited to damages for the act or neglect of the master in his capacity as such. For any tortious endeavor on his part to prevent the libelant from recovering possession of his goods she is not responsible; nor would such acts of the master, committed at this port, and in command of the ship, fall within the jurisdiction of the court, in an action against him personally.

§ 1359. *Measure of damages where master wrongfully withholds delivery of baggage.*

It will be difficult to fix upon a measure of damages in that respect which will meet the particular merits of the case, yet rest on principles of general application. The actual damage to the owner of goods may be very great, yet when the damage to a considerable degree is merely consequential, it cannot be charged in its entirety upon the vessel as the immediate and proximate cause of it. If the goods were subject to freight, I should be inclined to regard a loss from the misconduct of the master in withholding their delivery a proper counterclaim against the freight; but these goods being the personal baggage of libelant and family, and not chargeable with freight, I think some compensation awarded by way of demurrage, as it were, will be the appropriate mode of satisfaction. The master made oath before the deputy collector to the manifest, on May 8th, the libelant being then here, seeking the delivery of his property; and did not make the proper baggage entry thereon, so that the goods could be obtained by the libelant, until June 15th. This act, although importing wilful misconduct on the part of the master, was yet within the scope of his authority, and accordingly the vessel stands chargeable with its consequences. Abbott on Shipp., 152, 153. I regard the delay to the owner in obtaining his goods, and his necessary expense in procuring them from the custom-house, as imposing on him a loss or damage amounting to \$2 per day; and without a more satisfactory measure of compensation, I shall adopt that as a reasonable remuneration, and allow him the sum of \$74, because of the wrongful non-delivery of his property pursuant to the shipping contract.

§ 1360. *Further facts of case as to loss of money.*

The libelant charges that a chest of drawers which was shipped by him amongst the cases of merchandise above referred to contained the sum of \$2,500 in specie, and that this money was missing from the chest when de-

livered to him in this port. There is no evidence, however, to support either of these averments; and the claimant proves, by the testimony of one of the mates of the vessel, that the libelant himself had access to the chest of drawers while it was yet on board the vessel; that he took a bundle from the furniture previous to its being landed, and that no complaint was then made by him of the loss of any money. He establishes no right to recovery on this part of his claim.

§ 1361. *Rule of liability stated where a vessel fails to carry a passenger pursuant to contract.*

The libel avers that the libelant contracted with the master of the Zenobia to convey him and his family from Whampoa to this port; that he paid the master of the bark in advance \$150, being one-half of the passage money, and that the vessel sailed without him, previous to the time appointed and without his knowledge. I think the libelant has established this charge, and is entitled to recover against the bark his damages for this breach of contract by the master to transport him and his family as passengers. This contract is one which it was competent for the master to make in the employment of the ship, and became binding on the vessel. Abbott on Shipp., 160; 3 Kent, 162. The vessel is liable on this contract for the \$150 paid the master in advance in China, upon the grounds stated in the former decision of the court in this cause in July last (Abb. Adm., 48).

The libelant came down from his residence at Hong Kong to Whampoa in season to embark on the Zenobia on November 28th, which was her appointed day of sailing, but found she had already left. His expenses incurred in coming down to Whampoa are stated at \$60, and his further expenses incurred through his detention at Whampoa at \$64, besides \$16 paid in going to Canton to confer with the agents of the bark respecting her departure. There is no ground upon which the libelant can claim to recover the cost of his passage from Hong Kong to Whampoa, as he must necessarily have made that voyage whether he came home in the Zenobia or the Rainbow. But the vessel is chargeable with the expenses of the libelant incurred in waiting at Whampoa after the Zenobia had left, for the sailing of a vessel in which he might take passage to the United States. The evidence shows that \$64 is a moderate allowance for those expenses, and that sum should accordingly be allowed.

It is not necessary to discuss the question of the liability of the vessel or master to the libelant for the disbursements said to have been made at Canton in a premium for the loan alleged in the libel to have been paid, or for the new supply of clothing for himself and family there purchased. No proof is given that the libelant made any such disbursements, and the court cannot presume them from any supposed necessity arising from the circumstances of the case. I consider the bark equitably liable because of the violation of the contract to transport the libelant and his family to this port in damages equal to the cost of his passage to this country in the Rainbow, upon the general grounds upon which I have already placed his right to recover back the advanced passage-money. That disbursement is fairly chargeable upon the ship as a portion of the damages recoverable by libelant for a breach of the passage contract. The sum of \$400 paid by him is proved to be below the usual and customary rate of charge for such passages, and that sum he is entitled to recover.

A reference must necessarily be had to a commissioner to ascertain the amount of injury to the clothes contained in the trunk by wetting unless the parties can agree to the amount of such damage.

§ 1362. *The master, being a party to the suit, is an incompetent witness.*

It is proper to remark, in respect to the deposition of Captain Cronstadt, the respondent, which was offered in the cause, that even if it were legally admissible it would not, in my estimation, displace the other evidence in the cause nor vindicate his conduct. But he stands a party to the suit, being prosecuted *in personam*, and subject to a decree against himself for all the liabilities of the vessel in this behalf, and the case of *Bridges v. Armour*, 5 How., 91, seems to settle the point that he is an incompetent witness in the cause.

The decree will accordingly be for the libellant, as above, and for full costs of suit.

WEST v. STEAMER UNCLE SAM.

(Circuit Court for California: 1 McAllister, 505-512. 1859.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—The libel was exhibited to recover damages for the breach of a passenger contract which had been entered into for the transportation of the libellant and his wife from San Francisco to New York *via* the Nicaragua route; and the alleged breach consisted in not carrying them to Nicaragua, but transporting them against their consent to the Isthmus of Panama, and leaving them there to shift for themselves and without the immediate means of escape therefrom. It appears that after leaving San Francisco with the libellant and his wife and other passengers on board, about five days out, the Uncle Sam was boarded by an agent from the owners, and after communication with him the master of the Uncle Sam announced to the passengers that the destination of the vessel was changed from Nicaragua to Panama. The fact also appeared that the steamer which was to have connected with the Uncle Sam at San Juan del Norte, and have taken her passengers to New York, had been withdrawn by the agents of her owners; and consequently libellants would have been unable, even if they had reached that place, to get away from it. The defense set up for the breach of contract is, that the Costa-Rica army was in possession of the Nicaragua route, and that any attempt by the passengers to cross would be hazardous.

§ 1363. *Where the carrier assumes an absolute duty by express contract he cannot allege inevitable necessity as an excuse from performance.*

In the case of *Hand v. Baynes*, 4 Whart., 204, defendant received for carriage certain goods from Philadelphia to Baltimore *via* Chesapeake and Delaware canal. On arriving at the mouth of the canal, the master was informed the locks were out of order and that he could not be allowed to pass through the canal. He then went down to sea, and proceeded to sea, intending to go outside to Baltimore, but in a gale of wind struck on a shoal, and the ship with the cargo was totally lost. The following remarks are made by the supreme court of Pennsylvania in that case: "There is no mistaking the intention of the parties;" "the route through the canal is part of the contract." (There was no mistake about the intention of the parties in this case; the route was to New York *via* Nicaragua.) "But it is said," said the court, "that although the contract was to carry the goods by way of the Chesapeake and Delaware canal, yet that the deviation from the prescribed route arose from necessity. When the master discovered the impediments to the prosecution of the voyage through the route called for in the contract his duty was plain; he had one of two courses to pursue — to remain in a place of safety until the obstructions were removed, or he should have returned and informed the shippers

and owners of the impracticability of proceeding through the canal. But suppose the contract to be express, to deliver the goods in a prescribed time (or, as it may be said in this case, by a prescribed route), would any temporary obstruction, or the impossibility of complying with the engagement, arising from the condition of the locks or any other cause, be a defense to a suit for a failure to perform the contract? When the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by the contract. This is founded in reason and authority." The principles enunciated in foregoing case of *Hand v. Baynes* are applicable to the one at bar.

§ 1364. *Further facts stated showing breach of carrier's duty.*

But there are other facts worthy of consideration. The existence of hostilities in Nicaragua had been known in San Francisco for some time, and the seizure by Walker of the property of the company was known at San Francisco at the time the agents of the company despatched the *Uncle Sam*, entered into the contract, and pocketed the money of the libelant. When, a few days subsequently, the master of the *Uncle Sam* learned that the steamer that should have connected with the *Uncle Sam* at San Juan del Norte had been withdrawn, and rendered impracticable the fulfilment of the contract, his duty was to have instantly retraced his course, and brought his passengers back to San Francisco. This he did not do, but consulting the wishes or what he conceived to be the interest of his owner, and treating his passengers as so much live cattle, he carried them to Panama and left them on the Isthmus to shift for themselves. Had they been a drove of cattle, or a mass of merchandise, he should have had them forwarded at the expense of the owners to New York. At Aspinwall, the libelant and his wife, there being no steamer for New York, and no means of escape, were forced to remain seventeen days. A forced residence in a place whose pestilential horrors inflame the imagination of the most phlegmatic, whose unhealthiness is almost a by-word, and where illness almost unto death visited the libelant, and sickness fell upon his wife—if not the result, certainly aggravated by the position in which they were placed by the breach of the contract by the master,—are facts which entitle the libelant to compensation. The amount of it was fixed by the district court at \$800. This court has repeatedly decided that, as an appellate tribunal, it does not interfere with the decree of the court below on the ground of the amount of damages, unless such decree has been given as to show manifest injustice. It can perceive none such in this case.

§ 1365. *Objection that no special damages are alleged overruled.*

But it is objected that no special damages are alleged in the libel, and that there is nothing but a general allegation, which is insufficient; that such allegation would not be sustained at common law; and that the pleadings in an admiralty court and in a common law court are the same. The libel alleges that the libelant and his wife were at Panama taken out of the *Uncle Sam* against their will; carried to Aspinwall, and then set down, without food, or sustenance, or accommodation of any kind; where, there being no means of leaving, no vessel to carry them away, they were detained seventeen days, at great expense; and from want of accommodation, and the well-known sickly character of the climate, were put to great expense from sickness; and that libelant has sustained, as he believes, damages thereby to the amount of \$2,000. Under this general allegation, the libelant gave evidence of the facts to show

detention, illness, etc. That the allegation is inartificial, and not technically drawn, may be admitted. To ascertain its sufficiency we must look to the character of the breach charged. It involved personal wrongs, constituting both mental and physical sufferings, which may be experienced and felt, but cannot be decimated into dollars and cents. One may, as the libellant did in this case, suffer from illness aggravated by the total want of accommodation and comforts, and the sickliness of the wretched place in which he was placed, and where he was forced to remain by the acts of another; and the amount of damage can only be inferred from his detention and his situation, which facts are set forth in the libel.

In the case of *Wade v. Leroy*, 20 How., 34, a common law case, the allegation was general, and there was no special damage alleged. Objection was made to the proof of special facts, on the ground that the declaration contained no allegation of special damages; but evidence was admitted under the general allegation. The court say: "This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character,—an injury to his person; and which was followed by expense, suffering and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it." That was a common law case; and the allegation of damages was general, and mental and bodily suffering deemed sufficient for the court to act upon.

In *Coppin v. Braithwaite*, 8 Jur., 875, cited in Angell on Carriers, edition of 1851, p. 508, note, "A declaration in *assumpsit*, to carry the plaintiff in a ship to a certain place, alleged, as a breach, that the defendants, by their agents, caused him to disembark at an intermediate point, and the disembarkation to be conducted in a scandalous, disgraceful and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the said agent, in effecting said disembarkation, the plaintiff sustained damage. *Held*, 1. The declaration was good, on motion in arrest of judgment. 2. That the judge had rightly received evidence of the language of the captain of the defendant's ship in putting the plaintiff ashore. 3. That the judge had rightly directed the jury that the defendants were responsible for an injury *naturally* resulting from the acts of the captain when acting as their servant; and that the plaintiff was entitled to a fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore."

In neither of foregoing cases was the want of an allegation of special damages held to be fatal to the declaration. Both were common law cases, where the more rigid and strict rules of that system of pleading obtain. In a court of admiralty the question as to the sufficiency of pleadings stands on a different footing from what it does in a court of common law. It has been earnestly urged that the pleadings in courts of common law and admiralty are the same, and the strictness which controls the one regulates the other. This would be strange, if true, considering the different sources from which the common law and the admiralty have arisen, and the different systems under which they have been fostered. It would be in fact to say there was no difference between the precise, minute and logical mind of a special pleader of Westminster and the expansive and capacious intellect of a Sir William Scott, or some other great advocate of admiralty practice and law.

In the case of *Dupont de Nemours v. Vance*, 19 How., 162, a libel was filed

against the consignee of a vessel to recover the contributory share of the salvage due from the goods which the master had voluntarily delivered to the consignee before the libel was filed; and the question arose whether the court could admit a claim for general average in an action founded on a cause of affreightment. In that case it is clear that the promise implied by law in one case is different from the promise to pay on the face of the bill. The causes of action were different. In a court of law it would have been difficult to have given judgment for a cause of action different from that alleged in the declaration; but in that case the court, considering the differences between the causes of action as technical, rendered a decree in favor of the libelants. Now, they rested their power to do so on the difference which existed between pleadings in courts of common law and admiralty, and in the fact that there existed in the latter no technical rules of variance or departure.

§ 1366. *Rules of pleading in admiralty are simple and free from technical requirements.*

After stating that the libelant may pray (*id.*, 171) generally or specially for the relief he asks, the court say: "Pleadings in admiralty are exceedingly simple and free from technical requirements. . . . The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance or departure in pleading like those of common law; nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for in the libel, because that entire case is not distinctly stated in the libel." This court cannot, therefore, consider that the general allegation in the libel in this case is to be deemed insufficient, which, in such a case, would be good even in a declaration at common law. In a libel for the breach of a passenger contract, consisting of personal wrongs by way of detention, loss of time, and subjection to exposure and risk in a place designated as fraught with danger to human life, I cannot consider that special damages must be laid in analogy to a common law declaration; but that proof, under such general allegation, may be given of the detention, loss of time and any other facts to show the exposure and suffering of libelant and his wife.

A decree will be drafted affirming the decree of the court below, and handed to the judge for signature.

HUDSON v. KANSAS PACIFIC RAILWAY COMPANY.

(Circuit Court for Colorado: 3 McCrary, 249-253. 1882.)

Opinion by HALLETT, D. J.

STATEMENT OF FACTS.—Plaintiff alleged that he purchased at St. Louis and at Kansas City, Missouri, in the year 1879, of defendant's agents, certain passenger tickets over the lines of the Denver & Rio Grande Railway, in this state, paying therefor the prices named in the complaint, and that the tickets were, and are, worthless, as the Rio Grande Company refuse to recognize them. At the trial it appeared that the tickets were issued by eastern companies having lines extending to Kansas City, not to the plaintiff, as alleged, but to travelers in the regular course of business. When issued, they provided for passage over the line of the company by which they were issued to Kansas City, and from that place to Denver, over defendant's line, and from Denver to destination, over the lines of the Rio Grande Company. Coupons were attached applicable to the several parts of the route, and as the Rio Grande Company was

to complete the contract, its coupon was the last of the series, and connected with the general provisions constituting the contract. All of them were in substance like those issued by the Missouri Pacific Railway Company, in the following form:

MISSOURI PACIFIC RAILWAY.	FORM 307.
<p>This Ticket entitles the holder to one First-Class Passage TO TRINIDAD, COLORADO.</p>	<p>Issued by MISSOURI PACIFIC RAILWAY COMPANY. Denver & Rio Grande Ry. One First-Class Passage. Denver to Trinidad. This Check is not good if detached. M P-K P-D & R G. Trinidad, Col.</p>
<p>FORM 307. F. E. FOWLER, <i>Acting Gen'l Passenger Agent.</i></p>	28

It will be observed that there are no conditions as to the time of performing the journey, or as to the right of the purchaser to transfer the ticket to another. It entitles the holder "to one first-class passage" from the place of departure, which, in this instance, was St. Louis, Missouri to Trinidad, Colorado.

At his office in Denver, for a month or more, the defendant redeemed tickets similar to these in all respects, paying therefor local rates from Denver to the points named in the tickets. It was not then contended that the right was limited to the original purchaser, but payment was made to the holder, and many of them were presented by the plaintiff himself, who received the money for them. The tickets in suit were bought by plaintiff, who calls himself a "ticket broker," in the expectation that defendant would redeem them as had been done with others of the same class. As to these tickets, defendant's agent at first requested plaintiff to hold them a few days until money should be received for redeeming them, and, after four days, defendant absolutely refused to redeem them. Meantime plaintiff had bought others of the same class, amounting in all to the sum in controversy, and after defendant refused them he bought no more.

§ 1367. *Liability of railroad company for tickets sold by it for travel over connecting lines, where such tickets are not honored.*

As to what may be a fair deduction from this proceeding, concerning defendant's liability, there is not much room for discussion. That defendant should accept the coupon for travel over its own line implies only that it was sold by its authority. But if that was the limit of authority in the company selling the ticket, why should defendant assume responsibility in respect to the remainder of the journey over the Rio Grande line? As to tickets of this class, defendant not only performed the part assigned to it in the original contract by carrying the passenger from Kansas City to Denver, but also protected the remainder of the ticket by furnishing a local ticket to destination, or paying the money which would procure it. A fair inference from such conduct may be that the ticket was originally sold by its authority. And if sold by defendant's

authority, and the Rio Grande Company refused to carry the passenger according to its terms, the defendant was clearly liable to some one for the value of the ticket. It must often happen in the effort to draw travel over its lines which would otherwise go to a rival, that a railroad company will assume the burden of carrying a passenger beyond its own terminus, and in such case there would seem to be nothing in reason or authority to exempt it from liability on its contract. It is conceded that a railroad company may contract to carry a passenger any distance, provided its own line be a part of the journey. And whether the part owned by the contracting company be the first or the last, or from the middle, must be wholly immaterial. The principle is, that in promoting its own business a railroad company may make any contract which it may have capacity to perform in some part, although not the whole, and the exact part, whether great or small, cannot be material.

§ 1868. *The holder of ticket may sue, under present facts, and an assignment of the rights under it is good.*

The objection that a contract for transportation over a railroad is not assignable by a passenger, if correct in principle, does not meet the case. The evidence shows that the Rio Grande Company did not accept the tickets, and it must have been known to defendant, when they were sold, that they would not be honored. The fact that other tickets bought of the Rio Grande Company were given in lieu of them, or that money was paid for them at the option of the holder, admits of no other construction. The truth appears to be that the tickets were not sold to be used on the Rio Grande road according to their terms, and could not be so used. How, then, shall we say that the purchaser was bound to ride in person when he was not allowed to ride either in person or by another, or in any way. If he has no remedy in damages, it would seem that he is without remedy. It may be conceded, also, that a ticket is a receipt for passage money, and not full evidence of the contract to carry, as declared in *Quimby v. Vanderbilt*, 17 N. Y., 306. But it is, nevertheless, in the hands of the passenger, evidence of his right to be on the train, without which he cannot travel. By delivering it to another he may signify his purpose to assign his contract with defendant, and that should be enough. We have seen that although the tickets were for passage over the Rio Grande road they were not available for that purpose, and the right of the holder to demand of defendant a ticket or money, whatever it was, could be maintained. That it was assignable under our statute, so as to give a right of action to the assignee, would seem to be clear, and the delivery of the ticket, although it should be called a receipt or token, should be evidence of such assignment. Can it be questioned that in delivering the ticket to plaintiff the holder intended to part with his right? If he did so intend the right of action is now in the plaintiff, although the contract as originally made may have contained something more than is expressed in the ticket.

§ 1869. *An objection that comes too late after verdict.*

It is also said that the facts appearing in evidence are not set out in the complaint, and the proof varies from the allegation. The plaintiff charges that he purchased the tickets of defendant's agents, and the fact appears to be that they were bought by others, of whom plaintiff bought them. He has said nothing in the complaint of the redemption of the tickets by defendant, but relied on the refusal of the Rio Grande Company to honor them. Whatever weight this objection would have, if made at the trial, it is believed that it comes too late after verdict. The matter in issue between the parties was the

present value of the tickets, as defendant must have understood from the complaint, and no formal objection can now be entertained. The motion for new trial will be denied.

CODY v. CENTRAL PACIFIC RAILROAD COMPANY.

(Circuit Court for Nevada: 4 Sawyer, 114-119. 1876.)

STATEMENT OF FACTS.—Cody sued the Central Pacific Railroad Company for ejecting him from their cars. Cody offered an emigrant ticket which he had bought from one Meur, who had traveled on it from Omaha to Palisade. This ticket had been given Meur in exchange for one he had bought in Baltimore, from that city to San Francisco, and which expressed on its face that it was not transferable. This, however, did not appear on the ticket sold to Cody, which used other expressions commented upon in the opinion of the court. Cody was put off at Battle Mountain.

§ 1370. *Ticket for "one continuous emigrant passage," held not good in the hands of a purchaser from the original passenger whose contract was not transferable.*

Opinion by SAWYER, J.

It is clear to our minds that the plaintiff had no right to ride on defendant's road upon the check purchased of Meur at Palisade, and that he was properly excluded from the cars on that ground. Meur made a contract for a through emigrant passage from Baltimore to San Francisco at a reduced rate in consequence of taking a through passage. His contract stated in terms that it was not transferable, and he signed the contract assenting to its conditions. The written contract was surrendered in pursuance of its provisions at Omaha, where Meur received from the Union Pacific Railroad Company the usual check given in such cases, known as the "Union Pacific Railroad emigrant exchange check," which called for "one continuous emigrant passage from Omaha to station canceled," viz., San Francisco. The contract entered into with Meur was to carry him through the whole distance as an emigrant, and not to carry him to one station and some one else to another. And it was an express term of the contract that it was "not transferable."

§ 1871. — *that the exchange ticket did not express the terms, "not transferable," of the original ticket, is immaterial.*

It does not affect the question that the evidence of the original contract was surrendered at Omaha, and the exchange check given not fully expressing the terms of the contract. The check was, doubtless, evidence in Meur's hands that he was entitled to a "continuous emigrant passage" from Omaha to San Francisco. But it did not purport to give the terms of the contract. The fact that through emigrant rates are lower than rates for local travel from station to station is one of general notoriety. The check had marks and numbers referring to the written contract at first executed, by which the connection of the two could be traced and identified. It was the duty of the purchaser to ascertain before purchasing what his rights under the purchase would be. If he did not understand the numbers and reference, as well as the other matter expressed upon the check, he should have ascertained what they signified. He knew, at all events, that the check only called for a "continuous emigrant passage" from Omaha to San Francisco, and that he was not an emigrant and not a passenger from one of these points to the other. But if the check is considered only as evidence of a right to a passage from Omaha to San Francisco,

without regard to the previous contract in pursuance of which it was in fact issued, the result, in our judgment, would be the same. It is still evidence upon its face only of a right to "one continuous emigrant passage" from Omaha to San Francisco. The evidence showed that through rates from Omaha to San Francisco are considerably less than local rates from one station to another; that a railroad company can afford to carry cheaper on long through routes than on short local portions of the route; and that their tariff of fares is based upon this principle. It is evident that this must be the case. A contract, therefore, for one "continuous emigrant passage" from Omaha to San Francisco is not a contract to carry one man from Omaha to the next station, another to the next station, and so on through the entire line, but an entirely different contract, and one upon different terms, and for a different rate of compensation. If this experiment should succeed, parties could readily arrange privately for local travel at through rates without the consent of the companies. A party might as well contract to carry a ton of freight from Omaha to San Francisco, and then insist that he could have a ton carried to the first station, and transfer a right to another party to carry another and different ton of freight to the next station, and so on through the entire line. The inconvenience and loss to the company would doubtless be greater than in the case of a passenger, but the difference is only in degree, not in principle. In the case in hand, then, whether we regard the exchange check issued to Meur as a part of the original contract, or as an independent contract for one "continuous emigrant passage from Omaha to San Francisco," it was not a contract to carry Meur from Omaha to Palisade, and Cody or some one else to some other station on the road. The right to ride upon the road upon this check from Palisade could not be transferred to Cody without defendant's consent. And the fact that the contract was for one through passage appeared on the face of the check itself. Plaintiff, therefore, was not entitled to ride on the check, as the defendant never contracted to carry him on it. As he refused to pay the usual fare he was properly ejected from the defendant's cars on that ground. Let judgment be entered for defendant.

THE ABERFOYLE.

(District Court for New York: Abbott's Admiralty, 242-258. 1848.)

STATEMENT OF FACTS.—Libel *in rem* for damages for breach of contract for the passage of libellant and his family. The contract was made with the charterer, and the action was brought for damages for short allowance of provisions and water. The owner of the vessel filed a claim and answer.

§ 1372. *Distinction between a contract of affreightment for the voyage and a letting of the entire ship.*

Opinion by BETTS, J.

The contract proved in this case between the owner of the vessel and the charterer was a contract of affreightment for the voyage, and did not amount to such a letting of the entire ship as to constitute the charterer owner for the voyage. The rule of construction of a charter-party, in this respect, is stated by Mr. Abbott to be as follows: "When, by the terms of the charter-party, the master and mariners are to continue subject to the orders of the ship-owner, he retaining through them the possession, management and control of the vessel, it is to be considered as a contract to carry the freighter's goods; but where the merchant engages to pay a stipulated price to the ship-owner for

the use of his ship, by the month or year,—takes it and them into his service,—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and of the vessel being given up to him,—it is a demise of the vessel with her crew for the voyage, or the term specified; the charterer becomes owner *pro hac vice*, entitled to the rights and subject to the responsibilities which attach to that character.” Abbott on Shipp., 47–52, and notes.

The case of *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39, drew in question the construction in this respect of a charter-party of the following nature: One M'Dougal, the general owner of the brig Betsy, let her to the plaintiff by a charter-party of affreightment, excepting and reserving her cabin for the use of the master and mate, and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions and cables, for a voyage from New York to Nantes; and M'Dougal, by the same instrument, covenanted to man, victual and navigate the brig at his own charge during the voyage, and to receive on board and carry any shipment of goods made by the plaintiff. The passengers on board of the brig were to be at the joint expense of the parties, and the passage money was to be equally divided between them. It was held, upon these facts, that M'Dougal remained the owner for the voyage, upon the general principle that, where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. Citing *Hooe v. Groverman*, 1 Cranch, 214. And this conclusion, that the owner of the vessel, notwithstanding the charter, remained her owner for the voyage, was derived in part from the fact that he retained the exclusive possession, command and management of the vessel, and that she was navigated at his expense during the voyage,—and apart from the circumstance that the whole charter-party, except the introductory clause, “hath granted and to freight let,” was one sounding merely in covenant.

In the case of *The Schooner Volunteer*, 1 Sumn., 556, the same principles were applied to a case quite analogous to the present. The charter-party there, after naming the parties, proceeded to state that the owner, for the consideration thereafter mentioned, “has letten to freight the whole of the said schooner, with appurtenances to her belonging, except the cabin, which is reserved for the use of the master, and what room is necessary under deck for provisions, wood, water and cables,” for a voyage specified. It further set forth covenants on the part of the owner and charterers respectively, among which were these: that the owner should pay all and every charge of victualing and manning the schooner, during the voyage, and should furnish the schooner victualed and manned; and that the charterers should bear all other charges, and should pay a specified freight. It was held that, upon the construction of this instrument, the general owner remained unquestionably the owner for the voyage. Mr. Justice Story remarked, “The vessel was equipped and manned and victualed by him, and at his expense, during the voyage; and he covenanted to take on board such goods during the voyage as the charterers should think proper. The whole arrangements on his part, in these respects, sound merely in covenant. It is true that, in another part of the instrument, it is said that he has ‘letten to freight,’ which may seem to import a present *demise* or *grant* (and not a mere covenant) of the whole schooner for the voyage.

But this language is qualified by what succeeds. And the whole schooner is not let; for there is an express exception of the cabin, and certain portions of other room under deck. If the whole schooner, then, was not granted during the voyage on freight, how is it possible to contend that the libellant did not still remain owner for the voyage? The master was his master, appointed by him, and responsible to him; the crew were hired and paid by him; and the victualing and manning were at his expense. He also retained the exclusive possession of a part of the vessel for the voyage, and the control and navigation of her during the voyage. Taking, then, the whole instrument together, it seems wholly inconsistent with the manifest intent of the parties that the charterer should be owner for the voyage."

In a later case, also, decided by Mr. Justice Story (*Certain Logs of Mahogany*, 2 Sumn., 589), which arose upon a charter-party substantially analogous, as to all points important to the present discussion, to that drawn in question in *The Volunteer*, that learned jurist, commenting on a discrepancy between the English and American cases, thus restated the American rule: "If the absolute owner does not retain the possession, command and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all persons who do not contract personally and exclusively with the charterer, by a subcontract with the latter, knowing his rights and character under the charter-party." And it was further held in the same case, that wherever, upon comparing the various clauses of a charter-party, it remains doubtful whether the charterer was intended to have the sole possession and control of the vessel during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such; for his rights and authorities over the voyage must continue, unless displaced by some clear and determinate transfer of them.

Bearing in mind this presumption against any transfer of the ship to the charterer for the voyage, I proceed, in the light of the foregoing adjudications, to consider what construction is to be placed upon the charter-party proved in this case; and, at the outset, two distinctions may be noticed between the present case and those already cited. In each of the three cases just mentioned, stress was laid in the decision upon the circumstance that the charter-party was, for the most part, one sounding in covenant; but this was adverted to with the qualification that there were also clauses of a contrary import. There is no such cause of embarrassment in the terms of the instrument now before the court. That instrument is one which rests entirely and unequivocally in covenant alone. It contains no words of grant or demise whatsoever. It commences, not by stating that the owner hath "let to freight" the vessel chartered, but by saying that "it is this day mutually agreed" that the ship shall take on board the cargo to be furnished by the charterer; and the remaining clauses of the instrument are not only clearly in the nature of mutual and reciprocal agreements, but are technically so expressed.

The second distinction between the present case and those which have been cited is, that the charter-party now before the court contains no express provision binding the owner to man and navigate the ship during the voyage; a clause which was inserted in each of the charter-parties in the cases referred to. It was contended upon the argument that the absence of this provision was immaterial, inasmuch as, by a general rule of law, it was said,

the owner is bound, notwithstanding a charter-party, to put the vessel in a suitable condition to perform her voyage, and to keep her in that condition during the voyage; and to victual and man her for the destined navigation, unless there is a contrary stipulation in the charter-party, or the nature and object of the charter-party devolve that duty upon the charterer. This rule was stated by counsel on the authority of a note to Abbott on Shipp. (Story and Perkins' ed., 323). The cases cited in that note probably support it so far as concerns the obligation of the owner to put her and keep her in suitable condition to perform the voyage. One only of those cases, however (*Goodridge v. Lord*, 10 Mass., 483), bears upon the question of the obligation to man the ship; and that case, so far from sustaining the rule contended for, holds directly the reverse. In that case the owners of the vessel brought suit against the charterers to recover moneys in part paid in settlement of seamen's wages, for which they had libeled the ship. There was, in that case, in the charter-party, a stipulation binding the charterers to pay the charges of victualing and manning the vessel; but the court remarked that an action would, under the circumstances, lie for the owners against the charterers to recover the amount paid, even without an express stipulation in the charter-party, or any proof that the charterers were to victual and man the ship; "for that would be the effect of the contract of charter-party, unless it appeared, by the instrument itself, that a different arrangement was intended." The absence of any provision in the agreement of charter-party requiring the owner to man and navigate the ship is, therefore, a circumstance not without weight, as an indication that the intention of the parties was to vest in the charterer the ownership of the vessel for the voyage. It is not conclusive upon the question of intention, however. That intention is to be inferred, not from a single clause of the instrument or a single fact in the case, but from the whole tenor of the charter-party throughout, construed in the light of all the facts proved, which may be admissible as explaining the intent and meaning of the contract. *The Volunteer*, 1 Sumn., 566; *Certain Logs of Mahogany*, 2 id., 589.

The question upon the point now under discussion may, therefore, be stated thus: Does this charter-party, read connectedly and as a whole, and with a proper reference to the circumstances under which it was executed, so clearly show an intent to vest in the charterer the ownership for the voyage, that the presumption of law in favor of the continuance of the general ownership is overcome? I think it clear that this question must be answered in the negative. The charter-party, as already noticed, sounds wholly in covenant. It describes Graves, the claimant, as "owner," and Quayle, the charterer, as "merchant and freighter." It identifies the vessel in part by the words "whereof Wilson is master;" Wilson being the master appointed by Graves before the chartering, and being, as is shown, in fact continued in that appointment until the day before the vessel sailed, when, in consequence of his sickness, a substitute was placed in command. The instrument contains agreements on the part of the owner that the vessel is tight, stanch and strong, and every way fitted for the voyage; that she shall take on board a cargo to be furnished by the charterer, not exceeding what she can carry over and above her cabin and necessary room for her crew, water, tackle, apparel, provisions and furniture; that the privilege of putting on board steerage passengers shall belong solely to the charterer, the entire of the between-decks, if required, being reserved for such passengers; and that if the ship shall be unable to carry cargo and passengers to the stipulated amount, there shall be a proportionate reduc-

tion in the hire of the vessel. And on the part of the charterer it is agreed that he shall furnish such a cargo as is contemplated; that he shall pay freight, £485, and demurrage, if more than twelve days are occupied in loading; and that the between-decks shall be calked, etc., at his expense. These provisions clearly indicate, upon the whole, the intention of the parties to retain in the owner the general ownership of the vessel, and to secure to the charterer only rights in the nature of affreightment. This construction is also confirmed by the conduct of the parties under the agreement. The facts are far from countervailing the presumption that no change of ownership was made. The remaining questions in the case are, therefore, to be considered on the basis of the general owner remaining owner for the voyage.

§ 1373. *Ships carrying passengers for hire stand on the same footing of responsibility with those carrying merchandise on freight.*

Ships carrying passengers on hire stand on the same footing of responsibility in that respect, with those carrying merchandise on freight,—passage money and freight being, in legal acceptance, equivalents. The liability of the vessel in specie, upon a contract of affreightment, is not varied by the circumstance that the contemplated subjects of transportation are passengers instead of merchandise. A passage contract is, in respect to the vessel's liability, only a species of affreightment, in which the passengers constitute the cargo, and the passage money answers to the freight. This principle was fully discussed in the late case of *The Zenobia*, Abb. Adm., 80 (§§ 1357-62, *supra*), in this court, in which the views of the court upon this subject were stated at large.

§ 1374. — *nor is it material that the contract to carry passengers is made with a charterer who acts as agent.*

The vessel is also liable *in rem* for merchandise laden on board by the charterers (*The Rebecca*, 1 Ware, 188; *Abbott on Shipp.*, 47, 52; *The Flash*, Abb. Adm., 67), as well as upon contracts by the master or the agents of the owners in relation thereto. She is therefore liable *in rem* upon a contract to carry passengers, equally whether that contract is made with a charterer, or with the master or owners, when the charter-party does not operate to render the charterer owner for the voyage; because, in that case, the charterer acts in the capacity of agent of the owner.

§ 1375. *The vessel is liable for the acts of the master as master, and for ill-treatment, ill-supply, etc.; limitations of this rule stated.*

She is liable for the conduct of the master as *master* during the voyage; and for any ill-treatment of the passengers by the master, in his capacity as such, a remedy may be had against the vessel herself. She may, indeed, not be liable for mere acts of personal malice or ill-will on the part of the master, not arising out of or connected with the exercise of his duties as master (*The Zenobia*, Abb. Adm., 80; §§ 1357-62, *supra*), though for such acts there is clearly a personal remedy against the master himself. *Chamberlain v. Chandler*, 3 Mason, 242. If, therefore, it were made to appear that the treatment complained of in this case was prompted by personal malice and ill-will on the part of the master,—if the withholding of provisions and water had been a tortious act on the part of the master, springing from personal spite and vindictiveness, and disconnected from any such circumstance as a general lack of provisions on board, for which the owners might be responsible,—there would be ground for doubt whether the libellant was entitled to any other remedy than an action *in personam* against the master himself. But such conduct on the part of the master is not to be presumed. In this case, the answer

does not aver that the ship had sufficient supplies; and there being no proof of that fact, the implication is that she did not have them to serve out.

It was contended, on behalf of the claimant, that the contract to furnish provisions was not a maritime contract, but a mere matter of personal agreement, independent of the contract for passage, and that it therefore could not be enforced against the ship. There may, undoubtedly, be a contract for passage, in which the passenger undertakes to carry his own store of provisions. Where, however, the contract is not of this description, but the maintenance of the passenger, during the voyage, is undertaken, as well the transportation of his person, the ship is as much bound to supply wholesome and necessary provision and water as to provide safe shelter and lodging.

§ 1376. *Libelants, having paid passage money, may recover it back where the consideration failed.*

There is no ground laid in the case for vindictive or punitive damages against the *owner* or ship. The agents of the owner *pro hac vice* did not fulfil the implied obligation of the ship and thus relieve her from performing it in this respect, and for that cause there was no ground for compelling the libelants to pay passage money; and the libelants having paid it, are, because of such violation of the obligation by the ship, entitled to recover it back, the consideration on which it was advanced having failed.

Decree accordingly, with costs. (a)

THE STEAMSHIP HAMMONIA.

(District Court, Southern District of New York: 10 Benedict, 512-516. 1879.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—The libelant in this suit, Henry A. Fleischmann, took a first-class passage for himself, his wife and son, a boy of three and a half years old, on board the steamship Hammonia, in April, 1873, for Hamburg. He complains in his libel that, when two days out from New York, the master compelled them to leave the state-room in the first cabin upper saloon, and confined them without cause in another room opposite the kitchen and known as the steward's room; that from the 5th to the 14th of April they were all confined in this room and not allowed to leave it "for air, or exercise, or to fulfil the calls of nature;" that this room "was filled with bad odor, was filthy, overrun with rats, cockroaches and other vermin, and was not suitable for nor fitted or intended for the accommodation of three persons;" that the libelant and his son were obliged to "sleep in and occupy the same berth," and that he was often "bitten by rats which infested said room," and that "when he expostulated and demanded that he should have the state-room which he had engaged," the master "insolently refused." And he claims damages in the sum of \$10,000, alleging not only the loss and deprivation of the comforts and accommodations engaged and agreed to be furnished to him and his family, but great bodily and mental "distress and agony," and injury to health during the voyage and for a long time afterwards, resulting from the confinement in said room. Upon the trial the libelant was allowed to amend his libel, alleging injuries to his baggage from the gnawing of his trunks by rats. The defense is that the child had the small-pox, and that it became necessary to isolate him

(a) This decision is affirmed in *The Aberfoyle*,* 1 Blatch., 360, which holds that a vessel is liable for breach of a passenger contract to provide food and drink, on principles analogous to those by which a vessel is liable for breach of a contract of affreightment.

from the other passengers, and that the libelant and his wife voluntarily accompanied him when the master caused him to be removed to the chief steward's room; that they were informed that if they remained with the child, they could not be allowed to go into the first cabin or mingle with the other passengers; that these precautions were necessary to prevent the disease from spreading among the passengers and crew. And the claimants deny in all other respects the averments of the libel as to the alleged discomforts and injuries suffered by the libelant and his wife and son, and also all the averments as to the filthy and improper condition of the room to which they were removed.

§ 1377. *The admiralty has jurisdiction of a suit by a passenger against a carrier for damages.*

There is no doubt that this court has jurisdiction of the cause. *The Moses Taylor*, 4 Wall., 411; *The New World v. King*, 16 How., 469.

§ 1378. *Duty and right of master in case of passenger having a contagious disease.*

There can be no doubt, also, that the master of a ship has authority, and that it is his duty, in case of the appearance of a dangerous and infectious disease, to isolate the sick person from all others on board, so far as it can be done with a reasonable regard to his comfort and welfare, so as to protect from infection as far as possible the other passengers and the crew. And in this case, upon the master's receiving information from the physician that the disease was small-pox, he did no more than his duty in removing the child from the first cabin; and the restraint put upon the parents who went with him to another part of the ship, in preventing them, while living in the room with the child, from going into the first cabin again, was reasonable and proper. The fact that the claimants had sold the libelant first-class tickets and assigned to him a room in the first cabin, with the comforts and accommodations appertaining thereto, did not and could not abridge the master's authority in this respect. The safety of the ship and the passengers and the ship's company is the first consideration with the master, and overrides any special assignment to a passenger of particular accommodations, where the continuance of the enjoyment by him of such special accommodations will, during the voyage, seriously endanger the lives or the health of all on board. I think the testimony shows that in this case the child had a very light case of small-pox or varioloid, and that his removal from the state-room in the first cabin was necessary and proper.

The libelant has testified to nearly all the discomforts, inconveniences and injuries set forth in the libel and some others as serious, except that there is no evidence offered of any ill health resulting from the alleged confinement; but on all the material points in respect to the manner in which the change of rooms was effected and the hardships and discomforts attending and following it, the libelant is contradicted and his statements shown not to be founded in fact. The proof is that the chief steward's room was fitted with two berths and a sofa; that it was a suitable room for three persons; that the libelant was not obliged to sleep in the same berth with his son; that the room was well ventilated and comfortable; that it was not filled with bad odors from the kitchen; that the libelant and his wife were not confined in the room; that he was not restrained in any way from going to other parts of the ship except the first cabin; that he went when he pleased on deck; that he went into the smoking room and elsewhere; that his wife was not prevented from leaving the room;

that she occasionally went on deck; that one servant was specially detailed to wait on them, and that they had as much comfort and as good accommodations as their exclusion from the first cabin rendered possible; that the steward's room itself was substantially fitted up as well as the state-rooms, and when the ship was full it was occupied by first cabin passengers. The libellant testifies that it was infested by rats and cockroaches, and that he complained of the rats to the captain and that the captain passed the matter off as a joke. I am satisfied from the testimony of the captain and the seaman who served the libellant's family and the doctor, that this story about the rats and cockroaches is greatly exaggerated or wholly unfounded. It is certainly proved that he made no complaints of the room; on the contrary, that he expressed himself much pleased with it and with the manner in which he was treated. That the libellant and his wife suffered some inconveniences from their necessary isolation from the rest of the passengers is undoubtedly true; but these were as slight as could be expected under the circumstances, and were not aggravated by any neglect or ill-treatment on the part of the master or officers of the ship. They left the ship voluntarily at Cherbourg. At that time they made no complaint of ill-treatment. The libellant has failed to make out any cause of action. Libel dismissed, with costs.

RAILROAD COMPANY *v.* LOCKWOOD.

(17 Wallace, 357-384. 1878.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Lockwood, a drover, traveled on a railroad with some cattle on a "drover's pass," to obtain which he signed an agreement waiving all claims for injuries or damages. The agreement stated that his cattle were carried at less than tariff rates, which was the consideration of the agreement. There was evidence, however, to contradict this. Lockwood was injured while on the train and sued for damages. There was a judgment in his favor and the railroad company appealed.

§ 1379. *Where one is carried on a drover's pass, he is a passenger for hire.*

Opinion by MR. JUSTICE BRADLEY.

It may be assumed, *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

§ 1380. *Policy of relaxing carrier's responsibility by special contract.*

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident, without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill

of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded. The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants is not so evidently repugnant to that policy as to be altogether null and void; or at least null and void under certain circumstances.

§ 1381. — *relaxation by statute in case of carriers by sea.*

In the case of sea-going vessels, congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence. It is true that the first section of the above act relating to loss by fire has a proviso that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of congress to leave the right of contracting as it stood before the act.

§ 1382. *American decisions reviewed as to relaxation of carrier's liability by special contract.*

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen or damaged," were held to be unavailing and void, as being against the policy of the law. *Cole v. Goodwin*, 19 Wend., 257; *Gould v. Hill*, 2 Hill, 623. But since the decision in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344 (§§ 220-242, *supra*), by this court, in January term, 1848, it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract, limit his common law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, above adverted

to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss. As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

§ 1383. *New York cases reviewed as to permitting special contract to excuse carrier's negligence.*

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that state to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found; however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr v. New Jersey Steam Nav. Co.*, decided in 1850 (4 Sand., 136). This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordi-

nary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, in 6 How., 344 (§§ 220-242, *supra*), and such we consider to be the law in the present case." And in *Stoddard v. Long Island R. Co.*, 5 id., 180, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the supreme court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence, of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases (*Parsons v. Monteath*, 13 Barb., 353; *Moore v. Evans*, 14 id., 524), all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Welles v. New York Central R. Co.*, 26 id., 641, that the supreme court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger traveling on a free ticket, which exempted the company from liability. In 1862 the court of appeals, by a majority, affirmed this judgment (24 N. Y., 181), and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the traveling public. *Perkins v. New York Central R. Co.*, id., 196, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith v. New York Central R. Co.*, 29 Barb., 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The supreme court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation,

relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But to accomplish that object the contract must be clear and specific in its terms, and plainly covering such a case. Of course this remark was extrajudicial. The judgment itself was affirmed by the court of appeals, in 1862, by a vote of five judges to three. 24 N. Y., 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that, if the party injured had been a gratuitous passenger, the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants. In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, *Bissell v. New York Central R. Co.*, 29 Barb., 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "*whether of negligence by their agents or otherwise*," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals (25 N. Y., 442), four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by *Welles v. Central R. Co.*; but whether so or not, the contract was founded on a valid consideration, and the passenger was bound by it, even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against, the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract on paying the regular fare prescribed by law; that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher v. New York Central R. Co.*, 49 N. Y., 263, is in all essential

respects a similar case to this, and a similar result was reached. These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts which, by *dicta* or decision, either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here. *Ashmore v. Pennsylvania Steam, etc., Co.*, 4 Dutch., 180; *Kinney v. Central R. Co.*, 3 Vroom, 407; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn., 539; *Peck v. Weeks*, 34 id., 145; *Lawrence v. New York R. Co.*, 36 id., 63; *Kimball v. Rutland R. Co.*, 26 Vt., 247; *Mann v. Birchard*, 40 id., 326; *Adams Express Co. v. Haynes*, 42 Ill., 89; id., 458; *Illinois Central R. Co. v. Adams Express Co.*, id., 474; *Hawkins v. Great Western R. Co.*, 17 Mich., 57; *S. C.*, 18 id., 427; *Baltimore & Ohio R. Co. v. Brady*, 32 Md., 333; 25 id., 128; *Levering v. Union Transp. Co.*, 42 Mo., 88.

§ 1384. *On a question of general commercial law federal courts are not bound to follow the courts of the state where the question arises.*

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could perhaps find no authority for reversing the judgment in this case. But on a question of general commercial law the federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that state. And in deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

§ 1385. *New York case as to stipulations excusing negligence compared with those of other American states to the contrary.*

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." *Stinson v. New York Central R. Co.*, 32 N. Y., 337.

We now proceed to notice some cases decided in other states, in which a different view of the subject is taken. In Pennsylvania it is settled by a long course of decisions that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. *Laing v. Colder*, 8 Penn. St., 479; *Camden & Amboy R. Co. v. Baldauf*, 16 id., 67; *Goldey v. Pennsylvania R. Co.*, 30 id., 242; *Powell v. Pennsylvania R. Co.*, 32 id., 414; *Pennsylvania R. Co. v. Henderson*, 51 id., 315; *Farnham v. Camden & Amboy R. Co.*, 55 id., 53; *Express Co. v. Sands*, id., 140; *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 id., 14. "The doctrine is firmly settled," says Chief Justice Thompson, in *Farnham v. Camden & Amboy R. Co.*, 55 Penn. St., 62, "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." This inability is affirmed both when the exemption stipu-

lated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Pennsylvania R. Co. v. Henderson*, 51 Penn. St., 315, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. *Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St., 131; *Graham v. Davis*, 4 id., 362; *Wilson v. Hamilton*, id., 722; *Welsh v. Pittsburg, F. W. & C. R. R.*, 10 id., 75; *Cleveland R. R. v. Curran*, 19 id., 1; *Cincinnati, etc., R. R. v. Pontius*, id., 221; *Knowlton v. Erie R'y Co.*, id., 260. In *Davidson v. Graham*, 2 Ohio St., 131, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In *Welsh v. Pittsburg, F. W. & C. Railroad*, 10 id., 75, 76, the court says: "In this state, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the state." From these facts, the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says; "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." And in relation to a drover's pass, substantially the same as that in the present case, the same court, in *Cleveland Railroad v. Curran*, 19 Ohio St., 1, 12, 13, held: 1st. That the holder was not a gratuitous passenger; 2dly. That the contract constituted no defense against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of *Bissell v. New York Central R. Co.*, 25 N. Y., 442, and of *Pennsylvania R. Co. v. Henderson*, 51 Penn. St., 315, and expresses its concurrence in the Pennsylvania decision. This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this: that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unneces-

sary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, etc. (*Fillebrown v. Grand Trunk R'y Co.*, 55 Me., 462), yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence can scarcely be over-estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." *Sager v. Portsmouth, etc., R. Co.*, 31 Me., 228, 238.

To the same purport it was held in Massachusetts in the late case of *School District v. Boston, etc., R. Co.*, 102 Mass., 552, 556, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence." To the same purport, likewise, are many other decisions of the state courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here. *Indianapolis R. Co. v. Allen*, 31 Ind., 394; *Michigan Southern R. R. v. Heaton*, 31 id., 397, note; *Flinn v. Philadelphia, W. & B. R. R.*, 1 *Houst.*, 472; *Orndorff v. Adams Express Co.*, 3 *Bush*, 194; *Swindler v. Hilliard*, 2 *Rich. (S. C.)*, 286; *Berry v. Cooper*, 28 *Ga.*, 543; *Steele v. Townsend*, 37 *Ala.*, 247; *Southern Express Co. v. Crook*, 44 id., 468; *Whitesides v. Thurlkill*, 12 *Smedes & M.*, 599; *Southern Express Co. v. Moon*, 39 *Miss.*, 822; *New Orleans Mutual Ins. Co. v. Railroad Co.*, 20 *La. Ann.*, 302.

§ 1386. *English authorities reviewed as to special contracts for immunity against negligence.*

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in *The Doctor and Student* (Dialogue 2, c. 38), pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." A century later this passage is quoted by Attorney-General Noy in his book of maxims, as unquestioned law. *Noy's Maxims*, 92. And so the law undoubtedly stood in England until comparatively a very recent period. Sergeant Steven, in his commentaries (vol. 2, p. 135), after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a rea-

sonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says: "Proof of a direct misfeasance or gross negligence is, in effect, an answer to proof of notice." Evidence, vol. 2, p. 205, 6th Am. ed. But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant, or ordinary negligence in the accustomed mode of speaking. *Hinton v. Dibbin*, 2 Ad. & Ell. (N. S.), 649; *Wyld v. Pickford*, 8 Mees. & W., 460. Justice Story, in his work on Bailments (§ 571), originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence. In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point. In 1863, in the great case of *Peck v. North Staffordshire R'y Co.*, 10 H. of L. Cas., 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'" This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that at that time common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr v. Lancashire R. Co.*, 1 Fisher's Dig., 1466, and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. 7 Exch., 707. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

§ 1387. *Decisions of this court reviewed as to the same point.*

It remains to see what has been held by this court on the subject now under consideration. We have already referred to the leading case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344 (§§ 220-242, *supra*). On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be

done, at least, in terms that would leave no doubt as to the meaning of the parties." As to carriers of passengers, Mr. Justice Grier, in the case of *Philadelphia & Reading R. v. Derby*, 14 id., 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of *The Steamboat New World v. King*, 16 id., 469, 474, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

In *York Co. v. Central Railroad*, 3 Wall., 113 (§§ 243-248, *supra*), the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker v. Transportation Co.*, decided at the same term (id., 150; §§ 195-199, *supra*), it is true the owner of a vessel destroyed by fire on the lakes was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Co. v. Kountze Brothers*, 8 id., 342, 353 (§§ 1494-1502, *infra*), where the carriers were sued for the loss of gold dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

§ 1388. *Conclusion that carrier should not be permitted to stipulate against liability for negligence.*

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of state courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

§ 1389. *Whether carrier may contract as ordinary bailee for hire.*

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character

and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

§ 1390. *Common carrier may become private carrier when outside the scope of his vocation.*

On this point there are several authorities which support our view, some of which are noted in the margin. *Davidson v. Graham*, 2 Ohio St., 131; *Graham v. Davis*, 4 id., 362; *Swindler v. Hilliard*, 2 Rich., 286; *Baker v. Brinson*, 9 id., 201; *Steele v. Townsend*, 37 Ala., 247. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

§ 1391. *A carrier should not be permitted to stipulate for immunity for the negligence of his servants.*

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental

principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

§ 1392. *Modern carriers and their customers do not deal on equal terms; hence such contracts should not be left to private choice.*

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. New Jersey Steam Nav. Co.*, 1 Kern., 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities in a matter no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right." Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were seventy

cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at two thousand pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The *status* and relative position of the parties render any such conditions void.

§ 1393. *Contracts of carriers should be regarded like those of a fiduciary.*

Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

§ 1394. *Policy of English Traffic Act of 1854 commented upon.*

Hence, as before remarked, we regard the English statute called the Railway

and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

§ 1395. *Special contracts of carriers should not be upheld unless just and reasonable.*

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence — an excuse so repugnant to the law of their foundation and to the public good,— they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity. On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

§ 1396. *Whether gross and ordinary negligence should be distinguished in this connection.*

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter. We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of

the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply "negligence." And this seems to be the tendency of modern authorities. 1 Smith Lead. Cas., 453, 7th Am. ed.; Story on Bailm., § 571; Wyld v. Pickford, 8 Mees. & W., 460; Hinton v. Dibbin, 2 Q. B., 661; Wilson v. Brett, 11 Mees. & W., 115; Beal v. South Devon R'y Co., 3 Hurlst. & C., 337; Grill v. Iron Screw Collier Co., Law Rep., 1 C. P., 600; Philadelphia & Reading R. Co. v. Derby, 14 How., 486; Steamboat New World v. King, 16 id., 474. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Art. 1382. Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. Vol. 6, p. 243. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

§ 1397. *Stipulations for exemption not just and reasonable cannot be made by a common carrier.*

The conclusions to which we have come are: *First.* That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

§ 1398. — *he cannot stipulate for exemption from responsibility for negligence of himself or his servants.*

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

§ 1399. — *these rules apply to carriers of goods and carriers of passengers, especially the latter.*

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

§ 1400. *One traveling on a drover's pass is a passenger for hire.*

Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

HANNIBAL RAILROAD v. SWIFT.

(12 Wallace, 262-275. 1870.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—This was an action for the loss of plaintiff's baggage and personal property by fire while being transported from St. Joseph to Hannibal, Missouri. The property consisted of wearing apparel of plaintiff and his family, certain household furniture, including silverware, a set of surgical instruments, deer and buffalo robes, engravings, statuary and pictures, jewelry, and the manuscript of a work on veterinary surgery. The allowance for the various kinds of property, and the circumstances under which it was shipped, are stated in the opinion by the court.

The material facts, as shown by the agreed case, were as follows: The plaintiff was an army surgeon, and the garrison with which plaintiff and his family were stationed was ordered to Cincinnati. The troops, with the plaintiff, were carried over the road of the Hannibal & St. Joseph Railroad Company from St. Joseph to Hannibal, and on the way the car in which plaintiff's property was carried was destroyed by fire, without the fault of the agents of the company, so far as known. This was the only car destroyed. It was not the regular baggage car. There was room in the baggage car for plaintiff's property, but this car was selected by the commanding officer at St. Joseph, and the property and equipage of the officers and men, and the property of plaintiff, were put into it, and the car was attached to a regular passenger train. By the army regulations, a surgeon is entitled to eight hundred pounds of baggage.

Opinion by MR. JUSTICE FIELD.

Two questions are presented by the record for our determination: 1st, whether, upon the facts stated in the agreed case, the railroad company was liable, as a common carrier, for the safe conveyance of the baggage and other property of the plaintiff; and 2d, whether there was any error in the assessment of damages as allowed by the circuit court.

§ 1401. *A carrier of passengers must take all persons who apply and their baggage.*

The railroad company was chartered by the legislature of Missouri in 1847, and for many years its railroad between the city of Hannibal, on the Mississippi river, and the city of Saint Joseph, on the Missouri river, has been constructed and in operation. Between those places the company was, in 1861, a common carrier, over its road, of passengers and their baggage, and of goods and merchandise. As such carrier, its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage and their baggage, and as a carrier of goods, to take all other property offered for transportation, and was

responsible for the safe conveyance of the baggage and other property to the point for which they were destined, or the termination of the road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

§ 1402. *Unless reasonable ground of refusal be stated, the passenger and baggage are received as though no ground of refusal existed.*

If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If, not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed.

§ 1403. *Transportation was not refused here, notwithstanding dangers of insurrection.*

It does not appear from the agreed case that the company refused to transport over its road the troops of the United States, and the plaintiff and his family, who accompanied them, when they arrived in December, 1861, at Saint Joseph, or their baggage, camp equipments, arms, munitions and other property, but only that it refused to enter into any special contract for the transportation, on account of the danger to the troops from the insurrectionary condition of the country through which the road ran, and the frequent depredations committed by armed bands of rebels upon the railroad, and its track, bridges, depots and station-houses. It was usual at the time, and during the entire war, for railroad companies to transport troops of the United States, with their baggage, at a less rate per head, and their equipments, arms and munitions at a less rate per pound, than the prices paid by ordinary passengers for similar services, and it was undoubtedly the desire of the commanding officer in this case to have a special contract as to the amount of compensation to be paid for the transportation. As we read the agreed statement it was only a contract of this kind, fixing the rate of compensation, which was refused. Whether the reasons assigned would also have justified a refusal to transport the troops and the plaintiff, with his family, and their baggage and other property, it is unnecessary to determine. It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter.

§ 1404. *Liability for baggage is not affected by selection and loading of car by military authorities, no objection being made by the carrier, and the latter taking control.*

The liability of the company was in no respect affected by the fact that the baggage, camp equipments, arms and munitions of the troops, and the property of the plaintiff, were placed in a separate car, selected by the commanding officer out of several cars standing in the yard of the company, and not in its regular baggage car, or by the fact that the car was loaded by some of the soldiers detailed for that purpose, and not by the servants of the defendant. The car selected belonged to the company, and after it was loaded and locked by the commanding officer the agents and employees of the company took charge of it and placed it in the regular train, which transported the troops

and the plaintiff and his family, next to the tender of the engine. The liability of the company attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed, or to the locking up of the car by the commanding officer. If objection existed on any of these grounds, or on any other ground not concealed, but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading, or upon the possession of its key, or upon all of these things. Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier.

The case of *Mallory v. Tioga R. Co.*, 39 Barb., 488, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them; yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The court did not consider the fact that the property was transported in the cars of the plaintiff, and that the cars were loaded and unloaded by him, affected, in any respect, the liability of the company, the entire train in which the cars were moved being, whilst on the route, under the control and management of its servants and employees.

§ 1405. *Liability of carrier attaches when baggage passes with his assent into his possession.*

In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property.

§ 1406. *A military guard over the car does not affect the carrier's liability, his own servants having control.*

It does not distinctly appear, from the agreed case, whether any troops were detailed to guard the car which contained their property and that of the plaintiff, except while the car was being loaded. But if it were admitted that a special guard was appointed for the car on the route, the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and employees of the company, were not impeded or interfered with; and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety.

§ 1407. *Property transported with baggage, but not offered as such, is presumed to be accepted as freight.*

The ruling of the court upon the findings of the referee, appointed to ascertain the damages sustained by the plaintiff, does not appear to us to be open to any valid objection. A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the con-

tract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage.

§ 1408. *Surgical instruments of an army surgeon traveling with troops are baggage.*

Here two companies of artillery in the army of the United States sought transportation with their arms, equipments and ammunition. The plaintiff, as surgeon in the army, was ordered to accompany the troops, and for him and his family and his property transportation was also sought as part of the general transportation for the whole command. On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character, in the case of a surgeon in the army traveling with troops, may properly be regarded as part of his baggage. He may be required to use these instruments at any time, and must, accordingly, have them near his person where they can be had upon a moment's notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff.

We see no error in the judgment of the circuit court, and it is accordingly affirmed.

RAILROAD COMPANY v. FRALOFF.

(10 Otto, 24-32. 1879.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to a judgment rendered against the New York Central & Hudson River Railroad Company, in an action by Olga de Maluta Fraloff to recover the value of certain articles of wearing apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the company, and while the trunk was in its charge for transportation as part of her baggage. There was evidence before the jury tending to establish the following facts:

The defendant in error, a subject of the czar of Russia, possessing large wealth, and enjoying high social position among her own people, after traveling in Europe, Asia and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theatres, or attending dinners, balls and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central & Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls, she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case, in 1873, the jury, being unable to agree, was discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and, at the same time, submitted numerous instructions, which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge, to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instructions to the jury. The court

refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated the company excepted in due form. The jury returned a verdict against the company for the sum of \$10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount. It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a minor and merely technical nature, which do not involve the merits of the case or the just rights of the parties.

§ 1409. *Peremptory instruction of court for the defendant, where facts are in dispute, should not be given.*

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction would have been proper. 1 Wall., 369; 11 How., 372; 19 id., 269; 22 Wall., 121. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

§ 1410. *A passenger, unasked, need not inform the carrier of the extraordinary value of his baggage.*

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action. The circuit court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents.

§ 1411. *Carriers may by fair contract limit liability on baggage carried without extra compensation.*

It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk.

§ 1412. *Carrier may ask the value of baggage offered.*

And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person.

§ 1413. *General liability of passenger carriers for baggage.*

But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when traveling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage,—the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier, which defeats all right of recovery.

§ 1414. *The law imposes no limit of value; but what is reasonable baggage depends upon circumstances.*

The instructions asked by the company virtually assumed that the general law governing the rights, duties and responsibilities of passenger carriers prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise, which sustains that proposition without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveler," says Erle, C. J., in *Philpot v. Northwestern R'y Co.*, 19 C. B., N. S., 321, "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification, may suggest; and that, whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as

insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Angell, Carriers, sec. 115. In *Hannibal Railroad v. Swift*, 12 Wall., 262 (§§ 1401-1408, *supra*), this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the queen's bench in *Macrow v. Great Western R'y Co.*, Law Rep., 6 Q. B., 121, where Chief Justice Cockburn announced the true rule to be, "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons, Contr., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquied of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law.

§ 1415. *Laces of a female passenger, though costly, may, under circumstances, be her proper baggage.*

The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted anything essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the company at Albany for transportation to Niagara Falls, the

court charged the jury, in substance, that every traveler was entitled to provide for the exigencies of his journey in the way of baggage, was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons traveling, for their comfort, convenience and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travelers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveler might lead that traveler to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort or convenience, the company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion*.

§ 1416. *This court will not readily, on appeal, reverse a judgment merely because the verdict was for a large sum.*

Looking at the whole scope and bearing of the charge, and interpreting what was said as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons v. Bedford*, 3 Pet., 446; 21 How., 167; *Insurance Co. v. Folsom*, 18 Wall., 249.

§ 1417. *Section 4281 of the Revised Statutes, as to carriers by water, is inapplicable to a railway company.*

It is, perhaps, proper to refer to one other point suggested in the elaborate brief of counsel for the company. Our attention is called to section 4281 of the Revised Statutes, which declares that "if any shipper of platina, gold, gold-dust, coins, jewelry, . . . trinkets, . . . silk in a manufactured or unmanufactured form, whether wrought up or not wrought up with any other material, furs or laces, or any of them, contained in any parcel, package or bundle, shall lade the same as freight or baggage on any vessel, without, at the time of such lading, giving to the master, clerk, agent or owner of such vessel receiving the same a written notice of the true character and value

thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any of such goods beyond the value and according to the character thereof, so notified and entered."

It is sufficient to say that the section has no application whatever to this case. It has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

Judgment affirmed. (a)

Dissenting opinion by MR. JUSTICE FIELD, JUSTICES MILLER and STRONG concurring.

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by the owner to be worth \$75,000, and found by the jury to be of the value of \$10,000, can, as a matter of law, be properly considered as baggage of a passenger, for the loss of which the railroad company, in the absence of any special agreement, should be held liable.

HELLMAN v. HOLLADAY.

(Circuit Court for Nebraska: Woolworth, 865-871. 1888.)

STATEMENT OF FACTS.—Passengers traveled together in a coach through a country exposed to robberies and Indian attacks. Cahn was of the number. He had a bag of gold dust, which was lost, and a suit was brought to recover its value. The defendant asked the following instruction: "If the jury believe from the evidence that Cahn assisted or encouraged his fellow passengers in getting the driver drunk; that he caused him to put the carpet-bag containing the gold dust in the boot of the coach, the driver not knowing that it contained gold dust; that he surreptitiously introduced the gold dust into the coach at Salt Lake, to avoid paying the rates chargeable in the express, and at Millersville paid for it as extra baggage only, and at the rates chargeable therefor, then you will find for the defendant."

§ 1418. *Testimony tending to show carrier's knowledge of gold dust carried as baggage must not be excluded.*

Opinion by MILLER, J.

I cannot give this request as drawn. There is evidence here which it ignores. It was evidently framed with the purpose of shutting out from the consideration of the case certain evidence introduced by the plaintiff. The credibility of that testimony is not for us to pass on. It is for the jury. The jury must be instructed upon the law as it stands on the whole of the evidence. The testimony which I refer to as not taken account of in the request is, that of the plaintiff tending to show that, when the payment was made as for extra baggage, the defendant's agents knew that the carpet sack contained gold dust, and, knowing that fact, charged for it only the rates usual for extra baggage.

§ 1419. *Intentional concealment of gold dust in passenger's bag offered as baggage is a fraud.*

I agree with the defendant's counsel that if Cahn introduced the gold into the coach secretly at Salt Lake, and attempted to get it carried for nothing, he

was guilty of a gross fraud. If that were the whole of the case he could not recover here. In this view of the case, it may upon the authorities be doubtful even whether it is incumbent to bring home to Cahn notice that the carrier would not be liable for gold thus carried. In that view the case would, without any evidence, show an intentional concealment in order to escape payment for a service rendered to the passenger by the carrier. That would be a fraud; and the law would not aid the party practicing it. It would be a fraud by which the passenger, without payment, would secure an advantage, and if he could recover for a loss, it would be a great advantage. It would be forcing a contract on a carrier which he did not make.

§ 1420. *Other cases distinguished from the present.*

The case of *Orange County Bank v. Brown*, 9 Wend., 116, is precisely in point. A traveler on a steamboat on the Hudson river took \$11,250 to be carried for the plaintiff. He placed it in his trunk, which, with its contents, was lost on board. The plaintiff sought to recover the money as lost baggage. Mr. Justice Nelson, in an able opinion, held that this amount of money was too large to come under the head of "baggage," and that an attempt to have it carried free of reward under the cover of baggage was an imposition upon the carrier, and that he was deprived of his just compensation, and subjected to unknown risks by such devices. But that case and the many others in which it has been followed is distinguishable from this in the particulars which I have mentioned. Here there is evidence tending to show that the carrier knew that the baggage contained the gold. If he did, he was not deceived. Cahn may have intended to deceive and defraud him. If he did, he failed to do so. If the carrier knew that the carpet sack contained the gold, and took not the usual rates chargeable for gold, but only such as were chargeable for ordinary extra baggage, then he was not defrauded. The *Orange County Bank* case proceeds throughout on a state of facts which, as the plaintiffs claim, differs from that shown here. Whether they are right, we must leave it to the jury to say. This instruction does not do so, and we cannot give it as requested.

The other matters referred to in the request are properly submitted to the jury. I will give the request modified according to the views I have expressed.

WALSH v. STEAMBOAT H. M. WRIGHT.

(District Court, Eastern District of Louisiana: 1 Newberry, 494-497. 1854.)

Opinion by McCaleb, J.

STATEMENT OF FACTS.—The libelant in this case claims from the steamboat H. M. Wright the sum of \$143, as the value of a gold watch, a pair of gold spectacles, a sum of money amounting to \$11, some other small articles, and the valise in which they were deposited. These articles, it is alleged, were stolen from the state-room of the boat which was occupied by the libelant while the boat was on her voyage from New Orleans to Bayou Sara; and the evidence adduced in the cause leaves no doubt on the mind of the court that such was the fact. It is shown that the libelant is a lady of the highest respectability, residing in Woodville, Mississippi; that the state-room in which the valise containing the articles stolen was deposited was occupied only by herself and a young lady, also of the highest respectability. It is shown that the valise was carefully deposited under her berth by the libelant when she retired to rest on the night when the robbery was perpetrated. The respondent has attempted to raise a presumption that the articles were stolen

by a servant belonging to another lady of the party with which the libelant was traveling; but this attempt has been unsuccessful. The conclusion I have formed from the evidence is, that the state-room was entered and the articles taken by some one having no immediate employment about the ladies' cabin, and having no right to be there. Whether the intruder was a person connected with the boat, or a stranger, it is unnecessary to inquire. The fact that he had time and opportunity to enter a state-room of the ladies' cabin, which, it is shown, was properly fastened, exhibits a want of that care and watchfulness which should always be observed in the police regulations of every boat engaged in the transportation of passengers. It is certainly not exacting too much of those in charge of these common carriers to require of them that degree of vigilance which would effectually protect from all intrusion, during the night-time, at least, that portion of the boat which is appropriated for the security and convenience of helpless females.

§ 1421. *Steamboat companies are liable for the baggage of passengers.*

It is well established that steamboat proprietors, who are common carriers of passengers for hire, are liable for the baggage of passengers; and it is equally well established that they are not subject to damages for the loss of anything that is not strictly baggage. This leads us to the inquiry, what is *baggage* strictly so called?

§ 1422. *What articles may be carried as baggage.*

The supreme court of Pennsylvania have considered that it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the ordinary purposes of traveling, because, in the nature of things, it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely upon the intelligence and integrity of the jury to apply the proper corrective. The defendants in the particular case in which this decision was made, requested the court to charge the jury that they (the defendants) having had no notice that the trunks lost contained jewelry, or other articles of greater value than ordinary wearing apparel, they were not liable for such articles of jewelry; but the court refused, and the jury found for the plaintiff, and the judgment was affirmed upon appeal.

"An agreement," says Angell, in his work on carriers, "to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be at all extended beyond such things as a traveler usually has with him as a part of his baggage. All articles which it is usual for persons traveling to carry with them, whether from necessity or for convenience or amusement, fall within the term baggage. So, likewise, does money, not exceeding a reasonable amount; and a watch has been held to be a part of a traveler's baggage, and his trunk a proper place in which to carry it." Angell on Carriers, § 115. See, also, 9 Wend., 85; 19 id., 534; and 6 Ohio, 358.

§ 1423. *For articles of personal convenience kept in the state-room carefully by the passenger, the carrier is responsible.*

The proctor for the respondent has contended that the articles lost should have been deposited with the clerk for safe keeping. On the contrary, they were just such articles as a lady of the age and circumstances of the libelant would naturally prefer to keep about her person. They were necessary to her personal convenience, and it is not shown that she failed in taking the proper precaution for their security.

§ 1424. *The admiralty has jurisdiction over contracts for the transportation of passengers.*

It has also been contended that this is not a case of admiralty jurisdiction. This position cannot be maintained. A contract for the transportation of passengers for hire is a contract over which the admiralty has exercised jurisdiction from a very early period. It is distinctly mentioned among the subjects of that jurisdiction by the learned Godolphin of the court of admiralty in England, in the reign of Charles I. It has repeatedly, within a few years past, been a subject of jurisdiction in the United States district court for the southern district of New York, and has been clearly recognized as such, both in the district and circuit courts. It was also recognized as such in a recent case by Mr. Justice Campbell, in affirming a decree of this court. The value of the articles claimed by the libelant has been proven, and she is entitled to a judgment for the sum of \$143, with costs.

THE R. E. LEE.

(District Court, Southern District of Mississippi: 2 Abbott, 49-52. 1870.)

Opinion by HILL, J.

STATEMENT OF FACTS.—This cause is submitted upon the following agreed facts: The libelants and their daughter took passage on the steamer against which the libel is filed, at New Orleans for Vicksburg. They paid the usual passage fare, and delivered their trunks, etc., to the baggage-master, and retired to the state-rooms assigned them, taking with them a small leather hand-bag or companion, in which the ladies carried their combs, brushes and articles of immediate necessity in traveling. In the evening, the ladies made their toilet for tea, leaving in the hand-bag or companion jewelry usually worn on their persons, as part of their apparel, worth \$105. This companion was hung on a hook on the side of the state-room. When the ladies left the room they closed the door, and on returning from tea found that during their absence some one had entered the room and abstracted the jewelry. Notice of the theft was immediately given to the officers of the boat, who made inquiries for the property, but did not recover any portion of it. Payment of its value was then demanded of the officers of the boat, but was refused. (a)

§ 1425. *A carrier by water is not liable for jewelry in a hand-bag of the passenger, retained in the passenger's possession.*

Whether or not the boat was liable for the loss under these circumstances is the only question to be decided. The amount claimed is small, but the question is an important one to travelers and common carriers, and therefore demands serious inquiry. That the steamer is liable, as a common carrier, for the libelants' ordinary baggage, committed to the care of the officers in charge, is admitted; but that this hand-bag or companion, with its contents, was committed to their charge, is denied by the respondent, and the facts, as stated, do not show that any actual delivery thereof was made or intended to be made, but that it was retained by the ladies in their own possession. The rule in England, and perhaps in this country, before the invention of steamboats and railroads, was very strict upon common carriers, and rendered them liable for the loss of the baggage of passengers conveyed by them; one reason given was, that often there was a conspiracy between the coachman and the robber;

(a) The report of this case fails to state whether the ladies locked the state-room door, or only closed it—a material circumstance, which might properly affect the decision. See §§ 1421-1424.—EDITOR.

but under our recent modes of travel, this rule has been very properly modified, and the carriers are only held responsible for such portion of the passenger's baggage as may have been delivered to them, or to the agent whose business it is to receive and take care of the same. This delivery must be complete. See *Blanchard v. Isaacs*, 3 Barb., 383; *Kent Com.*, 604; *Packard v. Getman*, 6 Cow., 757. In *Tower v. Utica, etc., R. Co.*, 7 Hill, 47, it was held by Nelson, C. J., that a passenger who retains his overcoat in his seat cannot recover against the company for its loss. Again, Mr. Story, in his work on Contracts, § 766, holds that in this country, if a passenger does not surrender his baggage to the carrier, but retains it in his own possession, and it is lost, he cannot recover against the carrier therefor. Other authorities might be referred to, but these are sufficient.

§ 1426. — *cases on this subject considered.*

I am referred by libellant's proctor to *Mississippi R. Co. v. Kennedy*, as sustaining the adverse proposition, but that is not a case in point. It is true, it holds that jewelry usually worn as part of personal apparel does constitute a portion of a traveler's baggage, but in that case the trunk in which the articles were placed was delivered to the baggage-master. I am also referred for the same purpose to the case of *Maclin v. New Jersey Steamboat Co.*, reported in 9 Am. L. Reg. (N. S.), 239. This case was decided by the court of common pleas, New York. This was a case in which the passenger was given the key of his state-room, and took his valise with him. The substance of the ruling is, that this was a delivery to the officers of the boat, who, if they did not intend to become liable, should have notified him of the fact. The ruling of the court in that case, from the authorities cited, was based upon the older cases, and is not sustained by reason or the modern cases. I am also referred to the case of *Epps v. Hinds*, 27 Miss., 657. This was a suit against an innkeeper. The guest requested the innkeeper to send his trunk to his room. The guest placed the money given him by his father to pay his traveling expenses and his tuition at the University at Oxford, to which he was going, in the trunk, and locked it. Some time afterward the innkeeper placed in the same room another guest, who, during the night, broke open the trunk, took the money, and left. The innkeeper was properly held liable, for he had no right, after having assigned the guest to his room, to intrude another into it without his consent. Again, the trunk had been delivered to the innkeeper, who was only requested to remove it to another room, and, if he was not willing to take the risk, should have notified the guest.

These cases, when properly considered, do not support the claim of the libellants. The baggage for which the carrier is responsible must be such as can, with propriety, be placed in the baggage room, or must be delivered to the clerk of the boat, or some other officer authorized to receive it, and not such articles as the passenger necessarily keeps in his possession, such as the hand-bag or companion stated in this case. I am satisfied, from a careful examination of authorities, and the agreed state of facts, that the claim of the libellants in this case cannot be sustained. The libel will, therefore, be dismissed at the cost of libellants.

BLUM v. SOUTHERN PULLMAN PALACE CAR COMPANY.

(Circuit Court for Tennessee: 1 Flippin, 500-506. 1876.)

Charge by BROWN, J.

STATEMENT OF FACTS.—This is an action to recover of the defendant the sum of \$3,135, lost by the plaintiff while riding upon a sleeping car owned and controlled by the defendant. The plaintiff left Cairo, in the state of Illinois, about five o'clock in the evening of March 28, 1873, taking the boat down the river to Columbus, Kentucky. On the boat he purchased a through ticket by rail from Columbus to Memphis, and, shortly after midnight, entered the sleeping car of the defendant at Humboldt, Tennessee, in which he was assigned a lower berth in the section nearest the front end of the car. He disrobed himself of his outer garments, placed his waistcoat, in an inside pocket of which was a wallet containing the money in question, under his pillow, lay down and went to sleep. The train arrived at Memphis between three and four in the morning, but the plaintiff did not rise, except for a temporary purpose hereafter explained, until about seven o'clock. Meanwhile the other passengers had all left the car. A conductor and porter employed by the defendant had charge of the car, to which the conductor and brakemen of the train also had access, for the purpose of collecting fares and regulating its movements. Prior to entering his berth plaintiff paid the conductor of the car \$2 for his lodging, and at the same time handed him his through ticket to Memphis to be delivered to the conductor of the train. In rising to dress himself the plaintiff found his waistcoat and money were missing. The important question of law is presented as to the measure of defendant's liability.

§ 1427. *The owner of a sleeping car attached to a railway train is not a common carrier, semble.*

The first count in the declaration charges defendant with the responsibility of a common carrier, but there is no evidence to support it, and it was virtually abandoned upon the argument. The contract of carriage was with the railway company. It received the ticket of the plaintiff, offered him accommodation in its passenger car, and was ready to receive his luggage in another car adapted to that purpose. It drew the sleeping car of the defendant, collected fares of its passengers, controlled its movements and provided for its safety. Plaintiff's contract with the railway company was entirely distinct from that with the defendant.

§ 1428. — *nor is the owner of a sleeping car liable as an innkeeper.*

It is strenuously insisted by plaintiff's counsel, however, the defendant should be held to the responsibility of an innkeeper. If the liability of an innkeeper at common law does not extend to all losses of his guests not caused by an act of God, the public enemies or the negligence of the guest himself, as held by the older authorities, he is at least presumptively responsible for all injuries happening to the goods of his guests intrusted to his care, and can only exonerate himself by showing that he did all to insure their safety which it was in his power to do, and that no default is attributable to his servants or guests. In regard to goods stolen from his custody, without evidence to show how or by whom it was done, his liability is the same as that of a carrier. It is admitted that, if the defendant is held as an innkeeper, it is liable for the loss of the money in question. The plaintiff's counsel have produced no case directly in point, nor has the defendant produced any authorities determining definitely the scope of liability in such cases, although the supreme court of Illinois has

recently decided that the responsibility of a sleeping car company is not that of an innkeeper. The analogy is certainly a strong one between the hotel and sleeping car. The passenger is invited to undress and go to sleep in a bed provided for that purpose. To accept this invitation his vigilance must be relaxed, and his clothing and purse exposed to thieves. But the rigid responsibility of innkeepers and carriers at common law was imposed in older and more troublous times, when goods were carried in common wagons, passengers traveled by coach, making frequent stops at houses of public entertainment, whose proprietors frequently colluded with thieves and highwaymen to plunder their guests. While the ancient rule is still enforced as against those classes of persons, the tendency of modern legislation and judicial opinion has been to limit it strictly to them. The keeper of a private boarding or lodging house, or of a restaurant or coffee house, is not an innkeeper in the view of the law, notwithstanding he may furnish lodgings or food, or both, for the entertainment of his guests. It has also been held that the proprietor of a hotel for summer resort is not an innkeeper. Notwithstanding an innkeeper was responsible for the loss of the horses and carriage of his guest, the keeper of a livery stable is liable only as bailee for negligence. So, also, notwithstanding seeming analogies in their positions, the liability of common carriers has not been extended to warehousemen, wharfingers, telegraph companies or ordinary bailees. In all these cases, except the last, the opportunities for plunder are no less favorable than those of carriers and innkeepers. The liability of the innkeeper, indeed, stands less upon reason than upon custom growing out of a state of society no longer existing.

There are good reasons for not extending such liability to the proprietor of a sleeping car. 1. The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection. 2. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment. 3. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those. 4. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging. 5. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose. 6. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged

to admit the employees of the train to collect fares and control its movements. 7. The sleeping car cannot even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

I hold, therefore, that sleeping car companies are not subject to the responsibility of innkeepers at common law, and that defendant cannot be held liable upon that ground.

§ 1429. *Sleeping car proprietor is liable for negligence.*

The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is, undoubtedly, the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants. Defendant's own testimony tends to show a custom on its part to keep a man on watch all night, and to keep the rear door locked. Upon the night in question, however, both the conductor and porter were asleep at the rear end of the car for two or three hours prior to the arrival of the train at Memphis, leaving the front door unlocked and a brakeman sitting in the front end of the car. If you find the loss was occasioned by the negligence of the defendant in this particular, and that the plaintiff himself was guilty of no negligence, you will find for the plaintiff. It is proved, however, that the plaintiff arose once or twice during the night, either before or after the arrival of the train at Memphis, to get a drink of water at a wash-stand immediately adjoining his section, but separated from it by a board partition, leaving his waistcoat under his pillow. There is some conflict of evidence as to whether he could see his berth from where he was standing. If you find the plaintiff guilty of negligence in this regard, and that this negligence contributed to his loss, then he is not entitled to recover, notwithstanding the defendant was also guilty of negligence in the particulars above specified.

§ 1430. *Measure of damages for loss by negligence of sleeping car proprietor.*

The measure of damages only remains to be considered. The plaintiff again claims the benefit of the law applicable to innkeepers, and insists upon his right to recover for the entire amount of his loss. The same reasoning would entitle him to recover a fortune if he had seen fit to carry it about his person and lay it under his pillow, and this, too, in the absence of notice to the company. The defendant, however, like a common carrier of passengers, is liable only for such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for his traveling expenses. A man may lawfully carry any sum he chooses about

his person, but with the modern facilities for obtaining drafts and sending money by express, it is, to say the least, imprudent to carry a large amount. As defendant received but two dollars for the use of its berth, it would be grossly unjust to mulct it in any sum the plaintiff may choose to swear he has lost, when the charges, simply of transmitting this amount by express, might have been double or quadruple the price paid for the accommodation. The rule claimed by plaintiff would place carriers and owners of sleeping cars completely at the mercy of unscrupulous and designing men. It was, at least, the duty of the plaintiff to notify the conductor of the amount he carried about him, though even then it is very doubtful whether he could have charged him with the responsibility.

The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of his journey, and all the other circumstances of the case.

§ 1431. Refusal to transport.—A common carrier is not obliged to take on board his vessel a passenger against whom reasonable objections exist, such as that his presence in the city to which the vessel is bound, and from which the passenger had been expelled under threat of death if he returned, would tend to promote further disorder; but if such passenger gets on board without violating any inflexible rule of the vessel, conducts himself properly and tenders his fare, the master is not justified in placing him aboard another vessel to be returned to the port whence he was carried. The basis of damages will, however, be confined to the act of the master in putting him aboard the other vessel, and cannot extend to subsequent difficulties met with at the hands of third persons while getting to the city whence he had been expelled. *Pearson v. Duane*, 4 Wall., 605.

§ 1432. Civil rights statutes.—A state statute requiring all common carriers of passengers to make no discriminations of race or color as respects transportation or the quality of accommodations furnished is, so far as it attempts to control such carriers engaged in transportation between different states, a regulation of interstate commerce, and to that extent unconstitutional. *Hall v. DeCuir*, 5 Otto, 485; *Civil Rights Cases*, 109 U. S., 3.

§ 1433. A colored woman, who purchases and holds a first-class ticket for passage on a railroad, is entitled to be admitted into the car provided for ladies; and if, while lady-like in her appearance and bearing and carrying a sick child in her arms, she is refused a passage except in a smoking car for men only, some of whom were smoking, she may decline to ride in that car and recover damages for her loss of time and the inconvenience she suffered. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. R., 663; *Civil Rights Bill*, 1 Hughes, 541.

§ 1434. Limit of accommodations.—A special contract made by a stage proprietor's agent with certain passengers as to the number of passengers the coach should carry is inadmissible in evidence in favor of another passenger, who took his seat at another part of the route. *Maury v. Talmadge*, 2 McL., 157.

§ 1435. In an action against a stage proprietor a general custom as to the number of passengers carried in like coaches on other routes, and as affected by different kinds of roads passed over, is admissible in evidence in his favor, but not the practice established on his own route. *Ibid.*

§ 1436. Statute limiting the number.—Under the act of March 2, 1819, declaring a vessel forfeited that carries more than twenty passengers beyond the proportion of two to every five tons of the vessel, according to custom-house measurement, no deduction is to be made for children or persons not paying for their passage, and the tonnage is to be estimated at the custom-house in the United States where the vessel arrives. *United States v. The Louisa Barbara*, Gilp., 332. See §§ 206, 207.

§ 1437. Rights of ticket holders, etc.—The assignee of a *chose in action* may sue in admiralty in his own name. Thus the assignee of a passage ticket may sue for a breach of contract. *Cobb v. Howard*,* 3 Blatch., 524; affirming S. C., 10 N. Y. Leg. Obs., 358.

§ 1438. A railroad ticket agent must exercise reasonable care in delivering tickets to purchasers, and he is not justified, if a purchaser is called away after applying for a ticket and

depositing his money, in putting down the ticket for him on the counter in his absence. *Quigley v. Central Pacific R. Co.*, 5 Saw., 107.

§ 1439. Where emigrants engaged passage with a ship agent for New York, and, the ship direct for that port not being ready, such agent chartered "between decks" of a vessel bound for Philadelphia, and gave to each emigrant a passage ticket to the latter city, with an indorsement that on his arrival there he should be forwarded to New York free of expense, the master of such vessel, by receiving such emigrants on board and conveying them to Philadelphia, bound the ship for their transportation to New York as agreed. *Dennison v. The Wataga*,* 1 Phil., 468.

§ 1440. Where A. contracted to have a vessel at port by a certain time, to carry certain passengers, receiving the passage money in advance, and the vessel was delayed by stress of weather, held, that A. must return the passage money. *Cobb v. Howard*,* 3 Blatch., 525; affirming S. C., 10 N. Y. Leg. Obs., 353.

§ 1441. Until a passenger becomes connected with a vessel as a passenger on board, he is in no way subject to her casualties and misfortunes, occurring through stress of weather or otherwise. *Ibid.*

§ 1442. Passage money is not due before arrival at destination, unless one agrees to pay for a proportionate part of voyage; but on the ending of the voyage at an intermediate port, expenses to the destined port must be paid or tendered to passenger, on whose refusal to proceed *pro rata* compensation may be recovered, or, if passage money was paid in advance, such proportionate part must be refunded. *Howland v. Brig Lavinia*, 1 Pet. Adm., 123, 126.

§ 1443. As to whether, on a contract for transporting a passenger by water, a libel may be brought in admiralty, where the passenger, because of alleged breach in affording him reasonable means of transportation, refused to embark, having paid his passage money. *The Pacific*, 1 Blatch., 569.

§ 1444. Where the master of a schooner, who had taken passage on a steamer to rejoin his vessel, as mutually understood, was carried beyond the place for which he had bought his ticket and at which the steamer usually stopped, he was held entitled to recover damages in the nature of demurrage for the detention of his vessel, besides indemnity for personal expenses and loss of time. *The Canadian*,* 1 Brown, 11.

§ 1445. The measure of damages for a wrongful expulsion from a railroad car is a reasonable compensation for the indignity offered in addition to loss of time, expenses during delay and the price of another ticket. *Quigley v. Central Pacific R. Co.*, 5 Saw., 107.

§ 1446. But where one, who is provided with sufficient money to pay the fare which the conductor demands on the train, refuses to do so, and the conductor expels him under a reasonable regulation of the carrier requiring conductors to demand the fare of all persons traveling without tickets, he cannot recover the damages specially consequent upon such expulsion, even though he may have had a right to be carried under a special contract with the company, irrespective of such regulation. *Hall v. Memphis, etc., R. Co.*,* 9 Fed. R., 585.

§ 1447. Providing for passengers.—Libel by emigrant passengers for failure of vessel to furnish water and provisions pursuant to contract, dismissed for want of proof to sustain the allegations. *Kramme v. The Ship New England*,* 1 Newb., 481.

§ 1448. Treatment of passengers.—A passenger's contract entitles him to the respectful treatment of the ship's officers and to exemption from insult or personal violence from the crew; and as regards female passengers, to implied protection from obscenity and immodest approach. *Nieto v. Clark*, 1 Cliff., 145.

§ 1449. The master of a vessel impliedly stipulates that female passengers shall be protected against obscene conduct, lascivious behavior and every immodest and libidinous approach; and an attempt at rape on the part of a steward will justify the master in discharging him in a foreign port. *Ibid.*

§ 1450. A soldier on board a vessel, for whose transportation the government has contracted, does not become, by the mere fact of his discharge from the service before the end of a voyage, a passenger such that the master's failure to relieve him from military discipline will render the latter liable in damages. *White v. McDonough*, 3 Saw., 311.

§ 1451. It is negligence on the part of a carrier of passengers to allow disorderly soldiers armed with loaded muskets to occupy the space on his steamboat where passengers come on deck, without notice of the fact to the passengers, and without attempt to quell the disturbance; and a passenger who is shot by the discharge of a musket during a scuffle under such circumstances may recover from the carrier for the ensuing injury. *Flint v. Norwich, etc., Transportation Co.*, 6 Blatch., 158.

§ 1452. Liability for carrying negligently.—A carrier of passengers is bound to provide proper means of access to and egress from his vessel, but only when the vessel has reached the usual place for the reception of passengers. *Ship Anglo Norman*, 4 Saw., 185.

§ 1453. A passenger, who attempts to come on board before a vessel is in readiness for pas-

sengers, by means of a plainly insufficient gangway, is guilty of contributory negligence and cannot recover for injuries thus received. *Ibid.*

§ 1454. A steamship carrying steerage passengers is bound to have fastened securely whatever freight it carries in the steerage-room; and a passenger injured by the overturning of an insecurely fastened pile of tin while sitting beside it, without warning or knowledge of the danger, is entitled to recover for such injury. *Koch v. Oregon Steamship Co.*,* 7 Ch. Leg. N., 347; *The Kate Cann*, 2 Fed. R., 241; S. C.,* affirmed on appeal, 8 Fed. R., 719.

§ 1455. In an action against a stage proprietor for damages caused by the driver's misconduct, such proprietor must prove that the driver possessed and exercised that degree of skill which competent drivers, in like business, usually possess and ought to possess to carry passengers in safety, and that he exercised, at the time of the accident, the utmost prudence and caution; the least negligence on his part producing bodily injury being sufficient, in the absence of contributory negligence, to make the proprietor liable. *Saltonstall v. Stockton*, Taney, 11.

§ 1456. A stage proprietor is not liable for an accident caused by the physical incapacity of the driver, who is competent and guilty of no negligence, caused by exposure to extreme and unusual cold. *Ibid.*

§ 1457. A passenger, who is placed in peril by a stage-driver's negligence, and, reasonably supposing that the stage will upset or that the driver is incapable of managing his horses, rashly springs from it, may recover for his injuries, although in fact such attempt to escape may have increased the peril or even caused the stage to upset. *Stokes v. Saltonstall*, 13 Pet., 181; affirming S. C., Taney, 11.

§ 1458. A stage proprietor is liable for his failure to furnish good coaches, gentle and well broke horses and a prudent and skilful driver, including the least negligence or lack of skill on the part of the latter, but not for accidents such as the utmost prudence cannot guard against. *McKinney v. Neil*, 1 McL., 540; *Maury v. Talmadge*, 2 McL., 157; *Peck v. Neil*, 3 McL., 22.

§ 1459. The upsetting a stage-coach and resulting injury to a passenger are *prima facie* evidence of the driver's negligence and unskilfulness, and cast upon the proprietor the burden of showing that the driver was in every respect qualified and acted with reasonable skill and the utmost prudence, the least negligence or skill or caution on whose part will make him liable; but not if the accident was caused by physical disability arising from extreme and unusual cold. *Stokes v. Saltonstall*, 13 Pet., 181; affirming S. C., Taney, 11.

§ 1460. If a stage-driver is lacking at all in skill or prudence, at the happening of an accident, the proprietor is liable, although the accident is due to the recklessness of another driver, employed by a different proprietor, who is also liable, and for exemplary damages. *Peck v. Neil*, 3 McL., 22.

§ 1461. A stage-driver's want of skill may, in an action for injuries from the upsetting of a stage-coach, be proved like any other fact. *McKinney v. Neil*, 1 McL., 540.

§ 1462. In an action against a stage proprietor an allegation in the declaration that the plaintiff, at the defendant's special instance and request, became and was a passenger in a certain coach, to be carried safely, etc., for certain rewards to the defendant, and thereupon it was his duty to use due and proper care in carrying the plaintiff safely, sufficiently sets out, after verdict, a legal duty to use due care on the defendant's part. *Stockton v. Bishop*, 4 How., 155.

§ 1463. A carrier by steam is held to the greatest possible care and diligence; any negligence in such a case is gross, and whether the consideration for conveyance is pecuniary or otherwise is immaterial. *Philadelphia, etc., R. Co. v. Derby*, 14 How., 468; *Steamboat New World v. King*, 16 How., 469.

§ 1464. A passenger, subjected either to direct or consequential injuries by a ship-master on the high seas, has a remedy against the latter in admiralty. *Chamberlain v. Chandler*, 3 Mason, 242.

§ 1465. The allegation that a passenger was "subjected to great inconvenience and injury," in the declaration in an action against a common carrier for breach of contract, does not disclose special damage. *Roberts v. Graham*, 6 Wall., 578.

§ 1466. Liability as to free passenger.—A passenger, carried gratuitously under a usage of the particular carrier, is not thereby deprived, when injured, of the remedy enjoyed by the other passengers. *Steamboat New World v. King*, 16 How., 469.

§ 1467. A person who goes at a railroad company's request and expense to meet on its line one of its officials, respecting a business matter between the company and himself, and is furnished with a free pass for that purpose, is a passenger for hire, and is not prevented by a condition on the pass, exempting the company from liability for its agents' negligence or otherwise, from recovering for injuries caused by the car in which he was riding being

thrown from the track by the defective condition of the rails. *Railroad Co. v. Stevens*, 5 Otto, 855.

§ 1468. The plaintiff, a stockholder in the defendant corporation, while riding at the request of the defendant's president on a small locomotive car used for the convenience of the company's officers, and paying no fare, was injured by a collision with another engine of the defendant driven by one of the defendant's engineers, in disobedience of direct orders. *Held*, that the company was liable for the injury. *Phil. & Read. R. R. v. Derby*, 14 How., 468.

§ 1469. Statute as to reporting arrivals.— A state statute requiring ship-masters, under a penalty, on arrival from foreign ports, to report a description of their passengers to certain officials, is not a regulation of commerce but of police, and, therefore, not in conflict with the United States constitution. *Mayor, etc., of New York v. Miln*, 11 Pet., 102.

§ 1470. Liability for baggage.— Where the baggage of a passenger did not arrive in time, and was shipped by the agent of the carrier on another vessel, on a bill of lading, *held*, that the latter vessel was entitled to freight, and was liable for the safe delivery of the baggage, the same as a carrier on freight. *The Elvira Harbeck*, * 2 Blatch., 338.

§ 1471. The fact that the words "personal goods" were written on the margin of the bill of lading did not affect the liability of the carrier; such words were merely descriptive. *Ibid.*

§ 1472. Where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If he does not accompany it, the carrier may claim compensation in advance, or may postpone his claim and rely on his lien or on the personal responsibility of the owner. *Ibid.*

§ 1473. As part of a passenger's "baggage" for a voyage, contained in his trunk, *semble* a gold watch and chain, gold ornaments intended for presents, and gold coin, are not properly included; though wearing apparel would be. But an untruthful statement as to the contents of one's trunk, made in answer to the captain's inquiry, and tending to induce him to relax his vigilance and thus contributing to the loss, may debar a recovery for lost baggage. *The Ionic*, * 5 Blatch., 538.

§ 1474. A student on his way to college may recover from a common carrier, as baggage, manuscript books necessary for the prosecution of his studies. *Hopkins v. Westcott*, 6 Blatch., 64; S. C., 16 Am. L. Reg., 533 (§§ 1503-1506). See § 1484.

§ 1475. Where the defendant's agent received for transportation two trunks and a rough pine box as the personal baggage of the plaintiff, a passenger, knowing that the box contained photographs, but asking no additional compensation for its carriage, and being unable to check it, assured the plaintiff that it should go safely without a check, the defendant cannot object that the box is not personal baggage after having delivered it to an unauthorized person. *Waldron v. The C. & N. W. R. R.*, * 1 Dak. Ty., 351.

§ 1476. A married woman may, in a court of admiralty (independently of married women's acts), maintain a libel for loss of her wearing apparel, without joining her husband. *The Steamboat State of New York*, * 7 Ben., 450.

§ 1477. A passenger vessel may be libeled for non-delivery of personal baggage shipped by the owner's agent and receipted for by the mate, although the owner pays his fare and takes his passage by another vessel. *The Elvira Harbeck*, * 2 Blatch., 336. As to the passenger's relation to a baggage express, see *post*, IX.

§ 1478. Liability of connecting carriers.— If several railroads by mutual arrangement form a continuous route between two cities and issue through tickets to either terminal point, the terminal road is liable for injuries thereon to a passenger whether the injury is caused by the negligence of its own servants or others with whom it had contracted for immediate service in the furnishing of motive power. *Keep v. Indianapolis, etc., R. Co.*, 8 McC., 208; S. C., 9 Fed. R., 625.

§ 1479. A ticket agent who sells a through ticket, if the agent of the company which begins the transportation, renders such company liable to the passenger, *prima facie*, over all connecting routes, for the safety of the passenger's baggage. *Maskos v. American Steamship Co.*, * 11 Fed. R., 698.

§ 1480. Liability of railroad contractors.— Railroad contractors in running construction trains are bound to exercise such care and skill in their management as prudent and experienced men are wont to employ under similar circumstances; failing which they are liable to a passenger for hire. But they are not bound to prove that their servants were of competent skill, good habits, and in every respect qualified for the business. *Shoemaker v. Kingsbury*, 12 Wall., 369.

IX. EXPRESS COMPANIES.

SUMMARY—*Express company is a common carrier, § 1481.—Liability for loss or injury, § 1482.—Effect of special contract, §§ 1483, 1484.—Obligation of railway to carry express matter, §§ 1485-1491.*

§ 1481. An express carrier is a common carrier. *Bank of Kentucky v. Adams Express Company, §§ 1492-1498.*

§ 1482. An express company's contract for exemption from liability for loss by fire does not exonerate from liability for the negligence either of such express company or of the agencies it employs in the transportation. If the fire was caused by the negligence of the railroad company so transporting, the express company is not excused because of its own freedom from fault, nor because the railway company was not under its own control, nor because the railway company might be held liable for the loss. *Ibid.*

§ 1483. A common carrier of goods is responsible for actual negligence, even though his receipt for the goods furnishes a sufficient special contract to restrict his common law liability. And he is chargeable with actual negligence, unless he exercises the care and prudence of a prudent man in his own affairs. Gross negligence, *semble*, is not the standard of responsibility where a carrier limits his risks by special contract. *Express Company v. Kountze Brothers, §§ 1499-1502.*

§ 1484. Where a passenger on a railroad gives to a baggage express company his metallic check, so that the carrier may obtain his trunk and take it to his residence, he is bound by actual notice of the contents of the receipt given, that the carrier would not become liable for merchandise or jewelry, nor for "an amount exceeding \$100 upon any article," unless, etc. But *held*, also, that the doubtful expression "upon any article" should be construed against the carrier so as to mean not any trunk, but any article contained therein. *Hopkins v. Westcott, §§ 1503-1506.*

§ 1485. A railway company cannot refuse to carry for an express company after the peculiar method and divided control pertaining to express business. Nature and methods of express business stated. *Dinsmore v. Louisville, etc., R'y Co., §§ 1507-1510.*

§ 1486. A railroad company, having carried express freight for many years for an express company, cannot deny its duties with reference to such business. *Ibid., § 1510.* And see *Southern Express Co. v. St. Louis, etc., R'y Co., §§ 1511-1514.*

§ 1487. A court of equity may compel a railway company to perform its duty in carrying express matter; due compensation being subsequently fixed and likewise compelled. *Ibid.*

§ 1488. A railway company cannot fix upon an absolute rate of compensation for express matter and insist upon its payment in advance. How compensation should be estimated under circumstances of injunction. *Southern Express Co. v. Louisville, etc., R. Co., §§ 1515-1517.*

§ 1489. A railroad company is not bound to conduct an express business. But, if so conducting, it cannot discriminate in its own favor against other companies, nor exercise supervisory control over such articles as the other express companies offer to be shipped. *Ibid.*

§ 1490. A railway company must carry the property of all persons alike without injurious discrimination as to rates or terms. Nor can it discriminate as in favor of particular express companies. *Southern Express Co. v. Memphis, etc., R. Co., §§ 1518-1520.*

§ 1491. Whether a railroad company may carry on an express business, *quære?* It cannot do so without giving other express companies equal facilities. *Ibid.*

[NOTES.—See §§ 1521-1533.]

BANK OF KENTUCKY v. ADAMS EXPRESS COMPANY.

(3 Otto, 174-188. 1876.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The defendants in each of these cases are an express company, engaged in the business of carrying, for hire, money, goods and parcels, from one locality to another. In the transaction of their business they employ the railroads, steamboats and other public conveyances of the country. These conveyances are not owned by them, nor are they subject to their con-

trol, any more than they are to the control of other transporters or passengers. The packages intrusted to their care are at all times, while on these public conveyances, in the charge of one of their own messengers or agents. In conducting their business they are associated with another express company, called the Southern; and the two companies are engaged in carrying by rail through Louisiana and Mississippi, to Humboldt, Tenn., and thence over the Louisville & Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation for carriage in proportion to the distance the package is transported by them respectively. Between Humboldt and Louisville both companies employ the same messenger, who is exclusively subject to the orders of the Southern Express Company when south of the northern boundary of Tennessee, and to the orders of the defendants when north of that boundary. Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers. On the 26th day of July, 1869, the Southern Express Company received from the Louisiana National Bank at New Orleans two packages, one containing \$13,582.15, for delivery to the Bank of Kentucky, Louisville, and the other containing \$3,000, for delivery to the Planters' National Bank of Louisville, at Louisville. The money belonged to the banks respectively to which the packages were sent. When the packages were thus received the agent of the Southern Express Company gave a receipt, or domestic bill of lading, for each, of which the following is a copy (the two differing only in the description of the consignees and in the amount of money mentioned):

Domestic Bill of Lading.

SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS.

"No. 2. \$13,528.15.

July 26, 1869.

"Received from Lou. Nat. Bank, one package, sealed, and said to contain thirteen thousand five hundred and twenty-eight $\frac{1}{10}$ dollars.

"Addressed Bank of Kentucky, Louisville, Ky. Freight coll.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, danger or detention of such package or its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable

for any such loss, unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company,

SHACKLEFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for to only, except against loss occasioned by the public enemy.

"For the company —

"Insurance, \$ —"

The bills of lading were sent to the consignees at Louisville.

Having thus received the packages the Southern Express Company transported them by railroad as far as Humboldt, Tenn., and there delivered them to the messenger of the defendants (who was also their messenger) to complete the transportation to Louisville, and to make delivery thereof to the plaintiffs. For that purpose the messenger took charge of them, placing them in an iron safe, and depositing the safe in an apartment of a car set apart for the use of express companies, for transportation to Louisville. Subsequently, while the train to which the car containing the packages was attached was passing over a trestle on the line of the Louisville & Nashville Railroad, and while the packages were in charge of the messenger, the trestle gave way during the night, the train with the express car was thrown from the track, and the car with others caught fire from the locomotive and was burned, together with the money in the safe. The messenger was rendered insensible by the fall, and he continued so until after the destruction was complete. There was some evidence that some of the timber of the trestle seemed decayed.

Upon this state of facts the learned judge of the circuit court instructed the jury that, "If they believed the package was destroyed by fire, as above indicated, without any fault or neglect whatever on behalf of the messenger or defendants, the defendants have brought themselves within the terms of the exceptions in the bill of lading, and are not liable." And again, the court charged: "It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville & Nashville Railroad Company and its agents, or not." And again: "But when he (the common carrier) has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care,—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles,—and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care or the want of care of his employees." At the same time the learned judge instructed the jury as follows: "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville & Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

§ 1492. *An express company cannot, by special contract, divest itself of liability for the negligence of the railway company it employs.*

These extracts from the charge, to all of which exception was duly taken, exhibit the most important question in these cases, which is, whether the stipulations of the carriers' receipt or bill of lading relieved them from responsibility for the negligence of the railroad company employed by them to complete the carriage. The circuit court was of opinion, as we have seen, that they did; and practically instructed the jury that, under the modified contract of bailment, the defendants were liable for loss by fire only to the extent to which mere bailees for hire, not common carriers, are liable; that is, that they were responsible only for the want of ordinary care exercised by themselves or those who were under their control. With this we cannot concur, though we are not unmindful of the ability with which the learned judge has defended his opinion.

§ 1493. *An express company is a common carrier.*

We have already remarked the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers.

§ 1494. *Duty and liability of a common carrier; how far controllable by special contract.*

The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God. By special contract with his employers, he may, it is true, to some extent, be excused, if the limitations to his responsibility stipulated for are, in the judgment of the law, reasonable, and not inconsistent with sound public policy. It is agreed, however, that he cannot, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servants; and this because such a contract is unreasonable and contrary to legal policy. So much has been finally determined in *Railroad Co. v. Lockwood*, 17 Wall., 357 (§§ 1379-1400, *supra*). But can he, by a contract made with those who intrust property to him for carriage and delivery,—a contract made at the time he receives the property,—secure to himself exemption from responsibility for consequences of the negligence of a railroad company or its agents not owned or controlled by him, but which he employs in the transportation? This question is not answered in the *Lockwood* case. It is raised here, or rather the question is presented, whether a common carrier does relieve himself from the consequences of such negligence by a stipulation that he shall not be liable for losses by fire.

§ 1495. *How far a stated exception of liability for loss by fire extends with reference to negligence of the carrier's agents.*

The exception or restriction to the common law liability introduced into the bills of lading given by the defendants, so far as it is necessary to consider it, is "that the express company are not to be liable in any manner or to any extent for any loss or damage, or detention of such package or its contents, or of any portion thereof, occasioned by fire." The language is very broad; but it must

be construed reasonably, and, if possible, consistently with the law. It is not to be presumed the parties intended to make a contract which the law does not allow. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct, or that of their servants or agents. But the circuit court ruled the exception did extend to negligence beyond the carriers' own, and that of the servants and agents appointed by them and under their control,—that it extended to losses by fire resulting from the carelessness of a railroad company, employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody: either of the express company or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants; but they were its employers; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it.

If, then, the Louisville & Nashville Railroad Company was acting for these defendants, and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Co. v. Lockwood*? The foundation of the rule is that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable. This is equally true, whether the contract be for ex-

emption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically, he has; but most frequently, when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor and to the public that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

§ 1496. *For a fire caused by the negligence of the railroad employed by an express company, the latter's stipulation against losses by fire does not protect.*

For these reasons, we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed. There are other reasons of weight which deserve consideration. Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If, in the course of transportation, a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyances are responsible, and they can obtain redress much more conveniently than distant owners of the property can. Indeed, in many cases, suits by absent owners would be attended with serious difficulties. Besides, express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being; and, if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles v. Cattle*, 6 Bing., 743; *Tower v. Utica & Syracuse R. Co.*, 7 Hill (N. Y.), 47; *Redf. on R'ys*, sec. 74.

§ 1497. *Although a subordinate agent of the carrier may be responsible for negligence, the carrier is not the less so.*

Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrangement relieve themselves from what, without it, would have been their clear duty? Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and the defendants.

They must claim through that. 6 How., 381. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs. But, as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading. We cannot close our eyes to the well-known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner, some of the responsibilities of common carriage are often sought to be evaded; but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company.

It has been urged on the part of the defense, that, though the contract does not attempt to exempt, and could not have exempted, the express company from liability for loss occasioned by the neglect of itself or its servants, yet, when it is sought to charge the company with neglect, it must be such as it is responsible for upon the general principles of law; and that, upon those principles, no one is responsible for damage occasioned by neglect, unless it be the neglect of himself, his servants or agents. The argument mistakes, we think, when it asserts that, upon general principles of law, no one is responsible for the consequences of any neglect except his own, or that of his agents or servants. Common carriers certainly are, and for very substantial reasons. These defendants, it is agreed, were common carriers; and they remained such after the exception in their receipt. If it be said the exception reduced their responsibility to such an extent as to make them liable only for such neglect as fastens a liability upon persons who are not common carriers, the answer is, such an averment assumes the very thing to be proved; and, even if the argument were sound, the question would still remain, whether the railroad company employed by the defendants to effect the carriage is not properly to be regarded as their agent, though not under their control. That question we have already considered.

§ 1498. *Although a common carrier may by contract be put upon the footing of a bailee for hire, he is liable as to all agencies in the transportation.*

Again, it is urged that, though the defendants remained common carriers, notwithstanding their contract, their responsibility was limited by their receipt to that of an ordinary bailee for hire; and, as such a bailee is not held liable for the neglect of persons over whom he has no control, it is argued that these defendants are not liable for the negligence of the railroad company. This also assumes what cannot be admitted. Although we are told all the authorities agree that, when a common carrier has by special contract limited his liability, he becomes, with reference to that particular transaction, an ordinary bailee,—a private carrier for hire,—or reduces his responsibilities to those of an ordinary bailee for hire, yet we do not find that the authorities assert that doctrine, if by the phrase “that particular transaction” is meant the undertaking to carry. Certainly those to which we have been referred do not. We

do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by the acts or omissions of others. The consignor may, by contract, restrain him; may direct how and by what agencies he shall carry. Under such an arrangement he may become a mere forwarder, and cease to be a carrier. But what we have to decide in these cases is, whether the contract proved has that operation. We have already said we think it has not. The exception in the bills of lading has sufficient to operate upon, without being a cover for negligence on the part of any persons engaged in the service undertaken by the carriers. It exempts the defendants from responsibility for loss by fire, caused by the acts or omissions of all persons who are not agents or agencies for the transportation.

This is a large restriction; and beyond that, in our judgment, the exception in the present case does not extend. To the opinion we have thus expressed we find direct support in the case of *Hooper v. Wells*, 27 Cal., 11. There an express company had undertaken to transport gold dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulation: "In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt." In the course of the transportation, the messenger of the carriers who had the property in charge took it on board a steam-tug, for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer, the boiler of the steam-tug exploded, in consequence of carelessness of its officers, and the gold dust and bullion were thereby lost. The steam-tug did not belong to the express company, nor was it or its officers under their control. Yet the court adjudged that the managers and employees of the steam-tug were in legal contemplation the managers and employees of the carrier, and that the restrictive clause in the receipt did not exempt the carriers from liability for loss occasioned by the carelessness of those employees. To the same effect is the case of *Christensen v. American Ex. Co.*, 15 Minn., 270; and the case of *Machu v. London & Southwestern R'y Co.*, 2 Exch., 415, though arising under the carrier acts of 11 Geo. IV. and 1 Wm. IV., is very analogous. The statute declared that the carrier should be liable to answer for the felonious acts of any coachman, guard, book-keeper, porter or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier undertook to do, either by himself or his servants, were to be regarded as his servants, within the meaning of the act. Baron Rolfe said the right as against the carriers arises, not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a subcontractor.

The other objections urged against the charge given by the court below to the jury require but brief notice. We find no error in what the circuit judge said upon the question whether the bills of lading, with the exceptions, constituted the contract between the parties. (a) The charge in this particular is jus-

(a) The charge was as follows: "If the jury believe that the teller of the Louisiana National Bank presented the bill of lading to the agent of the express company for his signature, with the blanks filled, and at such time as

tified by very numerous authoritative decisions. *York Co. v. Central Railroad*, 3 Wall., 107 (§§ 243-248, *supra*); *Grace v. Adams*, 100 Mass., 505; *Wells v. Steam Nav. Co.*, 2 Comst., 204; *Dorr v. New Jersey Steam Nav. Co.*, 1 Kern., 485; 6 How., 344 (§§ 220-242, *supra*); 3 Wall., 107; 6 Blatch., 64 (§§ 1503-1506, *infra*); *Kirkland v. Dinsmore*, 62 N. Y., 161.

Nor was there error in the instruction given respecting the iron safe. (b) Taken as a whole, it was correct. The charge covered the whole case, and except in those particulars in which we have indicated our opinion that it was erroneous, we find no just reason to complain of it. But for the errors we have pointed out new trials must be awarded.

Judgment in each case reversed, and the record remitted with directions to award a *venire de novo*. (c)

EXPRESS COMPANY *v.* KOUNTZE BROTHERS.

(8 Wallace, 842-854. 1869.)

ERROR to U. S. Circuit Court, District of Nevada.

STATEMENT OF FACTS.—Kountze Brothers shipped gold dust by the express company as common carriers. The latter were robbed of the gold dust and this suit was brought to compel them to pay for it. There was a judgment for the plaintiff and a writ of error by the defendant. Two questions were raised, one of jurisdiction and one upon the merits. The suit was brought in the district court of the territory of Nebraska, and after Nebraska became a state the papers were filed in the circuit court for the district of Nebraska. Other facts are stated in the opinion.

§ 1499. *Whether the circuit court has jurisdiction over the case; admission of a new state.*

Opinion by MR. JUSTICE DAVIS.

Before proceeding to consider the merits of this controversy, it is necessary to dispose of the point of jurisdiction which is raised. It is urged that the circuit court had no jurisdiction over the cause, because there was no authority to transfer it. This depends on the construction of the acts of congress relating to the subject. On the admission of a new state into the Union it becomes necessary to provide not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity, congress, after Florida became a state, passed an act providing, among other things, that all cases of federal character and jurisdiction pending in the courts of the territory be transferred to the district court of the United States for the district of Florida. The provisions of this act were made applicable, at the time of its passage, to cases pending in the courts of the late territory of Michigan, and were afterwards extended to the courts of the late

livered to the agent the package of money without disclosing who was the owner of it, but addressed to the plaintiff at Louisville, that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

(b) The charge was as follows: "It is claimed by the plaintiff that the defendant was wanting in care in the use of the safe or box in which the package was at the time of the loss. If there was any such want of reasonable care in this particular, the defendant is undoubtedly liable; but if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care, and the defendant is not responsible for want of care in this particular."

(c) *Reversing Bank of Kentucky v. Adams Express Co.*,* 1 Flipp., 242.

territory of Iowa. Congress, in making this provision for the changed condition of Iowa, thought proper in the same act to adopt a permanent system on this subject, and extended the provisions of the original and supplementary acts to cases from all territories which should afterwards be formed into states.

It is contended, if this cause were transferable at all, it went, under these acts of congress, to the district court, and not to the circuit court. This would have been true if Nebraska had not at the time of the transfer occupied a different judicial *status* from that occupied by Florida, Michigan or Iowa, when these laws were passed. These states were not then a part of any one of the judicial circuits, while Nebraska, when this cause was removed, was attached to the eighth circuit. Their district courts had general circuit court powers, while the district court in Nebraska had only the ordinary jurisdiction properly belonging to the district courts of the country. If Nebraska had not at the time of the transfer formed a part of a judicial circuit, her district court would, by virtue of the laws above recited, have been clothed with the general powers of a circuit court, and could have taken cognizance of this cause, and it would, in the purview of these laws, have been rightfully transferable to it. To construe these laws so as to limit the right of transfer to the district court alone, without regard to the powers of that court, would defeat the very object congress had in view. That object is made plain enough by the legislation relating to this subject. It was, on the admission of a new state, to transfer pending civil cases of a federal character from the territorial courts into the district court, if the state did not form part of a judicial circuit; because in such a case the district court was invested with circuit court powers. But if the state were attached to a circuit, then, as the district court did not possess this jurisdiction, the cause was transferable to the circuit court. To adopt any other construction would render the provisions for the transfer of causes, in case a new state on its admission were attached to a circuit, nugatory.

§ 1500. *To give jurisdiction, citizenship may appear indirectly as well as by direct averment.*

It is said, if cases of a federal character were properly transferable to the circuit court, this was not one of them, because it does not appear that the suit was between citizens of different states. It is true there is no direct averment to this effect, but it is the necessary consequence of the facts stated in the pleadings, that the parties to the suit were citizens of different states. The averment that the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying they had their domicile there. In this country people usually live and have their citizenship in the place where they do business. Especially is this true of persons engaged in a business requiring capital, and involving risk, at a point which is remote from the great centers of trade and commerce. The citizenship of the defendant is clearly enough averred. It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation, formed under and created by the laws of the state of New York. The obvious meaning of this allegation is that the defendant is a citizen of the state of New York. The course of proceeding in the court below shows that the parties to the suit recognized it as being of federal jurisdiction, and it could only be so (as there was no federal question involved) on the ground that the plaintiffs and defendant were citizens of different states. If the parties had thought otherwise, after the cause reached the circuit court, the point would

have been taken, and an effort made at least to test the jurisdictional question. The record shows that nothing of the sort was attempted.

§ 1501. *A carrier is responsible for losses occurring through actual negligence, not necessarily gross.*

There remains to be considered the merits of this case, so far as they are presented in the bill of exceptions. The only subject for review here is the charge given by the court to the jury. The court instructed the jury only on a single point — that of negligence. The jury were told substantially that, although the contract was legally sufficient to restrict the liability of the defendant as a common carrier, yet, if the defendant was guilty of actual negligence, it was responsible. And that it was chargeable with negligence, unless it exercised the care and prudence of a prudent man in his own affairs. The defendant requested the court to charge the jury that it was not liable unless grossly negligent.

To understand what are the rights of the parties to this suit, so far as the court was asked concerning them, it is necessary to see what were the facts proved in the case. It appears that the particular lot of gold dust, which is the subject of this controversy, was confided to the express company for transportation to Philadelphia, on the 29th of September, 1864, and that it was one of a series of shipments of the same kind, running through a period of eighteen months or more. The receipt given for the packages was not different from the ordinary receipts of the company, and was doubtless intended to limit the liability of the company as common carriers. There were two routes employed by the express company to convey their property — one across the state of Iowa, and the other to St. Joseph, Missouri, and thence across the state by the Hannibal railroad. The latter was the most expeditious route, but the former the safest, as Missouri, although at the time adhering to the Union, was in a disturbed and unsettled condition. The property in dispute was conveyed by the St. Joseph route, and was robbed while in transit across the state by a band of armed men. Under the circumstances in which the country was then placed, no prudent man, in the management of his own affairs, would have sent his property by the Missouri route, if another route were open to him. It seems that the plaintiffs acted on this idea, for one of them testifies that he notified the agent of the company not to send their gold dust by the St. Joseph route. If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes — the one safe and the other hazardous, — and yet the express company, in defiance of the wishes of the owner of the property, reject the safe and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation, whenever practicable. Redfield on Carriers, § 34. In this case it was practicable to obey the instruction given by the plaintiffs, and the defendant furnishes no excuse for not obeying it.

It is said that the weight of the evidence is against the statement of the plaintiffs, that they directed their goods sent by the Iowa route. Conceding this to be true, it cannot be corrected here. It was a proper matter to be considered by the court below, on a motion for a new trial, but the granting or refusing such motions are not subject to be reviewed in this court. If the evidence in the case tended to prove the defendant guilty of actual negligence, then the court below were justified in basing upon it an instruction to the jury. That it did tend to prove it is clear, and the charge of the court on the subject correctly stated the law to the jury.

§ 1502. *The omission of a court to instruct on a particular point is not error, unless the instruction had been asked for and refused.*

As the court was not asked to instruct the jury on any other point, there is not, as the argument for the plaintiff in error seems to suppose, anything else for this court to review. It is the usual practice for the presiding judge at a *nisi prius* trial, in his charge to the jury, to take up the facts and circumstances in proof, explain their bearing on the controverted points, and declare what are the legal rights of the parties arising out of them. If the charge does not go far enough, it is the privilege of counsel to call the attention of the court to any question that has been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this court, if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the court on the subject, cannot be assigned for error.

Judgment affirmed.

HOPKINS v. WESTCOTT.

(Circuit Court for New York: 6 Blatchford, 64-71. 1868.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—The defendants constitute the Westcott Express Company, and are carriers, for the public, of freight and baggage, for hire, to and from any points in the city of New York. On the 1st of October, 1866, the plaintiff passed from his home in Massachusetts, over the Hudson River Railroad, to the city of New York, together with his trunk, for which he received the usual metallic check, which, on his arrival at New York, he delivered to the defendants, to enable them to obtain the trunk at the depot, and deliver the same at his residence in the city, no rate of compensation being named. The defendants obtained the trunk, but failed to deliver it to the plaintiff, it having been lost, in some way unknown to the defendants and to the plaintiff. Upon the delivery of the metallic check to the defendants, they delivered to the plaintiff a paper, upon which the number of the check was indorsed, and which contained, also, the following printed matter: "The Westcott Express Company will not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding \$100, upon any article, unless specially agreed for in writing, on this check receipt, and the extra risk paid therefor. . . . And the owner hereby agrees that Westcott Express Company shall be liable only as above." This printed matter the plaintiff did not read at the time it was delivered to him, nor till after notice from the defendants that his trunk was lost. The general custom of express companies is to charge forty cents for every trunk, and twenty-five cents in addition for every \$100 of value beyond \$100. The defendant was ignorant of this custom. The defendant was a student at Columbia College, and was proceeding to New York, for the purpose of prosecuting his studies at that institution; and certain manuscript books, which formed part of the contents of his trunk, were necessary to the prosecution of his studies.

§ 1503. *Limitation of the liability of carrier by notice.*

The discussion of this case, at bar, took a wide range, and a considerable number of the many cases, relating to the general question, how far, and in

what manner, a carrier may limit or qualify the liability which the general rules of the common law impose upon him, were cited. I shall not here enter upon a review of the authorities touching this broad question. It has been remarked, by a learned and accurate writer, that "a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be liable for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly." 2 Greenl. Ev., § 215. But, in the case now before the court, the defense does not rest upon a general notice, with constructive knowledge of which the plaintiff is to be charged, by proof that it was generally and widely promulgated. It rests on a special printed notice, put into the hands of the plaintiff, at the time he delivered his check to the defendants. It can make no difference that the plaintiff did not choose to read it until after he had notice that his trunk was lost. He received it at the time he parted with his check, it was legibly printed, and he must be charged with actual notice of its contents. By its terms, it qualified the duty or liability of the defendants, and limited their responsibility, in case of loss, to an amount not exceeding \$100 for any article, unless the plaintiff should disclose such articles, and have the fact indorsed on the paper, as well as pay for the extra risk. It excluded all liability for merchandise and jewelry. Though, as will be seen in the sequel, this point is of no practical importance in this suit, in view of the construction which I shall give to this notice, yet I am unwilling to leave it to be inferred that I entertain any doubt of the power of the carrier to qualify his responsibility by special notice, actually given to the owner, under circumstances like these. In *Orange Co. Bank v. Brown*, 9 Wend., 85, 115, Judge Nelson, speaking for the court, says of the carrier: "If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual, in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value and pay the premium." In the case before us we are not left to a general notice, to be charged upon the plaintiff on the ground of its general publication, and which he might have forgotten, although he had seen it; but the notice was served upon him at the time he sought the services of the carrier. I can have no doubt, therefore, that the plaintiff was bound by the notice, and that the carrier incurred no responsibility which his notice, properly construed, excluded.

§ 1504. *Rule as to construction of notice given by a carrier.*

But here a more difficult question presents itself. The list of the contents of this trunk, and the value of each article thereof, are agreed to by the parties; and they amount, in the aggregate, to \$744.10. It was contended on the argument that the notice limited the liability of the carrier to \$100, unless a greater value was disclosed, and that, as no greater value was disclosed, judgment should be rendered for that sum only. But, so far from giving this notice a liberal construction in favor of the carrier, I am inclined to construe it strictly against him. The rule which holds carriers to strict responsibility is founded upon high considerations of public policy and the security of the property of travelers. Every limitation of this responsibility

should be expressed, in each case, in clear and unequivocal terms. Notices of this character should, therefore, be construed strictly against the carrier. They are given to travelers of all ages and sexes, in the bustle of rapid transit from one place to another, in crowded vehicles and depots, and they should be free from all doubt or ambiguity, so that their contents may be clearly apprehended at a glance. Now, some portions of the defendant's notice in this case are clear and explicit. It declares that they will not be responsible for merchandise or jewelry contained in baggage received upon baggage checks. They do not choose to engage in the transportation of such articles as baggage, no matter what their value. They further give notice that they will not be liable for losses by fire. Where there is no question of gross or wilful neglect, or recklessness, or malfeasance or misfeasance, these restrictions, being plainly expressed and communicated to the owner at the time of the engagement, are, without doubt, binding upon him.

§ 1505. *What the words "any article," in a notice by an express carrier, restricting liability in value, will be construed to mean.*

But after designating merchandise and jewelry, and exempting them as well as losses by fire, the notice adds: "nor for an amount exceeding \$100 upon *any article*, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor." The question arises whether the term "any article" refers to a trunk or piece of baggage, and its entire contents in gross, or whether it is to be confined to each separate article contained therein. In other words, does it limit the liability of the carrier for the loss of a trunk and its contents, or does it leave him liable for each article contained in the trunk, according to its value, not exceeding \$100 for any single item. The terms "merchandise" and "jewelry" refer expressly to articles "contained in baggage received upon baggage checks;" that is, to the contents of trunks or packages, and excludes liability upon the articles specified. When limiting the liability to \$100 upon any one other article, I think it should be held also to refer to the separate contents of the trunks or packages, and not to the whole in gross. This strict construction is in harmony with the policy of the law, and essential to the protection of the community, in view of the constant devices of carriers to escape the responsibility of their calling, while their eagerness to obtain the patronage of the public remains unabated. Now, I can well conceive that they are unwilling to take the risks of carrying expensive articles of dress, such as costly furs, shawls and other valuable paraphernalia of an extravagant modern wardrobe, a single item of which is often valued at many hundreds of dollars, without notice of value, and without pay for the risk. But it may well be doubted whether they intend, by such notices as the one under consideration, to apprise the owner that they decline all responsibility beyond \$100 on each trunk and its contents, unless a special contract is made. A good trunk is worth half that sum, and often more, and the value of an ordinary traveler's trunk and necessary contents would usually exceed that sum. But, whatever be the intentions of carriers, such intentions must be so expressed as to leave no room for doubt as to their meaning, or they cannot be permitted to qualify their liability as fixed by the general rules of law applicable to their calling. As was remarked by Best, Ch. J., in *Brooke v. Pickwick*, 4 Bing., 218: "If coach proprietors wish honestly to limit their responsibility they ought to announce their terms to every individual who applies to their office, and, at the same time, to place in his hands a printed paper specifying the precise extent of their engagement." And, certainly, where they make no oral communica-

tion, but merely thrust into the hand of a traveler a small printed ticket, the notice which that contains should be explicit and leave nothing to be made out by construction. Where there is any doubt as to its meaning, it should be construed strictly as against the carrier. As to the general custom of express companies to charge extra for every package over \$100 in value, I do not think that has any bearing on this case. Even admitting that they could change their liabilities by a sweeping custom (which may well be doubted), no price was demanded or named in this case, and, therefore, the custom has no bearing upon the controversy.

§ 1506. *Manuscript books for a student are to be considered "baggage."*

Among the contents of this trunk were five manuscript books, no one of which exceeded in value \$100; but the defendants insist that they are not liable at all for these, on the alleged ground that they cannot properly be termed baggage. In *Hawkins v. Hoffman*, 6 Hill, 586, 589, Judge Bronson remarks: "An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveler usually has with him as a part of his baggage. It is, undoubtedly, difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This, I think, a good test for determining what things fall within the rule." Now, it may safely be said that books constitute, to some extent, a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed "baggage." With the lawyer going to a distant place to attend court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried as such in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case, the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed to have been a part of his baggage, for which the defendants are liable.

There was one article of jewelry in the trunk, for which, of course, they are not responsible, as all jewelry was excepted by specific designation. This will, however, make no difference with the amount of the judgment, as, by the

stipulation of the parties, it is not to exceed \$700, the sum demanded in the declaration, and the aggregate of the agreed value is \$744.10.

Let judgment be entered for the plaintiff for \$700, with costs.

**DINSMORE v. LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY—
SOUTHERN EXPRESS CO. v. NASHVILLE, ETC., RY CO.**

(Circuit Court for Tennessee: 2 Flippin, 672-689. 1890.)

STATEMENT OF FACTS.— This suit is between railroad and express companies. The former declined to carry express matter for the latter, and thereupon an injunction was issued restraining the railroad company from interfering with the business of the express companies as carried on previous to the notification to the contrary. The railroad company claimed the right to carry on the express business over its own road on its own account, and to exclude plaintiff from its facilities.

Opinion by BAXTER, J.

The case against the Nashville, Chattanooga & St. Louis Railway will be first disposed of. We have not time to state fully and in detail all the reasons for the decree we feel bound to enter in this case. The question is both novel and interesting, as well to the public as to the parties, and may be thus stated:

The express business, as it is understood and carried on in the United States, was initiated in 1839. About that time one Alvin Adams began the carriage of small packages of value between the cities of Boston and New York over the line of the Boston & Worcester Railroad, and the line of steamers connecting therewith, and plying between New York and Norwich. His enterprise proved remunerative. His success induced others to establish and maintain similar express lines between New York and Philadelphia, and Philadelphia and Baltimore, and other important commercial points. These all succeeded well, grew into general favor, and continued in active operation until July, 1854. At this time, by the mutual consent of the parties interested, these several express companies were consolidated and merged into the Adams Express Company, a voluntary association or partnership, which was formed and organized under authority of the laws of New York. This company, upon its organization, entered actively upon business, and prosecuted the same with unusual energy and success. It extended its operations over many of the most prominent railroads and water lines, and earned, as it justly merited, the confidence of its patrons and the general public. At the commencement of the rebellion it was doing an extensive and profitable business in the southern states. But the exigencies of war forced a suspension of the business within the insurrectionary territory, of which exigency the complainant, the Southern Express Company, was born. The complainant is a corporation organized under and pursuant to a charter granted by the state of Georgia, and by purchase succeeded to the property, business and good will of the Adams Express Company in the southern states. But the two companies, notwithstanding their separate existence, sustained close business relations, and agreed to the interchange of freights on terms beneficial to themselves and their customers. By this friendly co-operation and judicious interchange of business, they so far preserved their unity as to secure to their patrons all the conveniences that could have been offered by one company doing the business within the territory occupied by them both. Among other business of the Adams Express Company

to which complainant succeeded was the business which the former company was then doing over the several railroads, so far as they were then in existence, which now constitute the property of the Nashville, Chattanooga & St. Louis Railway Company, which complainant has continued from its organization till the present time. But it did said business under special contracts. These contracts contained stipulations reserving to the respective parties the right, upon giving the notice prescribed therein, to terminate the same.

Recently, many changes in the ownership, and consequently in the management, of railroads in Kentucky, Tennessee and contiguous states have taken place, whereby the Louisville & Nashville Railroad Company's power has been greatly augmented. The managers of this company, by leases and otherwise, have acquired the control, it is said, of about four thousand miles of railroad. The bill alleges that they have recently organized the Union Express Company to transact the express business over the several railroad lines controlled by it. And that with the view of supplanting the complainant and substituting the Union Express Company as express carriers on said roads, they caused notices to be given complainant terminating the contracts under and in virtue of which complainant has been carrying over said roads. This charge, however, is denied. But if such was defendant's purpose, on being better advised, the programme has been abandoned, and defendant now concludes that it cannot legally thus discriminate between express carriers; that if it carries for any, it is legally bound to carry for every one offering to do the same sort of business on the same terms. But defendant is, it seems, determined to exclude complainant from the use of its road, and now proposes, as the only alternative left for the effectuation of its determination, to exclude all express carriers, and do the express business over its road itself. And hence the question is squarely presented, Can defendant legally refuse to carry for complainant and extend to its messengers and agents all the facilities hitherto extended to it, and undertake and do the express business over its road itself? This is the question which the facts present.

§ 1507. *Railroads are quasi public institutions; their rights and duties.*

In order to a correct solution thereof, let us contemplate briefly the objects for which railroads were created, and the obligations and duties imposed on them by law. Railroads are *quasi* public institutions; they are authorized to facilitate and not to control or force from legitimate and natural channels or hinder or obstruct the business of the country. Hence the companies organized to construct them were invested with the right of eminent domain — with the authority to condemn private property necessary to the full enjoyment of their franchises, on paying just compensation therefor. The authority to do this could only be conferred upon the theory that the public interests, which they are supposed to represent, require such seizure and appropriation. Under our government, private property cannot be taken for any other than public uses; vested rights can be made to yield only to the public necessities; railroads are held to be such necessities, and it is solely on this ground that their construction has been encouraged by liberal grants of power, and aided by private and public contributions.

As *quasi* public instrumentalities, organized to promote the public good, they are, unless plainly and constitutionally exempted from such liability, amenable to such just regulations as the legislative department may choose from time to time to prescribe. All laws deemed necessary to insure good faith in the exercise of their franchises, or to enforce an honest, impartial and efficient dis-

charge of their legal duties and obligations, may be enacted; and, if the right has not been contracted away, the legislature may prescribe their schedule of charges, compel every necessary facility to the public and to individuals to the extent of their means, enact police regulations, limit the speed of trains, command the use of signals, and order or inhibit the doing of any and everything expedient to advance the general interest of commerce and intercommunication; insure safety to travelers, and generally to subserve the purposes of their creation, restricted only by the constitutional limitation that vested rights are not impaired without just compensation. They are as amenable to the unwritten (as it has been judicially expounded) as to the statute law. The first, and perhaps the most important, of these principles settled by judicial decisions is that railroad companies, as common carriers, are bound, to the extent of their corporate means, to supply all the accommodations and facilities demanded by the regular and ordinary business of the country through which they pass. Railroad carriage has in a large measure superseded every other means of inland transportation. Everybody, whether they will or not, is forced to patronize them. And as they were created to subserve the public good, and undertook to carry persons and property, they are, if able, bound to supply every facility needed for that purpose. They must keep pace with improvements in machinery, furnish easy access to and egress from their trains, stop at convenient points for the admission and exit of passengers, make adequate provision and tender suitable cars to carry on the business offered, and generally to carry passengers and freight, and from time to time adapt their rolling stock and equipment to the varying necessities of advancing civilization and approved methods of doing business. And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. If derelict in the performance of any one of the obligations imposed by law, they may be quickened thereto by the mandatory power of the courts, or compelled to surrender their franchises which they thus refuse or neglect to exercise in the spirit of their several charters.

§ 1508. *Railway cannot refuse to carry for an express company, after the peculiar methods of express business.*

But the defendants deny that any one or all of the foregoing familiar principles reach and control the question in this case. Its position, as we understand it, is that, notwithstanding it is a *quasi* public instrumentality, it is also private property belonging to defendant, and that it is ready, able and willing, and now offers, to render to the public every service which the public has a right to demand, including the carriage of express matter over its road, and protests that complainant has no legal right to use its road against its wishes and in the manner claimed, and, by a forced use thereof, enter into competition with it in the carriage and delivery of express freight. At first blush this position seems to be well taken, but, on further consideration, is found to be more plausible than substantial. As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons. The proposition, as it is stated, will not be controverted. Defendant cannot and does not deny its obligation to carry for the complainant. Its claim is that it is only bound to carry for the complainant when complainant, like other forwarders, delivers its freight into its care and custody, to be handled, transported and delivered by it through its own agents and servants; that complainant has no legal right to demand and enforce the use of defendant's passenger trains for the purpose of carrying freight in the special keeping of

its own employees, to be by them handled *in transitu*, and delivered at way stations and other places of consignment, and to have provided therefor special accommodations, such as have been heretofore supplied to it under special contract. It is upon this point the contest is to turn.

The issue is not, therefore, whether the defendant is bound to carry for the complainant, but can it be compelled to carry in the manner and with the divided responsibility proposed? Herein lies the novelty and importance of the question. No such question could have well arisen a half a century ago, because the methods of doing business and the facilities then provided for inland transportation were not such as to raise it; but we have made wonderful progress since that time in physical as well as mental development, and no instrumentality subject to man's service has been more potential in bringing about the change than railroads. They are as potential in peace as in war. We now have about ninety thousand miles of railway in the United States, which cost more than \$3,000,000,000, employing not less than four hundred thousand persons, and yielding more than \$500,000,000 of annual gross earnings. Their rapid transit has made luxuries, which, but for the facilities afforded by them, would be unknown in the interior land-locked localities of this great country, possible to the most remote sections. Tropical fruits, fish from the oceans and lakes, and oysters from the bays, are now, through the co-operative energies of the railroads and express carriers, within the reach of almost every community. These facilities making possible and suggesting corresponding changes in the methods of business, and gradually, but certainly, working changes in the habits and tastes of the masses of our people, have opened up the way for and called express transportation into use. The duties and office of railroads and express carriers are widely different and totally distinct. The former was created to furnish motive power and to receive, carry and deliver such freights as are appropriate to such a mode of transportation. But the legislatures, granting railroad charters, with perhaps few exceptions, never contemplated nor expected them to carry money, gold or silver bullion, bonds, bank-notes, deeds and other valuable papers, jewels and other small articles of great value, fruits, fresh meats, fish, oysters, or other like commodities liable to rapid decay, or live animals requiring special care and attention during their transportation; nor are railroad companies authorized by their charters to receive notes, drafts or other choses in action for collection and return of proceeds, nor to receive and forward freight with the bills and charges of the forwarder attached, to be collected from the assignee on delivery and returned to the shipper, and in connection with such business to afford to the public, under a single contract, and on assured responsibility, safe, reliable and speedy transportation from and to all points accessible by the use of two or more railroads; nor are railroads, under their charters, required to render such services. Much of the services rendered by express carriers, and appropriate to their peculiar functions, is not such as is by law imposed on railroads. If express carriers were ejected from the railroads, the latter could not be compelled to supply their places, and consequently the country would be without such facilities, unless the railroad companies would exceed their corporate obligations, and voluntarily undertake to do what they are not legally required to do, and to do many things which under their charters they have no right to do. As they are under no legal obligations to render such accommodations to the public, and could not be compelled to render them, they could, after ejecting the express carriers, monopolize the business, dictate oppressive rates, while affording less safety, celerity and

convenience to customers, as a substitute for the expeditious, reliable and necessary services of expressmen. The country would be dependent upon an illegal assumption of authority by railroads, an assumption in some respects in contravention of public policy, because it would enlarge their power and influence for controlling the business of the country, which, to say the least, is already sufficiently formidable.

§ 1509. *Nature of express business stated, and its established methods.*

But it is enough to say that railroad companies were not created to do an express business, are not suited to such service, possess no legal capacity to engage in it, cannot be required to undertake and perform it, and, I may add, ought not to be permitted to engage in these branches of the express business, *ultra vires* their corporate powers, if they would; and, as they are not legally bound to render express facilities to the country themselves, can they, by excluding the expressmen, deprive the public altogether of this necessary facility? Or else extort such concessions as the petty resentment or cupidity of their managers might prompt them to exact? We think not. On the contrary, if the express business, as we have hereinbefore asserted, has become a convenience to the general public, we think it the duty of all railroad companies, through their managers, and in the exercise of the trusts confided to them for the public good, to make proper provision for everybody wishing to carry express matter over their respective roads, as, in doing so, they would be accommodating the public, and fulfilling, to that extent, the object and purposes of their creation.

The express business, which had its inception as herein previously stated, now extends all over the states, is carried on by numerous organizations which meet the requirements of the several localities in which they do business, and occupies every railroad line in the country available for the purpose. They have an invested capital of over \$30,000,000, and the Adams and Southern Express Companies have in daily use and occupation twenty-one thousand two hundred and sixteen miles of railroad, employ four thousand two hundred and ninety-seven persons, make nine hundred and eleven daily trips over sixty-four thousand five hundred and sixty miles, aggregating nineteen million eight hundred and eighty-four thousand four hundred and twenty miles of travel annually. And for the transportation of their freights they pay the railroad companies over \$2,000,000 per year. It is further alleged, as showing the extent and magnitude of the express business, that these companies carried for the government \$1,200,000,000 in 1878, and \$661,000,000 in 1879, and for private parties, in the last-named year, the enormous sum of \$1,050,000,000, and that the Adams Express Company alone receives and disburses, in New York city, fourteen thousand packages daily, employing therefor, in connection with their general business, nine hundred and eighteen horses, with the necessary number of wagons.

From this summary it will be seen that the express carriage of the country is only second in importance to railroad transportation, and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity that cannot be dispensed with. It has attained its present enlarged usefulness under the fostering care of the railroads themselves, including the defendant company. It is profitable to the railroads and useful and convenient to the public. The right of the public to have quick, reliable

and safe carriage of goods through expressmen has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage. If legitimately within the scope of their charters, it is a legal duty imposed by law upon them. Endowed with extraordinary privileges, to enable them to fulfil the purposes of their being, they may be coerced to adapt their accommodations to the varying wants and necessities of general trade. They must keep abreast with advancing thought as well as with mechanical development. If they are under legal obligation to attach a Westinghouse air-brake or a Miller platform, as insuring greater safety to employees and passengers, they are likewise bound to adapt their facilities for transportation to the growing demands and conveniences of trade. Such requirements can work no injustice to them, and is no invasion of their vested rights. For such improved service they are entitled to compensation to the extent of the maximum allowed by their respective charters. No express carrier can lawfully demand the carriage of his goods without paying reasonable rates therefor. The carriage of such freights is in the strict line of railroad duty; it is a class of business that pays well, and such as the railroads have heretofore sought after. And if the custody of the freights is retained by the express carriers, the railroads will not be liable for anything more than the safe carriage of them. If they provide for the carrying and safely transport such freight, they will have done their full duty, and by doing this the railroads will realize the freight charges, and the expressmen will be enabled to fulfil their engagements and continue their business, keep up the continuity of their connections, and the public will be supplied with an indispensable facility, and no injury or injustice will be done to any one, unless it may be that railroad companies and railroad managers shall be deprived thereby of *incidental* profits and advantages to be obtained through unauthorized pursuits, and forced from the public by reason of the monopoly secured through the exclusion of lawful competition. We conclude, therefore, that upon the naked obligation which the law imposes on railroad companies, and without reference to the consideration to be hereafter adverted to, that the defendant is bound to render the services demanded by the complainant, and that this court, in the exercise of its judicial discretion, ought to require defendant to discharge its legal duty in this regard.

§ 1510. *A railroad company having carried express freight for many years cannot deny its duty to carry such freight.*

The second ground on which we think the relief prayed for may be granted is this: Complainant and the Adams Express Companies have for more than twenty years done business over the system of roads now directly and indirectly under the control of the managers of the Louisville & Nashville Railroad Company. By energy, fidelity, and the expenditure of a large amount of money, they have succeeded in building up and establishing a lucrative business over these lines, which constitute important links, securing continuity in their operations. They have trained and reliable servants, suitable chests, safes, wagons, horses and trucks, for collecting, transferring and delivering their freights, erected permanent offices and warerooms at various stations, established rapid communication and fixed and published a schedule of charges; and have a good and profitable, steady and reliable business, and an enviable and widely-advertised reputation; all of which has been accomplished, and the rights incident thereto acquired, under the friendly auspices of those who are now seeking to deprive complainant of the use of defendant's road. If de-

fendant possessed the legal right, which we deny, to refuse the accommodations which it has heretofore extended to the complainant, it ought not to be permitted to exercise it under the facts of this case. Defendant's long acquiescence in complainant's right to have transportation of its freight; the holding itself out for so long a time as the carrier of express matter; the encouragement it has always given to this class of business, considered in connection with the investments made and the rights of the public to such service, must, in our judgment, estop it from exerting its authority to exclude complainant, if it had any, at this time. A refusal to carry as heretofore for the complainant would inevitably do it great pecuniary injury, disserve its connections, cause it to lose the good will of its customers, and depreciate its valuable property and equipments along defendant's road — perhaps one-half. Complainant ought not to be held to be so dependent on the mercy of its adversaries and interested competitors, seeking to drive it from the field in order to insure a monopoly to themselves. Defendant responds, saying that hitherto complainant has occupied its road under and in virtue of special contracts, and it contends that complainant's enjoyment of the privileges thus granted confers nothing more than was accorded by these contracts. The position, in a qualified sense, is correct, but it is as equally correct that complainant lost nothing thereby. A farmer or other person wishing to ship one or more car-loads of stock or grain, or other commodity, may, with a view to convenience, specially contract for a car or cars suitable for the particular purpose, to be furnished at a specified time and place, and for such other facilities as he may need, but his doing so is no surrender of his legal rights, existing independently of contracts or special agreements, to demand of a railroad company the shipment of all suitable freight tendered for the purpose. The same principle is applicable here. It was altogether proper that the complainant and defendant, in view of the magnitude of their business, should by special contract stipulate for the facilities to be furnished by the one to the other, and fix the terms and conditions upon which the business should be done, but no right arising to the complainant from public considerations, or the charter obligations of the defendant, was thereby waived. These contracts were in affirmance of the pre-existing legal rights of the complainant, and an admission by the defendant that the business proposed was within the scope of its duties and reasonably remunerative. It was in the reliance upon these rights conferred by law and public considerations, and thus recognized by defendant, that the complainant made the investments mentioned, and built up and established its said business, and it would be no less than a fraud upon it for the defendant to exclude it from all further use of its road, rob it of its established extensive and profitable business, and transfer it to another or appropriate the business to itself. It will not be permitted to perpetrate such injustice.

But we do not wish to be misunderstood. The fact that the complainant has preoccupied the defendant's road confers no priority of right. The defendant, to the extent of its corporate authority, the Union Express Company, and all other persons or companies wishing to engage in the carrying of express matter over defendant's road, can enter upon that business on equal terms with the complainant. Neither the railroad companies nor the courts can discriminate in favor of one or more parties as against others. All are entitled to the same measure of accommodation who may offer to do the like business, and it is the duty of the courts to enforce, whenever applied to, this legal rule of impartial justice. We have no disposition to discourage or hinder any one from enter-

ing into competition with complainant. The more of them the better it will be for the railroads, as well as for the public. The railroads will thereby have more business, and the public will be better protected against exorbitant prices and the exactions of aggregated wealth and business combinations. Equal protection to all will do this. It can, however, never be attained by taking the fruit of one man's labor and giving it to another. Antagonisms between railroads and the public exist more or less in every locality, and are too often manifested in the verdicts of jurors, unjust legislation and various other ways. This is to be regretted, but the surest way of counteracting these popular resentments is to require the railroad companies and their managers to keep within their legitimate spheres, and compel them, in good faith, to administer the trusts confided to them for the public good. This court is as ready to protect railroad companies in the full enjoyment of their franchises, and against the injustice mentioned above, as it is solicitous to compel them to do their full duty to the public.

Judge Treat, of Missouri, Judge Gresham, of Indiana, and Judge Woods, of the fifth circuit, indicated the bent of their minds by granting restraining orders similar to the order issued in this case. I have consulted two of the district judges of this circuit, who concur in the conclusion herein announced. Justice Harlan, as I understand his recent decree, decided the same question in the same way, and the associate justice assigned to the circuit, on being requested, a few days since, to sit with me on the hearing of this motion, said that he had great confidence in the learning and accurate discrimination of Justice Harlan, and that he had no idea that he would, after investigation of the question, dissent from the decision made by the former. These intimations and concurrent views, coming from so many and such high sources, have very materially strengthened the convictions which I have myself entertained in relation to the questions involved. I shall follow the ruling of Justice Harlan, and continue the restraining order until a final hearing can be had. The same decree will be entered in the case of *Adams Express Co. v. The Louisville, Cincinnati & Lexington R'y Co.*

ORDER.—The motion of the complainant for a preliminary injunction herein, according to the prayer of the original and supplemental bill herein, having been brought on to be heard, and counsel for the respective parties having appeared and been heard, and the court having duly considered the questions involved, does hereby order that a preliminary injunction issue herein restraining the said defendant, its agents, officers and servants, during the pendency of this suit, from interfering with or disturbing in any manner the enjoyment by the Adams Express Company of the facilities now accorded to it by the said defendant upon its lines of railway, for the transaction of the business of the said Adams Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Adams Express Company, and from excluding or ejecting any of its express matter, or messengers, or employees from the depot, cars and lines of said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Adams Express Company, and from refusing to receive and transport in like manner as the said defendant is now doing, over its lines of railway, express matter and messengers of the said Adams Express Company; and from interfering with or disturbing the business of the said Adams Express Company in any way or manner whatsoever; and from refusing to permit the

Adams Express Company to continue the transaction of its said business over the lines of the defendant, on the same terms, conditions, privileges, facilities and accommodations as are or may be permitted or accorded to any other express company, or to or by the defendant itself, in the conduct of an express business over its railway lines, upon the payment by the said Adams Express Company of all lawful and reasonable charges which may be properly demanded by the said defendant, or paid by such other express company, or by the public, to the defendant therefor, not in excess of the rates authorized by its charter, and not in excess of the rates charged to others for similar services, and not in excess of the rates charged and received by the defendant from shippers of express matter, to be carried by the defendant as such. In the last case, less the reasonable costs of the accessorial service rendered off the railway lines and at the stations and on the trains of the said defendant, and with liberty to the parties to make such further application herein to the court as they may be advised is necessary to fix what is and shall be a lawful or reasonable compensation, or for any other matter growing out of the case. In the event of a dispute between the parties pending a preparation of this cause, as to what is reasonable compensation for the services performed by the defendant company for complainant, and what is a reasonable rebate to be allowed by the defendant for said accessorial service, such difference shall be referred to the court, after due notice; and pending such reference the complainant shall not be disturbed by the defendant in the transaction of express business over its line.

SOUTHERN EXPRESS COMPANY v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

(Circuit Court for Colorado: 3 McCrary, 147-156. 1892.)

STATEMENT OF FACTS.—There were a number of suits brought by plaintiff in the above named cause and other express companies against defendant and other railroad companies, which were heard together. The railroad companies had notified the express companies that their respective contracts for transportation would be abrogated, etc. The prayer of the bills was that the railroads be required to transport over their roads the express matter and messengers of the plaintiffs by the same trains and with the same accommodations afforded to the express matter and messengers of the railroads.

Opinion by MILLER, J.

In these cases, argued before me at St. Louis with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel.

§ 1511. *Express business defined; obligation of railway to transport after express methods.*

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized; that while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; that the object of this express business is to carry small and valuable packages rapidly in such a manner as not to subject them to the danger of loss and

damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it; and to refuse permission to this agent to accompany these packages on steamboats or railroads in which they are carried, and to deny them the right to the control of them while so carried, is destructive to the business, and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger the railroad company is no longer liable to all the obligations of a common carrier, but that, when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances, there does not exist, on the part of the railroad company, the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyances by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business. If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but, until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation, and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

§ 1512. — *a court of equity may compel the performance of the service.*

7. I am of the opinion that a court of equity in a case properly made out has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use, necessary to that end.

8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered to ascertain the necessary compensation and compel its payment.

§ 1513. *How compensation for express service should be fixed.*

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train [road], would be to enable them to defeat the just rights of the express company, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty I think that the court can assume that the rates or other mode of compensation heretofore existing between any such companies are *prima facie* reasonable and just, and can require the parties to conform

to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals and claim an addition to or rebate from the amount so paid; and, to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. Where no such arrangement has heretofore been in existence it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

§ 1514. *Construction of statutes of Missouri and Arkansas in this connection.*

12. I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

SOUTHERN EXPRESS COMPANY v. L. & N. RAILROAD COMPANY.

(Circuit Court for Tennessee: 4 Federal Reporter, 431-437. 1880.)

Opinion by KEY, D. J.

In the investigation of this case I have come to no conclusions different from those announced by the circuit judge of this district in another controversy between the same parties in respect to the relations, duties and general course of dealing between railroads and express companies. I am content to follow his rulings, so far as they are relevant to this suit, and shall enter upon no reiteration of the doctrines he has asserted.

§ 1515. *The conduct of the express business is no duty of a railway.*

The conduct of the express business is no part of the duty of railroads. Until within a recent period there has been, in this country, no effort on the part of railroads to carry it on. They have been content not only to permit this business to be done over their lines by others, but have fostered it, by the terms allowed and opportunities given, until it has grown into a distinct, separate and organized branch of general business, different in its methods and characteristics from the natural and legitimate transactions of railroads.

§ 1516. *A railroad company doing an express business cannot discriminate in its own favor against other express companies.*

Expressage has grown into a public necessity. The idea cannot now be entertained that railroads directly, or by indirection, can trammel or destroy express enterprises by excluding express companies from their lines, or by fettering them with unjust regulations or unfair discriminations. Nor can a railroad assume to itself the exclusive right or privilege of carrying on the express business over its own lines or any portion of them. I do not undertake to say that a railroad may not undertake to act as an expressman, but if it should undertake to do so, it must do it as an expressman and not as a railroad. It is no part of its duty or privilege as a railroad. If, then, in the conduct of its business as expressman, its duties, relations and operations be different and distinct from those appertaining to it as a railroad, it must treat its express department as though it had a separate individuality from that of the railroad — as though it were a stranger to the railroad in so far as it relates to its transactions with other express companies. It must give to it no opportunities, advantages or privileges it does not allow to other express companies carrying on a like business. The very fact that the interests and rivalries of a railroad

doing such a business tempt its officers and employees to secretly discriminate in its favor, and that it has so many opportunities and advantages in the conduct of its operations to covertly discriminate in its favor as against the express company which may be the rival of the railroad on its lines, demands that courts must hold railroads which incorporate expressage as a branch of their business transactions to a strict and rigid impartiality, so far as it may be possibly done. In dealing with this case the Louisville & Nashville Express Company must be considered and treated by the railroad as though it were a company or person in nowise connected with or belonging to the railroad, in so far as privileges and advantages are given it. It must have no better treatment than a stranger company doing a similar business over its lines under like conditions. Both are to be regarded as customers of the railroad, and neither as being a part of it. If it be said that this is impossible, the reason for rigid enforcement, or as near an approach to an impartial administration of their affairs as may be, becomes the more imperative.

Are the principles herein stated observed in this case? Here are two companies doing an expressage over these lines. One belongs to the railroad operating the lines, the other does not. Have they equality of position and impartial terms? I think not. Let us see.

§ 1517. *A railroad company cannot exercise a supervisory control over the business of a rival express company.*

October 6, 1880, an officer of the railroad, denominated the general superintendent of the express department, issued this order: "*To Messengers:* Commencing with Monday, October 11, and until otherwise instructed by me, you will take a correct account of all matter carried by the Southern Express Company over the Selma Branch, Owensboro Branch, and the Mobile & New Orleans Railroad; this tally to include the contents of their safes and chests. If the Southern Express Company's messengers decline to give you a memorandum of the contents of their safes and chests, you must so note on the bottom of the tally sheet. We do not care for the name of the consignee of either money or freight. All we want is the articles, weight, or value, as the case may be."

Because the agents of the Southern Express Company refused to allow an inspection of the safes and chests, or to render a list of the contents, some of the agents of the defendant removed the packages from the train, or refused to carry them on the road. Thereupon this order was issued, dated October 12, 1880: "We must not refuse safes or closed chests because the Southern Express Company refuses to allow us to inspect the contents or to give us a list of contents; but each article offered to be carried is to be tallied by weight. But if several articles are inclosed in one closed chest or package, we must take them as one article. If they refuse to tally by weight, then refuse to carry the freight."

The superintendent of the express department of defendant says that "agents of the defendant were directed to ask the value of the contents of safes and weight of chests, and to place a value on safes if the agents of the plaintiff refuse to give the value."

Under these orders and regulations the agents of the express department of defendant, as such, were directed and required to exercise this supervision over and make these demands of the agents of the plaintiff, while the plaintiff or its agents had no corresponding or reciprocal right or privilege. It was the agents of defendant's express company that were required to thus supervise the plaintiff's transactions. The first order assumes the right of defendant's

express company to demand and require an inspection of the safes, chests and packages of the plaintiff, and the direction given, that if such inspection is refused, or the required memorandum furnished, the fact is to be noted on the tally sheet, indicates that further action of some sort is to be predicated upon this refusal. Nor does the order of October 12th oppose or deny this conclusion, but only directs that the chests must be carried notwithstanding the refusal; but, as the superintendent states, defendant's express agents were to place a value on the contents of the safes which they were not permitted to inspect, and of whose contents no memorandum was furnished. Without stopping to inquire whether the railroad, as such, could demand and enforce this supervision legally, it is enough to say that, according to the views herein expressed, it had no power to authorize and require that the rival and competitor of the plaintiff along and over its lines should exercise this superior prerogative over the business of plaintiff.

Again. It appears from the allegations of the bill, which, as to this, are not contravened or denied, that defendant took charge of these lines in June last, or before, and carried the agents and freight of plaintiff at the same rates and upon the same terms as had been done by defendant's predecessors, and continued to do so without objection or question until, without any notice, the order of 6th of October was issued and fare was demanded for plaintiff's messengers. Defendant says that it had no notice of the contract with its predecessors, yet it is reasonable to infer that some understanding, express or implied, had been existing between the parties in relation to the matter by which the rates had been fixed, and the terms and privileges established; and the continuance of these rates and privileges for several months by the defendant after it took control of the lines was, at least, so far an adoption of the terms as to demand some notice in advance to plaintiff of the contemplated change, especially when the railroad was the competitor of the plaintiff in the operations affected by the change.

The general manager of the defendant says: "Under present existing circumstances I would even say that the railroads and the Louisville & Nashville Railroad Company are able to do the express business better than any express company possibly could. This is due to the consolidation of railways into great through lines. For example, the through route between New York and New Orleans, *via* the Mobile & Montgomery Railway, is operated by two companies only, . . . whilst on the same through route small express companies are in existence. It would, therefore, only be necessary to have one interchange, if both railroads work their own express. Further, the railroad companies can, through their employees, to wit, agents at different stations, train men, baggage-masters, etc., do the express business at lower rates and with much more satisfaction to the public than any express company could, as in many cases the railroad companies have not to employ several employees to do the express business. When the express companies were first established they were a matter of convenience, caused by the many railway companies of short distances between important points, where innumerable interchanges of business would have to be made, and it would have been inconvenient to manage this business by each company separately on its own line. It was then that, in conjunction with the railways, the express lines and fast through freight lines were permitted to come on railways under special, and in most cases exclusive, contracts, giving them all possible inducements to establish through routes for fast freight or express business between grand commercial

centers, thereby fostering interstate commerce. These express companies have, under the existing exclusive contracts with the railway companies, been enabled to establish, not only a through business, but to make large and profitable returns to the stockholders. But under the present system of consolidations of innumerable small companies into grand through lines, the necessity no longer exists, and for the aforesaid reasons the railway companies are much better able to do the express business themselves than any express company could, and the public will be vastly benefited thereby. The exclusive contracts which were originally granted to the different express companies, and which they have heretofore enjoyed, were granted merely for the reason that no two or more could have been allowed to come on one road, because the railways would not have been able to give them both the same facilities in space and in attendance, and it would be a matter of impossibility for any railway company to work its express business by more than one company to any advantage to the railway company, the express company or to the public. More than one express company would increase the expense to the railway company in such a material way that very different terms would have to be made and compensation asked than their former exclusive contracts specified, as in most cases an additional car would have to be hauled for each company on the fast passenger trains which carry the United States mail, and which, with the present condensed fast schedules and time cards, it would not be possible to do, except by providing specially constructed machinery for the purpose, as we would, with the present facilities we have, delay the mails and cause inconvenience to the passengers and the public at large; when, in point of fact, a great many of the large railway companies of this country have already dispensed with fast freight lines and express companies on their different systems, and are now doing their own express business to the best satisfaction of themselves and the public. The railway companies are able to give as satisfactory attention to the collection, transmission and delivery of express matter as the express companies can possibly give. The Louisville & Nashville Railroad Company is now doing its own express business, and meeting all the demands of the public for express accommodations."

This long quotation has been given that the theory of defendant on this question may be understood. Concisely stated, it is that when it was inconvenient for railroads to do express business, express companies were fostered and encouraged by them; but that now, as the business had become profitable, and railroads could conduct it conveniently, and as no railway could allow two express companies on its line, the railroad companies should monopolize the entire business on their lines, and, as some great lines had already done, dispense with the express companies and do the business themselves. Now, if in the field of fair competition the railroad has the advantages over express companies which are so forcibly stated by the general manager of defendant, and if, as he states, express companies had been encouraged and fostered by railroads until it had become a profitable business, making large returns to their stockholders, it would be unjust and most inequitable to allow railroad companies now, by unfair preferences or the assumption of superior power and authority, to drive them from their lines that the railroads might do the business. Under the views I have taken of this case a preliminary injunction must be awarded, continuing, until the further order or decree of the court, the provisions of the restraining order heretofore granted in the case.

SOUTHERN EXPRESS COMPANY *v.* MEMPHIS, ETC., RAILROAD COMPANY.

(Circuit Court for Arkansas: 2 McCrary, 570-575. 1891.)

STATEMENT OF FACTS.—This bill was filed by the Southern Express Company to enjoin the defendant from discriminating against plaintiff and in favor of itself or any other express company, the railway company having assumed to act as a carrier of express matter. The bill complained of vexatious and oppressive regulations, intended to harass the plaintiff and drive it out of the business of carrying express matter over defendant's road. A preliminary injunction had been granted and the case was heard on a motion to dissolve it, and also on a motion to modify it.

Opinion by McCRARY, J.

I. I will consider first the motion to dissolve the injunction. This is urged upon two grounds, to wit: 1. That the railroad company is by its charter possessed of the exclusive privilege of conducting the express business over and upon its own road; and 2. That even if this were not so the express company has no right to carry on its business upon said road without the consent of the railroad company. Does the charter of the respondent railroad company confer upon it the exclusive right to carry on the express business upon its own road? The answer to this question depends upon the construction of the sixth section of said charter, which provides as follows: "The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise or produce over said railroad by them to be constructed."

This language must be construed in the light of the history of the construction of railroads in this country. When first introduced they were regarded only as improved highways subject to be used by the general public. It was thought that any person ought to have the right to place his vehicle upon the track of a railroad, and to transport his own freight upon it, upon paying toll for the use of the track, and it was considered necessary, in order to limit the use of the road, and to give a particular person or company the exclusive right to operate it, that such exclusive right should be expressly reserved by law. It was for this purpose that clauses substantially like the one above quoted were inserted in very many of the earlier, and not a few of the later, railroad charters. Experience very soon demonstrated that it was not practicable to apply to the system of railways all the principles that obtained in defining and regulating the rights of the public with respect to the common highway. Certain innovations were necessary; certain exclusive privileges were inevitable in order to secure safety and celerity in the transportation of persons and property by the use of cars and steam-engines. One of the first of these to be generally recognized was the necessity that the operation of every railroad should be under the control of a single head. It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or, in other words, the exclusive right of transportation and conveyance of persons and property over their tracks. An examination of the railroad charters adopted by the various legislatures of the Union will show that this provision has been inserted in nearly all of them in one form or another. It was never intended to apply to or determine such a question as that now under consideration. It gives the railroad company the exclusive right to place cars on the track and operate them for the transportation of persons, goods, wares and merchandise. It gives no

other or greater exclusive right. It follows that the question whether the railroad company has the exclusive right to carry on the express business upon its line, and the right to eject the complainant, must be determined independently of this provision. This brings us to the question whether the express company may, as a matter of right, carry on its business upon the respondent's road? Substantially this question has recently been considered by several of the courts of the United States, and it has been uniformly held that it is the duty of the courts to maintain such right, by granting a preliminary injunction, at least, until there can be a final hearing upon the merits. Such has been the ruling of Mr. Justice Harlan on the circuit; of Judge Baxter, of the sixth circuit; and of District Judges Hill, Gresham, Treat, Hallett and Caldwell. I am of the opinion that these decisions are sound in principle, as well as of great weight as authority. They will be followed unless the supreme court shall otherwise decide. The guiding principles running through them all, and which should govern in determining the respective rights of the parties, are these:

§ 1518. *A railroad company is bound to carry the property of all persons alike, without unjust discrimination.*

1. A railroad company is a *quasi* public corporation, and bound by the law regulating the powers and duties of common carriers of persons and property.

2. It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms.

§ 1519. *A railroad company must carry express matter without discrimination in favor of any company.*

3. The business of expressage has grown into a public necessity. It is the means whereby articles of great value may be carried over long distances with certainty, safety and celerity, being placed in the hands of a special messenger, who is to have the charge and care of them *en route*. The railroad companies must, in common with the public, recognize the necessity for this mode of transportation, and must carry express packages and the messenger in charge of them for all express companies that apply, on the same terms, unless excused by the fact that so many apply that it is impossible to accommodate all—a state of things not likely to occur. If it be said that this is giving to the express companies privileges not afforded to other shippers, the answer is that the nature of the express business makes special facilities for its transaction necessary, and the case is, therefore, properly exceptional.

§ 1520. *If the railroad company may carry on an express business at all, it must do so on terms of equality.*

4. It is not necessary now to determine whether the respondent railroad company may, under its charter, engage in the express business, and undertake to carry and deliver express packages beyond its line. It is enough for the present to say that if it possesses the right to engage in this business at all, it must do so upon terms of perfect equality with all other express companies, and the court will see that it does not take to itself any privileges in this regard that it does not extend to complainant. The motion to dissolve the injunction is overruled.

II. What has been said virtually disposes of the questions raised by the supplemental bill. The railroad company is bound to carry for the express company for a reasonable compensation, and must not discriminate against it. A court of chancery has power to decree a compliance with this wholesome regu-

lation. This court cannot for a moment sanction the proposition that the railroad company may, by extortion or unjust discrimination, exclude the express company from the right to conduct its business upon their railroad. I am not prepared now to fix the maximum rates to be charged for the transportation of express matter, but I have no doubt of the power of the court, after investigation, to do so. An order for this purpose should not, as a rule, be made until after a reference to a master and a report by him after a hearing. For the present, the injunction hereinbefore allowed will be modified so as to enjoin and restrain the respondent from charging the complainant for the transportation of express matter, including closed packages, more than a fair and reasonable rate—such charges in no case to exceed the rate charged upon similar express matter to itself, or to any other express company, or for similar express matter received from or delivered to the Iron Mountain, etc., R. Company Express, or the Pacific Express Company. Ordered accordingly.

§ 1521. Statute restrictions, etc.—An act of congress forbidding the establishment of private expresses to carry mail matter is constitutional. *United States v. Thompson*, * 9 Law Rep., 451.

§ 1522. The carrying of letters, whether free or for a charge, by private express, other than such as relate to an article carried therewith, is a violation of the act of congress (act March 3, 1845, § 9) forbidding such carriage of letters on mail routes. *Ibid*.

§ 1523. Texas statutes as to maximum rates upon freights and passengers held not applicable to express carriers. *Texas Express Co. v. Texas, etc., R. Co.*, * 6 Fed. R., 426.

§ 1524. Liability of express companies.—Where a note, by its alteration, becomes a forged note, and is delivered to an express carrier by the forger, the express carrier is not responsible to the bank to whom it is sent to be discounted for its genuineness. Nor is he liable to the bank for delivering the proceeds of the note in good faith to the party employing him in this transaction, who styled himself A. B., when one A. B., not known to the carrier, was in reality the one meant by the bank as payee. *Norwalk Bank v. Adams Express Co.*, * 4 Blatch., 455; S. C., 19 How. Pr., 462.

§ 1525. A. shipped a quantity of bulky articles on a railroad, consigned to himself, taking the receipts of the railroad company, on which he marked "deliver to B." He then drew a draft on B., which, with the receipts, he delivered to an express company for collection. The depot agent at the point of destination was also the express agent, and, on ascertaining that the goods were to be delivered to B., he so delivered them, and, as express agent, demanded payment of the draft. The draft, not being paid, he returned it. Held, that the railroad company was not bound to hold the goods until the draft was paid, and that the express company never had possession of the goods, and of course was not liable. *Bland v. Southern Express Co.*, * 1 Hughes, 343.

§ 1526. If a carrier receives goods from A., as the agent of B., with the information that they are the property of B., consigned to A.'s firm in another place, and, without the consent of B., delivers the goods upon the order of A., at the place of shipment to a third person, it is liable to B. for the value of the goods. *Southern Express Co. v. Dickson*, 4 Otto, 549 (§§ 865-870); S. C., 15 Alb. L. J., 491; 23 Int. Rev. Rec., 228. See § 740.

§ 1527. Special stipulations.—An express company may lawfully stipulate for immunity from loss or damage to a package unless claim is made within ninety days from delivery. *Express Co. v. Caldwell*, 21 Wall., 264 (§§ 254-262). See § 126.

§ 1528. Or that, unless a greater value be expressly stated in the receipt, the carrier's liability for trunk and contents shall be limited to \$50. *Muser v. Holland*, 17 Blatch., 412 (§§ 249-253); *Earnest v. Express Co.*, * 1 Woods, 578. *Contra*, *The Steamboat City of Norwich*, * 4 Ben., 271.

§ 1529. Special property in articles carried.—An express company, from whose custody obligations of the United States known as seven-thirty notes, issued under the act of March 3, 1865, have been stolen, has a special property in the obligations and may recover their value from one who bought them after maturity. *United States v. Vermilye*, 10 Blatch., 280.

§ 1530. Connecting express carriers.—Where an express company receives a money package for a point beyond its own route, this is *prima facie* evidence of a contract to carry it through, succeeding carriers being its agents. There must be a special contract or a well-established usage shown to change this rule. *St. John v. Express Co.*, * 1 Woods, 612; S. C., 10 Am. L. Reg. (N. S.), 777.

§ 1531. Usage as to sealing and securing valuable packages considered. Any rule in this respect, in order to charge the customer whose money package has been stolen or lost, while the rule was disregarded, must have been settled and uniform, and brought to such customer's knowledge. *Ibid.*

§ 1532. Whether the customer has violated such rule or not, if the principal express company or one of its agents in the connecting transportation has recovered the whole or part of it, the customer may demand it and sue the principal company for its non-delivery. *Ibid.*

§ 1533. Relation between express and carrier by water.— A carrier by water, who has given his facilities to one express company, is not bound to carry as a passenger one who travels to transact a rival express business on his vehicle. *The D. R. Martin*, 11 Blatch., 233 (§§ 1851-53).

§ 1534. Contract between an expressman and a carrier by water as to the terms of carriage of specie cannot defeat the real owner's right to sue the carrier in admiralty for a loss of the specie. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., 344 (§§ 220-242).

§ 1535. If a carrier by water makes a special contract with an expressman limiting the carrier's liability for the transportation of specie, the real owner may sue for a loss, as upon such contract, instead of suing the expressman. *Ibid.* But see legislation, *supra*, IV, 1.

§ 1536. Relation between railway and express company.— A railroad company, as a common carrier, may participate in the accessory business performed off the rails by means of horse power in collecting freights at the doors of consignors and in making deliveries at the doors of consignees, but not to the extent of a monopoly of the business. *Camblos v. Philadelphia*, etc., R. Co., * 9 Phil., 411.

§ 1537. The contract of a railway with an express company construed. An express company may contract for such room daily on trains as may fairly be furnished, but not so that the railway shall be disabled from serving others equally entitled to its facilities. *Texas Express Co. v. Texas*, etc., R'y Co., * 6 Fed. R., 426.

§ 1538. As between a railroad and an express company employing it, the former is a carrier and the latter a shipper. It is a violation of the express company's rights for the railroad company to refuse to carry the safes and chests of the former, unless it is allowed to open the same and inspect the contents, or unless it is furnished by the express company with an inventory of the contents, with the understanding that the railway company may open the safes and chests and inspect their contents whenever it sees fit, and also unless it is permitted to collect the freights on each separate article or parcel as if it had been shipped by itself. *Dinsmore v. Louisville*, etc., R. R., * 8 Fed. R., 598.

As to Charter-Parties, see **MARITIME LAW**.

Limitation of Liability of Ship-Owners, see **MARITIME LAW**.

Liability for Injuries, see **TORTS**.

See **BAILMENT**, §§ 2, 21, 84.

See **CONSIGNOR AND CONSIGNEE**.

CARRYING THE MAIL.

See **POST OFFICE**.

CASE.

See **ACTIONS, VIII**.

CASHIER.

See **BANKS, IV**.

CATTLE.

See **ANIMALS**.

CAUSE OF ACTION.

See ACTIONS, III.

CAVALRY HORSES.

See WAR.

CAVEAT.

See PATENTS.

CAVEAT EMPTOR.

See LAND; NOTICE; SALES.

CEDED TERRITORY.

See GOVERNMENT.

CENTENNIAL BOARD OF FINANCE.

§ 1. Pursuant to the provisions of the acts of 1872 and 1876, the Centennial Board of Finance was required to pay into the treasury of the United States the sum of \$1,500,000, before any division of the assets could be made among the stockholders in satisfaction and discharge of the capital stock. *Eyster v. Centennial Board of Finance*,* 4 Otto, 500.

§ 2. The act of 1871 authorized the appointment of the board of commissioners, which was afterwards, by the act of 1872, incorporated as the "United States Centennial Commission." The duty of this board was to prepare and superintend the execution of a plan for holding the exhibition. That of 1872 was specially intended to provide a way by which the people could procure the necessary funds. It was so expressly declared in the preamble; and for that purpose the Centennial Board of Finance was incorporated, with apt provisions for subscription to and sale of its capital stock, and for the control and management of its affairs. The proceeds of the stock, together with the receipts from all other sources, were to be used by this corporation for the erection of buildings with their appurtenances, and for all other expenditures required in carrying out the objects of the act of 1871. Then, by section 10, it was provided "that, as soon as practicable after the said exhibition shall have been closed, it shall be the duty of said corporation to convert its property into cash, and, after the payment of its liabilities, to divide its remaining assets among its stockholders, *pro rata*, in full satisfaction and discharge of its capital stock." Afterwards came the act of 1876, which made the appropriation now under consideration, "to complete the . . . buildings and other preparations," and directed its payment to the president and treasurer of the Centennial Board of Finance for that purpose, but which contained a proviso "that, in the distribution of any moneys that may remain in the treasury of the Centennial Board of Finance after the payment of its debts, as provided for by the tenth section of the act of congress approved June 1, 1872, incorporating the Centennial Board of Finance, the appropriation hereinbefore made shall be paid in full into the treasury of the United States before any dividend or percentage of profits shall be paid to the holders of said stock;" and "that the government of the United States shall not, under any circumstances, be liable for any debt or obligation of the United States Centennial Commission or the Centennial Board of Finance, or any payment in addition to the foregoing sum." *Ibid*.

CERTIFICATE OF DEPOSIT.

See BANKS, X.

CERTIFIED CHECKS.

See BANKS, VI; BILLS AND NOTES.

CERTIORARI.

See APPEALS AND WRITS OF ERROR, XXVI; WRITS.

CHAMPERTY AND MAINTENANCE.*

SUMMARY—*Assigning debt after suit brought, § 1.—Agreement to collect claims for a share of the proceeds, § 2.—No defense to a suit, § 3.—Whether common law rules in force, §§ 4, 5.*

§ 1. There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against maintenance and champerty; nor will a want of a full money consideration, as between father and son, and brother and brother, subject the transaction to such imputation without further proof. *Lewis v. Bell*, §§ 6, 7.

§ 2. The defendant was the owner of letters patent for an improvement in trucks for railroad cars, which patent had been infringed by a large number of persons. The defendant, being entitled to recover divers sums of these infringers, entered into a written agreement with the plaintiff, the terms of which conferred on the plaintiff the exclusive right to control these claims and collect the same by suit or compromise, the latter to bear all the expenses of such collection, except that in case of failure to recover in any suit the defendant was to bear the costs. The plaintiff was to receive and retain as his compensation and for all his expense and time one-half of the amount collected. The rights which this agreement purported to vest in the plaintiff were to survive to his executors and administrators in the event of his death before the completion of the business of collection, and, in the event of the death of the defendant, they were to be confirmed against his heirs, executors and administrators. The plaintiff was given an irrevocable power of attorney to sue in the defendant's name. The contract was held to be void at common law for champerty and maintenance. That the plaintiff did not agree to indemnify the defendant against taxable costs, made no difference. It was also held to be immaterial that the contract was made in New York, where the common law doctrines of champerty and maintenance were almost swept away, inasmuch as the contract was to operate in other states in which such doctrines were in force. Such a contract, if barely valid at law, a court of equity would not uphold. *Grégerson v. Imlay*, §§ 8-10.

§ 3. The maker of a promissory note cannot avoid payment thereof, or prevent a recovery thereon, by showing that the agreement between the holder of the note and his attorney, under which the suit is prosecuted, is champertous and void. *Courtright v. Burnes*, §§ 11-16. See §§ 31-34.

§ 4. The tendency of the courts in this country is strongly in the direction of relaxing the common law rules concerning champerty and maintenance, so as to permit greater liberality of contracting between attorney and client. *Ibid.*

§ 5. The common law doctrine of maintenance and champerty prevails in Missouri. *Ibid.*

[NOTES.—See §§ 16-35.]

*Edited by THEODORE B. WALLACE, Esq., under the supervision of the general editor.

LEWIS v. BELL.

(17 Howard, 616-619. 1854.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The subject-matter in dispute in this case is a sum of money in the hands of the secretary of the treasury, which had been awarded to the appellant by the commissioner appointed under the act of congress (9 Stats. at Large, 422, 606) to adjust claims under the treaty (id., 971) between the United States and Brazil. Stephen J. Lewis, deceased, is admitted to have been the original owner of the claim. He was owner of one-fifth of the brig Caspian, which was illegally seized by the Brazilian squadron in October, 1827, and condemned. Lewis was on board at the time, and was robbed of his baggage and money to the extent of some \$4,000. The whole amount awarded on these claims of Lewis was \$11,551. Isaac Bell, senior, the father of the appellee, had an assignment of this claim from Lewis by deed of assignment, dated November, 1828. The claim was prosecuted to its final recovery in 1852, by Isaac Bell. But having, in the meanwhile, lost or mislaid his original deed of assignment, and not having sufficient legal proof of the copy, the commissioner awarded the money to the administratrix of Lewis.

Isaac Bell, senior, assigned his right to his son, Isaac Bell, Jr., and he soon after assigned to his brother, the appellee, who instituted this proceeding in the circuit court of the District of Columbia under the provisions of the act of congress of July 3, 1852. 10 Stats. at Large, 11. After the institution of this suit the original assignment was accidentally discovered and has been satisfactorily proven. The court below awarded the money to the complainant below, and the administratrix of Lewis has taken this appeal. The objections to the title of Edward R. Bell, as champertous, collusive and fraudulent, and made for the purpose of using the father as a witness, are wholly unsustained by any evidence.

§ 6. *The assignment of a chose in action from father to son is not champertous.*

There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against champerty and maintenance (see Story's Eq., 1049, 1054), nor will the want of a full money consideration, as between father and son, brother and brother, subject the transaction to such imputation without further proof. The father's testimony was not offered by the appellee in this case; we are not, therefore, bound to notice the question of its admissibility or the policy of permitting assignments for the purpose of making the assignor a witness, on which so much of the argument of this case was expended.

It is contended, also, that the assignment of Lewis to Bell, senior, is not absolute, but a security, only, of some debt which has been satisfied, and that it is voluntary and imports a trust between the parties. The deed of assignment, after a recital of the capture of the brig Caspian and the claim preferred by the American minister at Brazil, on behalf of Lewis, for indemnity, proceeds as follows: "Now know all men by these presents, that the said Stephen J. Lewis, for and in consideration of the sum of one dollar, lawful money of the United States, to him in hand paid by Isaac Bell, of the city of New York, merchant, the receipt whereof is hereby acknowledged, and also for divers other good considerations him thereunto moving, hath granted, bargained and sold,

assigned, transferred and set over, and by these presents doth grant, bargain and sell, assign, transfer and set over, unto the said Isaac Bell, his executors, administrators and assigns, all and singular, the said claim and all the sum and sums of money that may be recovered or received of and from the said Brazilian government, or of and from whomsoever it may concern, for or by reason of the said illegal capture, or which may arise from the proceeds of the said brig Caspian and cargo; to have and to hold the same and every part and parcel thereof, unto him, the said Isaac Bell, his executors, administrators and assigns, forever," etc., etc.

This is an absolute assignment of the whole claim of Lewis against the Brazilian government. Besides the consideration of \$1, it mentions "divers other good considerations," without specifying them particularly. The bill alleges that the real consideration was a large indebtedness of Lewis to Bell, which was never paid, Lewis having died in 1844, insolvent. This is denied by the answer. But the evidence, as far as it affects the point, tends to establish the correctness of the allegations of the bill. After the assignment Lewis does not appear to have interfered in the prosecution of this claim, up to the time of his death in 1844, nor did his administratrix set up a claim till the money was recovered in 1852.

§ 7. *The assignment of a chose in action "in consideration of one dollar and divers other good considerations" may be supported by showing ample and valuable consideration.*

In December, 1828, it appears that Bell transmitted this assignment to his agent in Buenos Ayres, in order to prosecute the claim, alleging that the "assignment was made by Lewis in consequence of advances made to him in the purchase of a brig and cargo." In the same year he wrote to the Hon. Henry Clay, inclosing the protest of Lewis, in order that our government might be led to urge the payment of his claim, and alleging as the reason of his interference that Lewis was indebted to him in the sum of \$15,000, and had failed, and had therefore made him the assignment now in question. In a letter from Mr. Bell to Mr. Cambreling, in 1830, urging his interference in behalf of the Lewis claim, Bell assigns as the reason for his request that Lewis had become indebted to him, and had no other means of payment but through that claim; and to confirm the whole matter beyond dispute, the counsel of the respondent below (now appellant) read in evidence the testimony of Isaac Bell, senior, proving the assignment to have been made in consideration of large indebtedness by Lewis to Bell, and that Lewis was then insolvent, and continued so to the time of his death. By their own showing, therefore, there is ample consideration for the assignment, and not the least evidence of a secret trust.

The decree of the circuit court is, therefore, affirmed.

GREGERSON v. IMLAY.

(Circuit Court for New York: 4 Blatchford, 503-508. 1861.)

STATEMENT OF FACTS.—Imlay was the owner of a patent which had expired, but while its validity continued it had been infringed by many persons and corporations, so that the patentee had claims for damages in almost all the states of the Union. These claims he had assigned to the plaintiff by a written agreement, and executed a power of attorney, irrevocable by its terms, authorizing him to bring suit in his (defendant's) name, and collect all of said claims, agreeing to pay the costs in any case in which there was a failure to recover

them. It was agreed that plaintiff might retain one-half of the gross amount he might collect. This bill was filed, stating these facts, and alleging that plaintiff was proceeding in good faith to execute the contract, but that defendant became for some reason dissatisfied and sought to resume control of the matter and collect the claims himself. The bill prays that he be perpetually enjoined from interfering with the claims. The case was heard on an application for a provisional injunction.

Opinion by SHIPMAN, J.

A variety of points, both in support of, and in opposition to, this motion, have been raised and ingeniously argued by the counsel, some of which are of an interesting character, but, in the view I take of the case, it is unnecessary to pass upon them.

§ 8. *A contract assigning numerous claims for unliquidated damages for torts is void at common law, for champerty and maintenance, and will not be sustained in a court of equity.*

This is certainly an extraordinary contract, and one which a court of equity should hesitate long before it sanctions. It is clearly void at common law, for champerty and maintenance, and, although it is quite true that the doctrines of the common law touching the effect of these features upon the validity of contracts have been greatly modified in modern times, yet I think it doubtful if any court of law, much less any court of equity, has ever sustained a contract of this description. This is not the case of an assignment of an interest in an individual claim, or a sale of property *in esse* which is involved in a legal controversy, but it is an attempted transfer of an interest in indefinite litigious rights, and in claims for unliquidated damages, arising out of torts, indefinite in number and amount, and limited only by territorial boundaries, covering nearly the entire country. Passing by other grave questions that suggest doubts as to the validity of such a contract, it is sufficient to say that it is one that no court of equity should countenance, inasmuch as it is tainted with champerty and maintenance. This view of the duty of courts of equity is fully supported by the chief baron of the exchequer in the case of *Prosser v. Edmonds*, 1 Younge & Colly, 481, where he remarks that such courts should lend no countenance to agreements which partake in any manner of champerty, although they might be barely valid at law. Without impugning the good intentions of either party to the contract before me, and even assuming that the unmolested execution of this agreement by the plaintiff would be highly beneficial to the defendant, still it is easy to see that such contracts are liable to great abuse. To arm one individual with exclusive and unlimited power over the claims of another for unliquidated damages arising out of numerous torts, with power to sue and press the claims to judgment in all courts in the name of the injured party, not for a fixed or a reasonable compensation, to be determined by the amount of labor performed and the expense incurred, but for what might prove an enormous bounty proportioned to the amount that might be recovered, while at the same time the other party is stripped of all power to adjust, settle or discharge those claims, of the justice of which he ought to be the better judge, would be detrimental to the peace of society and the safety of individuals, and against public policy.

§ 9. *A champertous contract is not validated by an agreement to indemnify against taxable costs.*

It may be claimed that this contract is not champertous, inasmuch as the plaintiff does not agree to indemnify the defendant against taxable costs. This

distinction has sometimes been taken; and some of the elementary treatises seem to regard it as valid. But the doctrine was pretty effectually exploded in the case of *Lathrop v. Amherst Bank*, 9 Metc., 489. Indeed, where the power over the prosecution of the claims is, as claimed in the present case, exclusive and irrevocable, the exemption of the prosecutor from liability for costs aggravates rather than relieves the mischievous character of the contract. The case of *Call v. Calef*, 13 Metc., 362, was one in which a contract was involved, resembling in many features the one now before me. The facts were these: Leeds & Co. claimed to own the exclusive right to use a patent planing machine in the town of Manchester, New Hampshire, in which town Baldwin & Stevens were infringing upon their rights by the use of another machine. Call, the plaintiff, had an interest in the same patent in Lowell, and Leeds & Co. executed a power of attorney to him, authorizing him, by suit or otherwise, to restrain Baldwin & Stevens from using the machine in Manchester, and promised him one-half of what he might recover or collect, for his compensation. It was claimed on a subsequent trial in which this agreement was drawn in question, that it was void for champerty and maintenance. The court held it valid, upon the sole ground, however, that, as the unauthorized use of the machine in Manchester would diminish the profits and value of the patent in the adjoining town of Lowell, where Call owned the right, the latter had a direct interest in preventing the infringement in Manchester, and that this interest supported the validity of the contract. It is needless to remark that, in the present case, the plaintiff had no interest whatever in the claims committed to his control by the plaintiff, except what arose out of the contract itself.

§ 10. *A contract champertous in its nature is not validated by the fact that it is executed in a state where champerty is not illegal, if it is to be performed in other states where it is illegal.*

I am aware that in *Sedgwick v. Stanton*, 4 Kern., 289, Selden, J., in an able opinion, maintains that the doctrines of the common law touching champerty and maintenance are pretty effectually swept away in New York by state legislation. But, although the contract under consideration was made in New York, still the *lex loci* cannot control the determination of the present case. The contract was, by its terms, to be executed in all the states of the Union except four, and the effect of the injunction asked for would be to support the contract in many states where it is clearly void. But, as already intimated, if the contract were barely valid at law, still, by applying the salutary doctrines of the English court of exchequer in *Prosser v. Edmonds*, in which I fully concur, I should feel compelled to deny this motion.

COURTRIGHT v. BURNES.

(Circuit Court for Missouri: 3 McCrary, 60-68. 1881.)

STATEMENT OF FACTS.—Action on a promissory note. The defendant filed a general denial, and also pleaded certain special defenses: (1) That the note was without consideration, and was assigned after maturity with notice of the facts. (2) That the suit was being prosecuted under a champertous contract with one of the attorneys. It was alleged that the note was executed to one Winston, under certain circumstances mentioned in the opinion by the court; that Winston assigned the note for the benefit of plaintiff to one De Camp, without consideration, and with full knowledge on the part of De Camp of the facts; that De Camp was to receive a part of the proceeds of the note.

Opinion by McCrery, J.

The answer alleges that this suit is being prosecuted by one of the attorneys for plaintiff upon a champertous contract by which he is to pay the expenses of the litigation and receive as his compensation forty per cent. of the sum realized; and the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the defendant himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note by proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon, by showing that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it.

§ 11. *Whether the fact that a suit is prosecuted under a champertous contract can be set up in defense.*

The authorities upon this question are in conflict. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner, it should refuse longer to entertain the proceeding. *Barker v. Barker*, 14 Wis., 142; *Webb v. Armstrong*, 5 Humph., 379; *Morrison v. Deaderick*, 10 Humph., 342; *Greenman v. Cohee*, 61 Ind., 201. Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. *Hilton v. Woods*, L. R., 4 Eq. Cas., 432; *Elborough v. Ayres*, L. R., 10 Eq. Cas., 367; *Whitney v. Kirtland*, 27 N. J. Eq., 333; *Robinson v. Beall*, 26 Ga., 17; *Allison v. Railroad Co.*, 42 Ia., 274; *Small v. Railroad Co.*, 8 N. W. Rep., 437.

§ 12. — *held not to be a ground of defense.*

This latter view is in my judgment supported by the better reason. It is not necessary for the full protection of the client to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement; nor are there any reasons founded on public policy that should require such dismissal. If all champertous agreements shall be held void, and the courts firmly refuse to enforce them, they will thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent or void contracts. If, on the other hand, the defendant in an action upon a valid and binding contract may avoid liability or prevent a recovery by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such case is no party to the champerty; he is not interested in it, nor in anywise injured by it. If the contract upon which he is sued is a *bona fide* contract, upon which a sum of money is due from him to the plaintiff, and he has no defense upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fees and expenses of the suit.

§ 13. *The tendency is to relax the common law doctrine.*

The tendency in the courts of this country is strongly in the direction of relaxing the common law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was

formerly allowed, and this for the reason that the peculiar condition of society, which gave rise to the doctrine, has in a great measure passed away. In some of the states the common law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. *Sedgwick v. Stanton*, 14 N. Y., 289; *Voorhees v. Darr*, 51 Barb., 580; *Richardson v. Rowland*, 40 Conn., 572; *Mathewson v. Fitch*, 22 Cal., 86; *Hoffman v. Vallejo*, 45 Cal., 564; *Lytle v. State*, 17 Ark., 609. The common law doctrine, however, prevails in Missouri, according to the decision of the supreme court of the state in *Duke v. Harper*, 66 Mo., 55. While following that ruling, I am disposed, in view of the general tendency of American courts to relax somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to allow debtors to make use of it to avoid the payment of their honest obligations. It follows that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

§ 14. *Parol evidence of a contemporaneous agreement is not admissible to vary the terms of a note.*

This brings us to the consideration of the case upon its merits. The first defense, as set forth in the answer, is, in substance, that the note sued on was not intended to bind the defendant to pay the sum therein named thirty days after date, as appears from its face, but was intended as a mere memorandum to show that Winston, the payee, claimed an interest amounting to \$7,333 in certain bonds, turned over by him to defendant, and for which defendant was to account to him in the settlement of certain partnership affairs. In other words, it is claimed that the note sued on was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with and repugnant to its terms. The note is in the usual form of a negotiable promissory note. The alleged understanding or agreement relied upon by defendant is not in writing, and the proof of it, so far as there is any proof, is in the parol testimony of the defendant. The testimony of Winston, the other party, is directly in conflict with that of the defendant, and if it were necessary to decide the question of fact, I should feel bound to say that Winston's statements, corroborated and confirmed as they are by the writing itself, made at the very time of the contract, and, presumably, embodying the understanding of the parties, would prevail over the testimony of the defendant. But it is not necessary to decide this question, because it is perfectly clear that all parol testimony to show a contemporaneous agreement in conflict with the plain terms of the note must be rejected. The rule which excludes such testimony is fundamental and elementary, and its application to this defense is too apparent to require argument or the citation of authorities. The contract signed by the defendant plainly declares that he is for value received to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defense would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains.

§ 15. *Want of consideration, whether defense may be made at law.*

The evidence was, however, received, and may, perhaps, be considered as tending to support the other defense set up in the answer, which is that the note was without consideration. To establish this defense the defendant has attempted to prove: *First*, that the note was given to represent the interest of

Winston in certain bonds which belonged to a partnership of which plaintiff and defendant, as well as Winston, were members, and which were at the date of the note turned over by Winston to the defendant; and *second*, that said Winston had, in fact, no interest in said bonds, because he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs. Ordinarily the defense of want of consideration may be made at law, but is such the case when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court? Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this court, setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for the injunction was resisted in this court at the last term.

Upon full argument it was held by this court, that the defense to the note upon the facts stated in the bill should be made in equity. Mr. Justice Miller, in delivering the opinion of the court, said: "As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer." Notwithstanding this decision the defendant saw fit to dismiss his bill in chancery, and to make his defense at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown on a settlement of the partnership affairs between Burnes, Courtright, Winston, and others, who were interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the court in this case shows that upon such a settlement it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him. I have, in considering the defense of want of consideration, assumed that the note sued on was given by defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs, and not to be a charge against the defendant personally. But whether this assumption is in accordance with the facts I do not decide. The testimony upon the question is quite conflicting, and it is not necessary to decide it, because, in any view of the case, the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit. *Sturges v. Swift*, 32 Miss., 239; *Anderson v. Robertson*, id., 241; *Gibson v. Moore*, 6 N. H., 547.

Judgment for plaintiff for the amount of the note and interest.

§ 16. General doctrine.—At common law if a person officiously interfered in a suit, in which he had no present or prospective interest, to assist one of the parties against the other, with money or advice, without any authority of law, he was guilty of the crime of maintenance. Champerty is an aggravated species of maintenance. It is a bargain with the plaintiff to divide the land, or other matter sued for, between them if they prevail at law, the

champertor undertaking to carry on the suit at his own expense. *McIntyre v. Thompson*, 4 Hughes, 562.

§ 17. To constitute maintenance there must be an assistance to one of the parties to the suit. A mere offer to assist is not sufficient. *Fletcher v. Ellis*,* Hemp., 300.

§ 18. Where a judgment has already been rendered in a suit, and execution placed in the hands of the officer, and the defendant has goods within the county sufficient to satisfy the execution, an offer by a third person to the plaintiff to pay all the costs and to see his debt made secure if he would have the defendant's body taken in execution, is not maintenance, since it is made in reference to a matter over which neither the third person nor the plaintiff has any power. The officer is bound to first levy and dispose of the property before taking the defendant's body. *Ibid*.

§ 19. An action will lie for maintenance in this country. In order to maintain such an action for the officious intermeddling in a suit, it is necessary to allege not only the pendency of the suit, but designate the particular court in which it was pending, together with the time and circumstances. *Ibid*.

§ 20. Contingent fees.—An agreement of an attorney at law, in a suit concerning land, to receive as his fee a certain sum to be paid out of the proceeds of the land when recovered, but by which he did not pay costs, and was not to receive any part of the thing recovered, is not tainted with champerty. *McPherson v. Cox*, 6 Otto, 404.

§ 21. An attorney appeared in behalf of his client and made an argument before a commission, appointed, under a treaty with the Choctaw Indians, for the purpose of adjudicating the client's claim against those Indians. After these services were performed, the client agreed to give the attorney as compensation one-tenth of all that he should realize from his claim. The court held that this agreement was not champertous. *Wright v. Tebbitts*, 1 Otto, 253.

§ 22. In Virginia.—By the act of 1798 of Virginia no person could be prevented from prosecuting or defending a claim to land held under the laws of that state, and no suit brought to make good such claim could be considered as coming within any statute against champerty or maintenance. *Boone v. Chiles*, 10 Pet., 177.

§ 23. Claim against a foreign government.—An agreement to allow a reasonable percentage to an agent on the amount recovered under a claim against a foreign government is not an illegal contract. *Wylie v. Coxe*, 15 How., 415.

§ 24. Insured property sold to speculators.—Where an insurance company, to whom property damaged in a voyage had been abandoned by the owner, took possession of it before it reached its destination, and sold it to speculators, and the latter, on refusal of the insurance company to bring suit against the carrier for the damage, brought an action themselves for the damage to the property, the court, while it held that the carrier was not liable for the injury to the goods on other grounds, expressed its satisfaction at being able to decide against the plaintiffs, inasmuch as they were volunteers in a speculation. *Propeller Mohawk*, 8 Wall., 153.

§ 25. Suit to recover land conveyed in trust.—Where one purchased stock in a mining corporation, and land was conveyed to him in trust for himself and all the other stockholders, and he brought suit to recover the land in his own name, it was held that the transaction contained none of the characteristics of champerty. *Roberts v. Cooper*, 20 How., 467.

§ 26. Trust estates.—Neither the common law relative to maintenance and champerty, nor the statute of 32 Henry 8, ch. 9, made in aid thereof, prohibiting the buying or selling of any pretended right or title to land, unless the vendor is in actual possession of the land, or of the reversion or remainder, applies to a trust estate actually existing either by the acts of the parties or by construction of law. A *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is controverted by the trustee. *Baker v. Whiting*, 3 Sumn., 475.

§ 27. The old cases upon the subject of maintenance and champerty have gone a great way farther than would now be sustained in courts of equity. *Ibid*.

§ 28. Conveyance of land held adversely.—The ancient doctrine of maintenance, which makes void a conveyance of lands held adversely, is in many states entirely rejected. In some it has been treated as obsolete by the courts. In others it has been abolished by statute. In others it is still in force. It has been abolished by statute in Michigan. But the statutes of Edw. I. and III., making it unlawful for a person to bear the expenses of a suit in which he has no interest, for a part of the profits of the litigation, are held to be in force in that state by its courts. *Roberts v. Cooper*, 20 How., 467.

§ 29. It was held that, under the laws against champerty and maintenance in Illinois, a deed for land held adversely to the grantor by one in possession was void. *Dubois v. McLean*, 4 McL., 486.

§ 30. Assignment of property held adversely.—The assignment of a right of action to property out of the possession of the assignor and held adversely is champerty at common

law. And so where a tax collector had distrained certain bank-bills from a bank for taxes due, and deposited them with an insurance company to his credit, it was held by Catron, J., dissenting from the majority of the court, that an assignment of such bills so held adversely was void. *Deshler v. Dodge*, 16 How., 622.

§ 81. Dismissal of suit.—The English statutes on the subject of maintenance and champerty, which were adopted in Kentucky, punished the offense, and declared the contract of maintenance void between the parties, but it did not direct or authorize the dismissal of the suit instituted between other persons in furtherance of such contract. *Boone v. Chiles*, 10 Pet., 177. See § 3.

§ 82. In an action to recover lands, where one of the plaintiffs' witnesses, who was not a party to the record, stated that he was a duly authorized agent in the prosecution of the suit, and that he had agreed with the plaintiffs to pay all costs and incidental expenses of the trial and was to receive one-half of the lands and damages that might be recovered, the court refused to dismiss the action on the ground of champerty, holding that, even if there should be a champertous contract between the plaintiffs and their agent, such did not affect the merits of the action, as the court was not called upon to enforce or invalidate such a contract. The court also refused to charge the jury that the witness was guilty of champerty, as the court had no jurisdiction of that crime. *McIntyre v. Thompson*, 4 Hughes, 582.

§ 83. No defense to suit.—Where certain creditors of a bankrupt agreed with a solicitor that he should take such proceedings to recover from or settle with the bankrupt as he should think proper, but the cost of all such proceedings should be at the solicitor's expense, and he was to save the creditors harmless therefrom, and was to retain as a compensation for his services three-fourths of all sums recovered, besides expenses incurred, it was held that this agreement was no defense, on the ground of champerty, to the enforcement of the claim itself by the creditors, since the claim existed independent of the agreement with the solicitor. *In re Lathrop*, * 8 N. B. R., 410. See § 3.

§ 84. Where an attorney borrowed of a third person a sum of money to complete a purchase from his client of property involved in a suit, and placed the title in the name of the lender to secure the repayment of the advance, and an action was brought by the attorney to compel the lender to convey the property on payment of the advance, it was held that the latter could not set up the illegality of the contract of purchase between the attorney and his client. *McMicken v. Perin*, 18 How., 507.

§ 85. Litigious rights.—Under a provision in the Code of Louisiana, declaring that "a right is said to be litigious whenever there exists a suit and contestation about the same;" that "litigious rights are those which cannot be exercised without undergoing a lawsuit;" and that "public officers connected with courts of justice, such as judges, advocates, attorneys, clerks and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under a penalty of nullity and of having to defray all costs, damages and interest," it is not unlawful for an attorney to purchase of his client the property involved in a suit after final judgment. *Ibid.*

CHANCERY

See EQUITY; PLEADING · PRACTICE.

CHANGE OF SOVEREIGNTY.

See CITIZENS AND ALIENS; GOVERNMENT.

CHANGE OF VENUE.

In Criminal Cases, see CRIMES AND CRIMINAL PROCEDURE.
In Civil Cases, see PRACTICE.

CHARGE OF COURT.

In Criminal Cases, see CRIMES AND CRIMINAL PROCEDURE.
In Civil Cases, see PRACTICE.

CHARITIES — CHRISTIANITY.

CHARITIES.

See USES AND TRUSTS.

CHARTER.

See BANKS, I; CORPORATIONS.

CHARTER-PARTY.

See MARITIME LAW.

CHATTEL MORTGAGES.

See CONVEYANCES.

CHECKS AND DRAFTS.

See BANKS, VI; BILLS AND NOTES.

CHEROKEE INDIANS.

See INDIANS.

CHESAPEAKE BAY.

See WATER AND WATER-COURSES.

CHICAGO.

See CORPORATIONS.

CHILDREN.

See DOMESTIC RELATIONS.

CHINESE CASES.

See CITIZENS AND ALIENS; CONSTITUTION AND LAWS; FOREIGN GOVERNMENTS.

CHRISTIANITY.

See CHURCHES AND BENEVOLENT ASSOCIATIONS.

CHURCHES AND BENEVOLENT ASSOCIATIONS.

SUMMARY — *Removal of trustees, § 1.—Withdrawal of a part of congregation, § 2.—Jurisdiction of the courts, §§ 3-5.—Division of the Methodist Church; proceeds of the Book Concern, § 6.—Seceders; property rights, § 7.—Grant of lands to Church of England. §§ 8-10.—Harmony Society; property rights, § 11.*

§ 1. Trustees of church property cannot be removed by the *cestuis que trust* without cause and at will. And much less can a small minority of the congregation meet without notice of their intention, in the absence of such trustees, and without any complaint against them, or notice of complaint, and divest them of their legal interest and substitute other persons to the enjoyment of those rights. Nor can such minority, in such manner, it being a Baptist Church, remove the seven trustees of the church elected annually, according to the Baptist Church manual. *Bouldin v. Alexander*, §§ 12-15.

§ 2. The fact that the trustees so removed, and a large number of the congregation who had been causelessly expelled by the minority, worshiped in another place, on the seizure of the church property by the minority, but still claimed to be the Third Colored Baptist Church (the name of the original congregation), and were recognized as such by the Baptist Association to which the church belonged, is no evidence that those withdrawing formed a new congregation and abandoned the property. *Ibid.*

§ 3. The courts have no power to revise or question ordinary acts of church discipline, or exclusion from membership. But they may decide that the action of a small minority of a Baptist Congregation, in expelling a large number of the members without cause, and causelessly removing the seven trustees, is not the action of the church. And the court in such a case will decree that the church property be delivered into the hands of the rightful trustees. *Ibid.* See § 77.

§ 4. Religious associations come before the courts in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. *Watson v. Jones*, §§ 16-26.

§ 5. Questions coming before the civil courts concerning the rights of property held by ecclesiastical bodies may be classified under three general heads: 1. With regard to property expressly devoted to the teaching, support or spread of some specific form of religious belief, by will or deed. 2. Property owned by a religious congregation independent of other ecclesiastical associations, and, in matters of church government, subject to no higher authority. 3. Where the ecclesiastical body holding the property is but a subordinate member of some general church organization, in which there are superior tribunals exercising more or less control over the whole membership of that general organization. With regard to the first, if the purpose is not immoral and the instrument of grant is legal in form, a court will see that the property is not diverted from the use to which it is dedicated. In such a case, if the trust is confided to a religious congregation of the independent or congregational form, it is not in the power of the majority, by reason of a change of views, to carry the property to the support of a new and conflicting doctrine. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. In case of a strictly independent and congregational church, where a schism leads to a separation into distinct and conflicting bodies, the rights of property must be determined by the ordinary principles which govern voluntary associations. But in the third class of cases, where there is an association of congregations in one organization, with a system of ecclesiastical government in regular succession, the rule is, whenever questions of discipline, or faith, or ecclesiastical rule, custom or law have been decided by the highest of these church courts to which the matter has been carried, the legal tribunals must accept such decisions as final and binding. *Ibid.*

§ 6. In 1808, the general conference of the Methodist Episcopal Church, then composed of all the preachers in its traveling connection, and possessing the supreme power in the church, created a representative general conference to govern the church in its stead, granting to the same power to make all rules and regulations for the church, with certain limitations contained in six restrictive articles. One of these articles declared that the general conference should not appropriate the produce of an institution belonging to the church, known as the Book Concern, to any other purpose than for the benefit of the traveling supernumerary, superannuated and worn-out preachers, their wives, widows and children. Differences having

arisen between the northern and southern members, in 1844, the general conference proposed a "plan of separation," which, if assented to by a convention of the southern conferences, was to divide the church into two distinct ecclesiastical organizations. It was agreed that the common property of the church, including the Book Concern, should be divided between the two churches in proportion to the number of traveling preachers falling within the respective territorial divisions. The plan of separation was adopted by the southern conferences and the church was divided. The managers of the Book Concern then ceased to send as usual to the southern conferences their quota of the produce of this business in proportion to the number of their traveling preachers. Certain of the traveling and worn-out preachers of the church south filed a bill in behalf of themselves and all other beneficiaries of the Book Concern in the church south to recover their share of this fund. It was held, 1. That the bill was not void for want of property parties. 2. That it could not be claimed that the beneficiaries falling within the church south were not entitled to any share in the produce of the Book Concern for want of connection with the Methodist Episcopal Church as originally constituted, since the same argument would exclude the northern church also from such fund. 3. That the general conference had power to divide the church as it then existed; and that, if it had no such power, the church was wrongfully divided, and the complainants were entitled to their share in the property of the dissolved church as original proprietors of the fund. 4. That the provision, in the plan of separation, for a vote by all the conferences upon the question of removing the limitations, placed by the restrictive articles, upon the power of the general conference over the Book Concern, was not a condition to the right of the church south to its share of the property, but a step taken in order to enable the general conference to complete the partition of the property; and that the division of the property followed, as a matter of law, the division of the church organization, nothing short of an express stipulation being able to preclude the southern church from asserting their right to the property. *Smith v. Swormstedt*, §§ 27-31.

§ 7. Where dissensions arose in a Baptist congregation, and one party assumed the control of the church affairs and property, and the other party worshiped elsewhere, the party dispossessed, on being decreed to be the rightful authorities of the church and entitled to its church building, were held not entitled to recover mesne profits for the time the building had been in the possession of the adverse party, there being no claim for such an allowance in the bill, and the church having always been kept open for religious worship and every member of the congregation permitted to worship there if he chose. *Bouldin v. Alexander*, §§ 32, 33.

§ 8. The Church of England, in its aggregate description, is not a corporation, and cannot receive a grant of lands. But such a grant to the Church of England at a particular place is good at common law, and the parson and his successors, in such a case, would take as representatives of the church. *Town of Pawlet v. Clark*, §§ 34-51.

§ 9. A grant made to the Church of England at a particular place, where there is no such church duly consecrated at that place, is not wholly void for want of a corporation having capacity to take, and the grant may take effect without a grantee as a dedication to pious uses. *Ibid.*

§ 10. Where a grant was made by the crown to the Church of England, at the town of Pawlet, in the royal province of New Hampshire, and there was no church duly consecrated and established at that place, the grant could not take effect until an Episcopal church was duly erected by the crown at that place. No voluntary society of Episcopalians, unauthorized by the crown, could entitle themselves to the glebe so granted. And no such church having been erected by the crown, the glebe remained as an *hereditas jacens*, and the state which succeeded to the rights of the crown might, with the assent of the town, alien or incumber it; or might erect an Episcopal church therein; or might grant it completely to the town. *Ibid.*

§ 11. "The Harmony Society," existing in Pennsylvania, is governed by the will of a superintendent, who holds the office of father, priest and king. It embraces a communion of property, all of which is vested in the superintendent. Members voluntarily leaving the society are entitled to withdraw no property contributed, except by the superintendent's consent. It is held that a member wrongfully expelled from the society has a right to the interference of the courts of justice; that a member voluntarily leaving the society is estopped from claiming any property, but there being no provisions in the compact forfeiting property in case of expulsion, or pointing out any tribunal authorized to expel, a member cannot be expelled and deprived of his property at the mere whim of the superintendent; that a receipt signed by a member, stating that he had voluntarily withdrawn from the society, and received a certain sum from the superintendent by contract, is, in view of the power of the superintendent, very slender evidence of a voluntary withdrawal; that declarations are also weak evidence of such a withdrawal; that the evidence warrants the conclu-

sion that the member was expelled; that the court will not decree a restoration of the member to his rights, but will decree him his several share in the assets of the society. *Nachtrieb v. The Harmony Settlement*, §§ 52-57.

[NOTES.— See §§ 58-78.]

BOULDIN v. ALEXANDER.

(15 Wallace, 181-140. 1872.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Bouldin, having made collections of moneys, by voluntary contributions, for the purpose of building a church, bought a lot and erected a church thereon in his own name. Other parties interested becoming dissatisfied and pressing him to do so, Bouldin and wife, in April, 1864, conveyed the greater part of this lot, upon which the church also was erected, to Joseph Alexander, Charles Alexander, John Middleton and Wm. Minor, as trustees, to be used as the "Third Colored Baptist Church of the City of Washington." The trustees in return gave their notes, secured by deed of trust upon the property, for an amount in excess of the collections, which Bouldin represented to have advanced out of his private funds in the purchase and erection of said property. The congregation was by this time organized in conformity with the constitution of the general Baptist Church of the United States, and seven trustees were elected as required by its rules. Soon after this dissensions arose in the congregation, and a small minority of the members met, and, by resolution, removed four trustees, without naming them, and without citation, trial or charges, and elected four others in their stead; and a few days afterwards the same small minority met, and, without citation or trial, expelled a large number of members, and took possession of the church property. The trustees and members so removed worshiped at another place, but retained the old organization, and in September, 1867, the trustees named in the deed, and the seven trustees first elected, filed a bill against the trustees elected by the minority, who had taken possession of the church, praying for a discovery, an accounting, a release of the deed of trust given to Bouldin, and cancellation of the notes, alleging them to have been satisfied, and a restoration of the possession of the church property to the four trustees named in the deed; also for an injunction. The court below granted the relief prayed for, referring the accounting to a master; from which decree the case is brought up by appeal.

Opinion by MR. JUSTICE STRONG.

It is contended that the court erroneously decided the complainants were, at the time of the commencement of the suit, the legally constituted trustees of the church. But it is very evident that Joseph Alexander, Charles Alexander, John Middleton and William Minor were then trustees for the church of the church property unless they had been removed by the action of the minority on the 7th of June, 1867. They were nominated as trustees in the deed from Bouldin and wife, and they had never surrendered or renounced their trust. And we think the evidence is satisfactory that Joseph Alexander, Henry Watson, Henry Scott, John Wiggins, John Middleton, William Laws and Willis J. Minor were then general trustees of the church unless they, or some of them, had been removed by the action of the same minority on the day last mentioned.

§ 12. *The trustees of the property of a religious association cannot be removed at the will of the cestuis que trust, and without cause.*

It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question. What we have to decide

is, where was the legal ownership of the property? The question respects temporalities, and temporalities alone. That the attempt made on the 7th of June, 1867, to remove the trustees then holding was inoperative, is not to be doubted in view of the facts of the case. Those who held under the deed were not removable at the will of the *cestui que use*, and without cause. And had there been cause, none was shown. No ecclesiastical authority has decided that the defendants, or any of them, were legitimate trustees of the church or of its property. Even if it be assumed that it was in the power of the church to substitute other trustees for those named in the deed, it may not be admitted that a small minority of the church, convened without notice of their intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could divest them of their legal interest, and substitute other persons to the enjoyment of their rights.

It is equally true that the seven persons who sue as church trustees were not removed by the action of the minority meeting held on the 7th of June, 1867. Indeed, that action does not seem to have been an attempt to remove them. It was voted to turn out four trustees, but who the trustees intended were nowhere appears. None were named. In view of the fact that the number was four, it is presumable the church had in view the four trustees of the church lot named in Bouldin's deed, and not the ordinary trustees of the church,—those contemplated by the Baptist Church Manual. That manual provides that in every church seven trustees shall be elected annually, in January, or at the next regular church meeting thereafter, and the church books, which appear to have been kept with considerable regularity from September 2d, 1857, until this controversy arose, show that on the 15th of February, 1867, at a regular church meeting, the seven persons who, with the church lot trustees, are complainants in this bill, were elected trustees of the church for the ensuing year. This was before any division took place in the society. It is true Mr. Bouldin testified that the minute of an election is a forgery, and that no such election ever took place, but we are satisfied that he is mistaken. An examination of the minute-book leaves no doubt in our minds that the election was made as claimed by the complainants, and that they were elected by a number of votes averaging more than two hundred. The entry in the minute-book is attested by the church clerk. It is in regular order, and there are subsequent minutes in the same book made by Bouldin himself. The court below was, therefore, as we think, not in error in holding that the complainants were the legally constituted trustees at the time when this suit was commenced. And if they were the rightful trustees, the decree for an account, for the surrender of the church property, and, indeed, the entire decree made by the court, was a matter of course upon the evidence.

§ 13. *When persons wrongfully expelled from a religious organization do not lose their rights.*

But the appellants insist that the complainants and those who acted with them withdrew from the church and formed a new congregation. This, they argue, was a relinquishment of all their rights in the Third Colored Baptist Church. It may be conceded that withdrawal from a church, and uniting with another church or denomination, is a relinquishment of all rights in the church abandoned. But there is no sufficient evidence in this case that any new congregation was formed, or that there was any withdrawal from the church, or union with any other. The complainants, and those who acted with them, after the church building had been wrested from the custody and control of

the rightful trustees, and after very many of them had been excommunicated in mass by the small minority, held their religious services at another place. But they formed no new organization. They still had the same trustees, the same deacons, and they claimed to be the Third Colored Baptist Church, and as such they were recognized by councils of Baptist churches duly called, and by the Philadelphia Baptist Association, an ecclesiastical body with which the church was associated. That body, it is true, was not a judicatory. Its action was not conclusive of any rights. But the fact that the complainants and those acting with them applied for recognition as the Third Colored Baptist Church, and that the association thus recognized them, is persuasive evidence that they were not seceders, and that their rights have not been forfeited.

§ 14. *Though the civil courts will not go behind the acts of a church in cases of excommunication, yet they may inquire into the fact whether such excommunication was the act of the church or not.*

This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with the rights of property. As was said in *Shannon v. Frost*, 3 B. Mon., 253, we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons excised are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church, and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be excised, was not the action of the church, and that it was wholly inoperative.

§ 15. *Congregational government; eligibility of trustees.*

In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act. We need not, however, dwell upon this; certain it is, that trustees are not necessarily communing members of the church. Excommunication from communing membership does not disqualify them, even if the excision be regular. Still more certain is it, that they cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules.

Decree affirmed.

WATSON v. JONES.

(13 Wallace, 679-785. 1871.)

APPEAL from U. S. Circuit Court, District of Kentucky.

STATEMENT OF FACTS.—In 1865 the Walnut Street Presbyterian Church of Louisville, Kentucky, had for its ruling elders three persons named Galt, Watson and Hackney, and for its trustees Farley, Fulton and Avery. There was about that time a very serious disagreement in the church on the subject of continuing the ministrations of the pastor, Mr. McElroy, which gave rise to litigation both in the ecclesiastical bodies, the presbyteries and synods, and in the courts of the country. The church authorities ordered a new election of

elders, at the instance of a majority of the church members, who were in accord with the minority of the elders and trustees, viz., Hackney and Avery. The other party, Galt, Watson, Fulton and Farley, refused to open the church for the meeting, which was held upon the sidewalk, and Avery, Leach and McNaughtan were elected additional elders. The matter then came into the civil courts upon a bill in equity, which went by appeal to the court of last resort in Kentucky. The ostensible question was whether Avery, Leach and McNaughtan were legally ruling elders, but the real question was, which of the two bodies represented by the contestants was the Walnut Street Church, and entitled to its buildings and other property. The decision of the chancellor was in favor of the new elders, but it was reversed by the court of appeals, whose final decision was that the possession of the property should be delivered to Galt, Watson and Hackney, elders, and to the trustees. This order was made June 26, 1868. On the 18th September, 1868, the chancery court directed its marshal, who had been acting as receiver, to restore the possession of the property to Galt, Watson and Hackney and the trustees, but previous to that time, to wit, on the 17th July, 1868, this bill was filed by Jones and Lee, who were citizens of Indiana, but members of the Walnut Street Church, against Watson, Galt *et al.*, complainants representing the adverse party. The decision of the circuit court for the district of Kentucky was in favor of complainants, the court declaring that they and their associates constituted the Walnut Street Presbyterian Church, and that Watson and his party did not. It is proper to remark that underlying this apparently personal controversy was the sectional issue of north and south, which pending these proceedings divided the Presbyterian Church. Watson and his party, supported by the local church authorities, the presbytery and synod representing the southern, and their adversaries, who were sustained by the general assembly of the church, holding the northern view of the questions which then agitated the church. Watson appealed.

Opinion by MR. JUSTICE MILLER.

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the state for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases.

§ 16. *Religious associations have the same legal rights as other voluntary organizations.*

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

The first of the points arising in the case concerns the jurisdiction of the cir-

cuit court, which is denied; first, on the ground that the plaintiffs have no such interest in the subject of litigation as will enable them to maintain the suit, and secondly, on matters arising out of the alleged proceedings in the suit in the chancery court of Louisville. The allegation that the plaintiffs are not lawful members of the Walnut Street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of the plaintiffs must stand or fall with the decision on the merits, and cannot be decided as a preliminary question. Their right to have this question decided, if there is no other objection to the jurisdiction, cannot be doubted. Some attempt is made in the answer to question the good faith of their citizenship, but this seems to have been abandoned in the argument.

§ 17. *To defeat the jurisdiction of a court on the ground that another suit is pending in a court of concurrent jurisdiction the case must be the same.*

In regard to the suit in the chancery court of Louisville, which the defendants allege to be pending, there can be no doubt but that that court is one competent to entertain jurisdiction of all the matters set up in the present suit. As to those matters and to the parties, it is a court of concurrent jurisdiction with the circuit court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree. But, when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest; there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication of the same matter between the same parties. In the case of *Barrows v. Kindred*, 4 Wall., 399, which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that, as in the second suit, the plaintiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit. But the principles which should govern in regard to the identity of the matters in issue in the two suits to make the pendency of the one defeat the other are as fully discussed in the case of *Buck v. Colbath*, 3 id., 334, where that was the main question, as in any case we have been able to find. It was an action of trespass, brought in a state court, against the marshal of the circuit court of the United States for seizing property of the plaintiff under a writ of attachment from the circuit court. And it was brought while the suit in the federal court was still pending and while the marshal held the property subject to its judgment. So far as the *lis pendens* and possession of the property in one court and a suit brought for the taking by its officer in another are concerned, the analogy to the present case is very strong. In that case the court said: "It is not true that a court, having obtained jurisdiction of a subject-matter of suit and of parties before it,

thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." And it might have been added, to the facts on which the claim for relief is founded. "A party," says the court, by way of example, "having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment for possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt secured by the mortgage. But, as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." This opinion contains a critical review of the cases in this court of *Hagan v. Lucas*, 10 Pet., 402; *Peck v. Jenness*, 7 How., 624; *Taylor v. Carryl*, 20 id., 594; and *Freeman v. Howe*, 24 id., 450, cited and relied on by counsel for the appellants; and we are satisfied that it states the doctrine correctly.

The limits which necessity assigns to this opinion forbid our giving at length the pleadings in the case in the Louisville chancery court. But we cannot better state what is and what is not the subject-matter of that suit or controversy, as thus presented and as shown throughout its course, than by adopting the language of the court of appeals of Kentucky, in its opinion delivered at the decision of that suit, in favor of the present appellants. "As suggested in argument," says the court, "and apparently conceded on both sides, this is not a case of division or schism in a church; nor is there any question as to which of two bodies should be recognized as the Third or Walnut Street Presbyterian Church. Neither is there any controversy as to the authority of Watson and Galt to act as ruling elders; but the sole inquiry to which we are restricted in our opinion is, whether Avery, McNaughtan and Leach are also ruling elders, and, therefore, members of the session of the church."

The pleadings in the present suit show conclusively a different state of facts, different issues, and a different relief sought. This is a case of a division or schism in the church. It is a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church. There is a controversy as to the authority of Watson and Galt to act as ruling elders, that authority being denied in the bill of the complainants; and, so far from the claim of Avery, McNaughtan and Leach to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim. This brief statement of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or in abatement of the second. The supplementary petition filed by the plaintiffs in that case, after the decree of the chancery court had been reversed on appeal, and which did contain very much the same matter found in the present bill, was, on motion of the plaintiff-

iffs' counsel, and by order of the court, dismissed, without prejudice, before this suit was brought, and of course was not a *lis pendens* at that time.

§ 18. *The execution of an order of a court of concurrent jurisdiction cannot be enjoined.*

It is contended, however, that the delivery to the trustees and elders of the body of which the plaintiffs are members, of the possession of the church building, cannot be granted in this suit, nor can the defendants be enjoined from taking possession as prayed in the bill, because the property is in the actual possession of the marshal of the Louisville chancery court as its receiver, and because there is an unexecuted decree of that court ordering the marshal to deliver the possession to defendants. In this the counsel for the appellants are, in our opinion, sustained both by the law and by the state of the record of the suit in that court. The court, in the progress of that suit, made several orders concerning the use of the church, and finally placed it in the possession of the marshal as a receiver, and there is no order discharging his receivership; nor does it seem to us that there is any valid order finally disposing of the case, so that it can be said to be no longer in that court. For, though the chancery court did, on the 20th March, 1868, after the reversal of the case in the court of appeals, enter an order reversing its former decree and dismissing the bill, with costs, in favor of the defendants, the latter, on application to the appellate court, obtained another order dated June 26th. By this order, or mandate to the chancery court, it was directed to render a judgment in conformity to the opinion and mandate of the court, restoring possession, use and control of the church property to the parties entitled thereto, according to said opinion, and so far as they were deprived thereof by the marshal of the chancery court under its order. In obedience to this mandate the chancery court, on the 18th September, three months after the commencement of this suit, made an order that the marshal restore the possession, use and control of the church building to Henry Farley, George Fulton, B. F. Avery, or a majority of them, as trustees, and to John Watson, Joseph Galt and T. J. Hackney, or a majority of them, as ruling elders, and to report how he had executed the order, and reserving the case for such further order as might be necessary to enforce full obedience.

It is argued here by counsel for the appellees that the case was, in effect, disposed of by the orders of the chancery court, and that nothing remained to be done which could have any practical operation on the rights of the parties. But if the court of appeals, in reversing the decree of the chancellor in favor of the plaintiffs, was of opinion that the defendants should be restored to the position they occupied in regard to the possession and control of the property before that suit began, we have no doubt of their right to make such order as was necessary to effect that object; and as the proper mode of doing this was by directing the chancellor to make the necessary order and have it enforced as chancery decrees are enforced in his court, we are of opinion that the order of the court of appeals, above recited, was, in essence and effect, a decree in that cause for such restoration, and that the last order of the chancery court, made in accordance with it, is a valid subsisting decree, which, though final, is unexecuted.

The decisions of this court in the cases of *Taylor v. Carryl*, 20 How., 594, and *Freeman v. Howe*, 24 id., 450, and *Buck v. Colbath*, 3 Wall., 334, are conclusive that the marshal of the chancery court cannot be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the two courts for that possession. And the

act of congress of March 2, 1793 (1 Stats. at Large, 334, § 5), as construed in the cases of *Diggs v. Wolcott*, 4 Cranch, 179, and *Peck v. Jenness*, 7 How., 625, are equally conclusive against any injunction from the circuit court forbidding the defendants to take the possession which the unexecuted decree of the chancery court requires the marshal to deliver to them. But though the prayer of the bill in this suit does ask for an injunction to restrain Watson, Galt, Fulton and Farley from taking possession, it also prays such other and further relief as the nature of the case requires, and especially that said defendants be restrained from interfering with Hays, as pastor, and plaintiffs in worshiping in said church. Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery, that court had a right to hear the case and grant that relief. This leads us to inquire what is the nature and character of the possession to which those parties are to be restored.

§ 19. *Trustees of the Presbyterian church are merely nominal title holders and custodians of the church property, and may be removed by the congregation.*

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian church, the trustees were the mere nominal title holders and custodians of the church property, and other trustees were or could be elected by the congregation to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable. The trustees obviously hold possession for the use of the persons who, by the constitution, usages and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their places. They have no personal ownership or right beyond this, and are subject, in their official relations to the property, to the control of the session of the church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a fiduciary possession. It is as a session of the church alone that they could exercise power. Except by an order of the session in regular meeting they have no right to make any order concerning the use of the building; and any action of the session is necessarily in the character of representatives of the church body by whose members it was elected. If, then, this true body of the church, the members of that congregation, having rights of user in the building, have in a mode which is authorized by the canons of the general church in this country, elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession which we have described, and which the chancery court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them to enjoy the uses, to protect which that trust was created. Undoubtedly if the order of the chancery court had been executed, and the marshal had de-

livered the key of the church to the defendants, and placed them in the same position they were in before that suit was commenced, they could, in any court having jurisdiction, and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights. All that we have said in regard to the possession which the marshal is directed to deliver to the defendants is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he received that possession, which we have recited, shows this very clearly.

§ 20. *It is competent for a court to enjoin a party receiving possession from another court to use that possession in subordination to a particular trust.*

The decree which we are now reviewing seems to us to be carefully framed on this view of the matter. While the rights of the plaintiffs and those whom they sue for are admitted and established, the defendants are still recognized as entitled to the possession which we have described; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the chancery court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

§ 21. *The different kinds of trusts for religious bodies.*

We are next to inquire whether the decree thus rendered is based upon an equally just view of the law, as applied to the facts of this controversy. The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which, of course, do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state. 1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief. 2. The second is when the property is held by a religious congregation, which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority. 3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization, in which there are superior ecclesiastical tribunals, with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

§ 22. *Right to dedicate property to religious purposes.*

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced the formalities which the laws require. And it would seem, also, to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So

long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man, building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the holy trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same. And, though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of *The Attorney-General v. Pearson*, 3 Meriv., 353, Lord Eldon said: "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the king's court is called upon to execute the trust." That was a case in which the trust deed declared the house which was erected under it was for the worship and service of God. And, though we may not be satisfied with the very artificial and elaborate argument by which the chancellor arrives at the conclusion that, because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of *Miller v. Gable*, 2 Denio, 492, appears to have been decided in the court of errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

§ 23. *Where a trust is for a body of congregational or independent organization, its conformity to the requirements of the trust must be judged by the general principles regulating voluntary associations.*

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that

it is for the use of that congregation as a religious society. In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of *Shannon v. Frost*, 3 B. Monr., 253, where the principle is ably supported by the learned chief justice of the court of appeals of Kentucky. The case of *Smith v. Nelson*, 18 Vt., 511, asserts this doctrine in a case where a legacy was left to the associate congregation of Ryegate, the interest whereof was to be annually paid to their minister forever. In that case, though the Ryegate congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly if that congregation was to be treated as an independent one.

§ 24. *Where a question of doctrine or practice of a subordinate religious body arises, involving the execution of a trust, the rule of decision for the courts is to follow the views of the highest judicatory of that faith and order.*

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important. It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government. The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner to the support of any special re-

ligious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity or succession is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, that, whenever the questions of discipline, or of faith, or of ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

§ 25. — *the rule of the English courts is that the court must decide for itself church questions. This rule is not authority for American courts.*

We concede at the outset that the doctrine of the English courts is otherwise. In the case of the Attorney-General *v.* Pearson, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of *Craigdallie v. Aikman*, 2 Bligh, 529, the same learned judge expresses in strong terms his chagrin that the court of sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the lord chancellor of England, who is, in his office, in a large sense, the head and representative of the established church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute-book hampering the free exercise of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found

in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling, established in the house of lords, to which final appeal lay in such cases, that the doctrine was established in the court of sessions after no little struggle and resistance. The full history of the case of *Craigdallie v. Aikman*, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in *Galbraith v. Smith*, 15 Shaw, 808, show this conclusively.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so. We have said that these views are supported by the preponderant weight of authority in this country, and, for the reasons which we have given, we do not think the doctrines of the English chancery court on this subject should have with us the influence which we would cheerfully accord to it on others.

We have already cited the case of *Shannon v. Frost*, in which the appellate court of the state where this controversy originated sustains the proposition clearly and fully. "This court," says the chief justice, "having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." In the subsequent case of *Gibson v. Armstrong*, 7 B. Mon., 481, which arose out

of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case; and in the case of *Watson v. Avery*, 2 Bush, 332, the case relied on by the appellants as a bar, and considered in the former part of this opinion, the doctrine of *Shannon v. Frost* is in general terms conceded, while a distinction is attempted which we shall consider hereafter.

One of the most careful and well-considered judgments on the subject is that of the court of appeals of South Carolina, delivered by Chancellor Johnson in the case of *Harmon v. Dreher*, 2 Speer, Eq., 87. The case turned upon certain rights in the use of the church property claimed by the minister notwithstanding his expulsion from the synod as one of its members. "He stands," says the chancellor, "convicted of the offenses alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether if held were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The principle is reaffirmed by the same court in the *John's Island Church Case*, 2 Rich. Eq., 215.

In *Den v. Bolton*, 7 Halst., 206, the supreme court of New Jersey asserts the same principles, and though founding its decision mainly on a statute, it is said to be true on general principles. The supreme court of Illinois, in the case of *Ferraria v. Vasconcelles*, 23 Ill., 456, refers to the case of *Shannon v. Frost* with approval, and adopts the language of the court that "the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals." In the very important case of *Chase v. Cheney*, recently decided in the same court, Judge Lawrence, who dissented, says, "We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts." And he dissents with Judge Sheldon from the opinion because it so holds.

In the case of *Watson v. Farris*, 45 Mo., 183, which was a case growing out of the schism in the Presbyterian Church in Missouri, in regard to this same declaration and testimony and the action of the general assembly, that court held that whether a case was regularly or irregularly before the assembly was a question which the assembly had the right to determine for itself, and no civil court could reverse, modify or impair its action in a matter of merely ecclesiastical concern. We cannot better close this review of the authorities

than in the language of the supreme court of Pennsylvania, in the case of the German Reformed Church *v.* Seibert, 3 Barr, 291: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals." In the subsequent case of McGinnis *v.* Watson, 41 Penn. St., 21, this principle is again applied and supported by a more elaborate argument.

§ 26. *A civil court cannot decide upon the jurisdiction of a church judicatory unless it intrudes upon the province of civil justice.*

The court of appeals of Kentucky, in the case of Watson *v.* Avery, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive. There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have been discussing it may very well be conceded that if the general assembly of the Presbyterian Church should undertake to try one of its members for murder and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the general assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may and must be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of

Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions. And this is precisely what the court of appeals of Kentucky did in the case of *Watson v. Avery*. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the general assembly over all, it went into an elaborate examination of the principles of Presbyterian church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the assembly and desired to conform to its decree.

But we need pursue this subject no further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far-reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we have made of the principles which should govern the case. For the same reasons we have held it under advisement for a year; not uninfluenced by the hope, that since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and that requires us to affirm the decree of the circuit court as it stands.

Decree affirmed.

MR. JUSTICE CLIFFORD, with whom MR. JUSTICE DAVIS concurred, dissented, holding that the circuit court had no jurisdiction, as the subject-matter of the suit was pending and undetermined in the state court. Citing *Buck v. Colbath*, 3 Wall., 341; *Hagan v. Lucas*, 10 Pet., 400; *Taylor v. Carryl*, 20 How., 594; *Freeman v. Howe*, 24 id., 450; *Payne v. Drewe*, 4 East, 523; *Peck v. Jenness*, 7 How., 612; *Evelyn v. Lewis*, 3 Hare, 472; *Noe v. Gibson*, 7 Paige, 513; *Russell v. East Anglian R'y Co.*, 3 McNaught. & G., 104.

The chief justice took no part in the decision.

SMITH v. SWORMSTEDT.

(16 Howard, 288-309. 1853.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the district of Ohio. The bill is filed by the complainants, for themselves, and in behalf of the traveling and worn-out preachers in connection with the society of the Methodist Episcopal Church South in the United States, against the defendants, to recover their share of a fund called the Book Concern, at the city of Cincinnati, consisting of houses, machinery, printing presses, book-bindery, books, etc., claimed to be of the value of some \$200,000.

The bill charges that, at and before the year 1844, there existed in the United States a voluntary association, unincorporated, known as the Methodist Episcopal Church, composed of seven bishops, four thousand eight hundred and twenty-eight preachers belonging to the traveling connection, and in bishops, ministers and members about one million one hundred and nine thousand nine hundred and sixty, united, and bound together in one organized body by certain doctrines of faith and morals, and by certain rules of government and discipline. That the government of the church was vested in one body called the general conference, and in certain subordinate bodies called annual conferences, and in bishops, traveling ministers and preachers. The bill refers to a printed volume, entitled "The Doctrines and Discipline of the Methodist Episcopal Church," as containing the constitution, organization, form of government, and rules of discipline, as well as the doctrines of faith of the association.

The complainants further charge that differences and disagreements had sprung up in the church between what was called the northern and southern members, in respect to the administration of the government with reference to the ownership of slaves by the ministers of the church, of such a character and attended with such consequences as threatened greatly to impair its usefulness, as well as permanently to disturb its harmony; and it became and was a question of grave and serious importance whether a separation ought not to take place, according to some geographical boundary to be agreed upon, so as that the Methodist Episcopal Church should thereafter constitute two separate and distinct organizations. And that, accordingly, at a session of the general conference held in the city of New York in May, 1844, a resolution was passed by a majority of over three-fourths of the body, by which it was determined, that, if the annual conferences of the slave-holding states should find it necessary to unite in a distinct ecclesiastical connection, the following rule should be observed with regard to the northern boundary of such connection: all the societies, stations and conferences adhering to the church in the south, by a vote of a majority of the members, should remain under the pastoral care of the southern church; and all adhering to the church north, by a like vote, should remain under the pastoral care of that church. This plan of separation contains eleven other resolutions, relating principally to the mode and terms of the division of the common property of the association between the two divisions, in case the separation contemplated should take place; and which, in effect, provide for a *pro rata* division, taking the number of the traveling preachers in the church north and south as the basis upon which to make the partition.

The complainants further charge that, in pursuance of the above resolutions,

the annual conferences in the slave-holding states met, and resolved in favor of a distinct and independent organization, and erected themselves into a separate ecclesiastical connection, under the provisional plan of separation based upon the discipline of the Methodist Episcopal Church, and to be known as the Methodist Episcopal Church South. And they insist that, by virtue of these proceedings, this church, as it had existed in the United States previous to the year 1844, became and was divided into two separate churches, with distinct and independent powers, and authority composed of the several annual conferences, stations and societies lying north and south of the aforesaid line of division. And also, that, by force of the same proceedings, the division of the church south became and was entitled to its proportion of the common property, real and personal, of the Methodist Episcopal Church, which belonged to it at the time the separation took place; that the property and funds of the church had been obtained by voluntary contributions, to which the members of the church south had contributed more than their full share, and which, down to the time of the separation, belonged in common to the Methodist Episcopal Church as then organized.

The complainants charge that they are members of the church south, and preachers, some of them supernumerary, and some superannuated, preachers, and belonged to the traveling connection of said church, and that, as such, have a personal interest in the property, real and personal, held by the church north, and in the hands of the defendants; and further, that there are about fifteen hundred preachers belonging to the traveling connection of the church south, each of whom has a direct and personal interest, in the same right with the complainants, in the said property, the large number of whom make it inconvenient and impracticable to bring them all before the court as complainants. They also charge that the defendants are members of the Methodist Episcopal Church North, and that each, as such, has a personal interest in the property; and further, that two of them have the custody and control of the fund in question; and that, in addition to these defendants, there are nearly thirty-eight hundred preachers belonging to the traveling connection of the church north, each of whom has an interest in the fund in the same right, so that it is impossible, in view of sustaining a just decision in the matter, to make them all parties to the bill. The complainants also aver that this bill is brought by the authority, and under the direction, of the general and annual conferences of the church south, and for the benefit of the same, and for themselves and all the preachers in the traveling connection, and all other ministers and persons having an interest in the property.

The defendants, in their answer, admit most of the facts charged in the bill, as it respects the organization, government, discipline and faith of the Methodist Episcopal Church as it existed at and previous to the year 1844. They admit the passage of the resolutions, called the plan of separation, at the session of the general conference of that year, by the majority stated, but deny that the resolutions were duly and legally passed; and also deny that the general conference possessed the competent power to pass them, and submit that they were therefore null and void. They also submit that, if the general conference possessed the power, the separation contemplated was made dependent upon certain conditions, and, among others, a change of the sixth restrictive article in the constitution of the church, by a vote of the annual conferences, which vote the said conferences refused. The defendants admit the erection of the church south into a distinct ecclesiastical organization, but deny that this was

done agreeably to the plan of separation. They deny that the Methodist Episcopal Church, as it existed in 1844, or at any time, has been divided into two distinct and separate ecclesiastical organizations, and submit that the separation and voluntary withdrawal from this church of a portion of the bishops, ministers and members, and organization into a church south, was an unauthorized separation; and that they have thereby renounced and forfeited all claim, either in law or equity, to any portion of the property in question. The defendants admit that the Book Concern at Cincinnati, with all the houses, lots, printing presses, etc., is now, and always has been, beneficially the property of the preachers belonging to the traveling connection of the Methodist Episcopal Church, but insist that, if such preachers do not, during life, continue in such traveling connection, and in the communion, and subject to the government of the church, they forfeit for themselves and their families all ownership in, or claim to, the said Book Concern and the produce thereof; they admit that the Book Concern was originally commenced and established by the traveling preachers of this church, upon their own capital, with the design in the first place of circulating religious knowledge, and that, at the general conference of 1796, it was determined that the profits derived from the sale of books should in future be devoted wholly to the relief of traveling preachers — supernumerary and worn-out preachers, and the widows and orphans of such preachers, — and the defendants submit that the Methodist Episcopal Church South is not entitled at law or in equity to have a division of the property of the Book Concern, or the produce, or to any portion thereof; and that the ministers, preachers or members, in connection with such church, are not entitled to any portion of the same; and further, that being no longer traveling preachers belonging to the Methodist Episcopal Church, they are not so entitled, without a change of the sixth restrictive article of the constitution of 1808, provided for in the plan of separation, as a condition of the partition of said fund.

The proofs in the case consist chiefly of the proceedings of the general conference of 1844, relating to the separation of the church and of the proceedings of the southern conferences, in pursuance of which a distinct and separate ecclesiastical organization south took place. There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect to be given to the acts and proceedings of these several bodies and authorities of the church. Our opinion will be founded almost wholly upon facts alleged in the bill and admitted in the answer.

§ 27. *Where parties interested in the subject-matter of a suit are very numerous, some of them may maintain a suit for themselves and others interested in like manner.*

An objection was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded. The rule is well established, that, where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Story's Eq. Pl., §§ 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl. (Jer. ed.), 167; 2 Paige, 19; 4 Myl. & Cr., 134, 619; 2 De G. & S., 102, 122. Story, J., in his valuable treatise on equity pleadings, after discussing this subject with his usual research and fulness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general

interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court. In this latter class, though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and *vice versa*, by some of the tenants, in behalf of themselves and the other tenants, to establish some right — such as suit to a mill, or right of common, or to cut turf. So by a parson of a parish against some of the parishioners to establish a general right to tithes — or conversely, by some of the parishioners in behalf of all to establish a parochial modus.

In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained. The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or, if ascertained, from the changes constantly occurring by death or otherwise. As it respects the persons into whose hands the fund in question should be delivered for the purpose of distribution among the beneficiaries, in case of a division of it, we shall recur to the subject in another part of this opinion.

§ 28. *Nature and origin of the Book Concern.*

We will now proceed to an examination of the merits of the case. The Book Concern, the property in question, is a part of a fund which had its origin at a very early day, from the voluntary contributions of the traveling preachers in the connection of the Methodist Episcopal Church. The establishment was at first small; but at present, is one of very large capital, and of extensive operations, producing great profits. In 1796, the traveling preachers in general conference assembled, determined that these profits should be thereafter devoted to the relief of the traveling preachers and their families; and accordingly resolved that the produce of the sale of the books, after the debts were paid, and sufficient capital provided for carrying on the business, should be applied for the relief of distressed traveling preachers, for the families of traveling preachers, and for supernumerary and worn-out preachers, and the widows

and orphans of preachers. The establishment was placed under the care and superintendence of the general conference, the highest authority in the church, which was composed of the traveling preachers; and it has grown up to its present magnitude, its capital amounting to nearly a million of dollars, from the economy and skill with which the concern has been managed, and from the labors and fidelity of the traveling preachers, who have always had the charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds. The agents who have the immediate charge of the establishment make up a yearly account of the profits, and transmit the same to the several annual conferences, each an amount in proportion to the number of traveling preachers, their widows and orphans comprehended within it, which bodies distribute the fund to the beneficiaries individually, agreeably to the design of the original founders. These several annual conferences are composed of the traveling preachers residing or located within certain districts assigned to them; and comprehended, in the aggregate, the entire body in connection with the Methodist Episcopal Church. The fund has been thus faithfully administered since its foundation down to 1846, when the portion belonging to the complainants in this suit, and those they represent, was withheld, embracing some thirteen of the annual conferences.

§ 29. *Division of the Methodist Episcopal Church.*

In the year 1844, the traveling preachers in general conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for division of the Methodist Episcopal Church in case the annual conferences in the slave-holding states should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations. And according to this plan, it was agreed that all the societies, stations and conferences adhering to the church south, by a majority of their respective members, should remain under the pastoral care of that church; and all of these several bodies adhering by a majority of its members to the church north should remain under the pastoral care of that church; and further, that the ministers, local and traveling, should, as they might prefer, attach themselves without blame to the church north or south. It was also agreed that the common property of the church, including this Book Concern, that belonged specially to the body of traveling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of traveling preachers falling within the respective divisions. This was in 1844. In the following year the southern annual conferences met in convention, in pursuance of the plan of separation, and determined upon a division, and resolved that the annual conferences should be constituted into a separate ecclesiastical connection, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical and economical rules and regulations of said discipline, except only so far as verbal alterations might be necessary; and to be known by the name of the Methodist Episcopal Church South. The division of the church, as originally constituted, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The Methodist Episcopal Church having been thus divided, with the authority and according to the plan of the general conference, it is claimed on the part of the complainants, who represent the traveling preachers in the church south, that they are entitled to their share of the capital stock and profits of this Book

Concern; and that the withholding of it from them is a violation of the fundamental law prescribed by the founders, and consequently of the trust upon which it was placed in the hands of the defendants. The principal answer set up to this claim is, that, according to the original constitution and appropriation of the fund, the beneficiaries must be traveling preachers, or the widows and orphans of traveling preachers, in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund; and that, as the complainants, and those they represent, are not shown to be traveling preachers in that connection, but traveling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries. This argument, we apprehend, if it proves anything, proves too much; for if sound, the necessary consequence is that the beneficiaries connected with the church north, as well as south, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are traveling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the church south. Their organization covers but about half of the territory embraced within that of the former church, and includes within it but a little over two-thirds of the traveling preachers. Their general conference is not the general conference of the old church, nor does it represent the interest, or possess territorially the authority, of the same; nor are they the body under whose care this fund was placed by the founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the church south. Assuming, therefore, that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the southern or northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established; in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a result that would differ very little in its effect from that sought to be produced by the complainants in their bill.

§ 30. *The separation of the Methodist Episcopal Church into two bodies in 1844 was done by competent authority and mutual consent, and is binding as a contract.*

It is insisted, however, that the general conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division; and hence, that the organization of the church south was without authority, and the traveling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. Even if this were admitted, we do not perceive that it would change the relative position and rights of the traveling preachers within the divisions north and south from that which we have just endeavored to explain. If the division under the direction of the general conference has been made without the proper authority, and for that reason the traveling preachers within the southern division are wrongfully separated from their connection with the church, and thereby have lost the character of beneficiaries, those within the northern division are equally wrongfully separated from that connection, as both divisions have been brought into existence by the same authority. The same consequence would follow in respect to them that is imputable to the

traveling preachers in the other division, and hence each would be obliged to fall back upon their rights as original proprietors of the fund. But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the general conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one. In 1784, when this church was first established, and down till 1808, the general conference was composed of all the traveling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities, to administer its polity, and promulgate its doctrines and teachings throughout the land. It cannot therefore be denied; indeed, it has scarcely been denied, that this body, while composed of all the traveling preachers, possessed the power to divide it, and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the general conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might at any subsequent period, the power remaining unchanged.

But it is insisted that this power has been taken away or given up by the action of the general conference of 1808. In that year, the constitution of this body was changed so as to be composed thereafter by traveling preachers, to be elected by the annual conferences, in the ratio of one for every five members. This has been altered from time to time, so that, in 1844, the representation was one for every twenty-one members. At the time of this change, and as part of it, certain limitations were imposed upon the powers of this general conference, called the six restrictive articles: 1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. 2. Nor allow of more than one representative for every fourteen members of the annual conferences, nor less than one for every thirty. 3. Nor alter the government so as to do away with episcopacy, or destroy the plan of itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive the ministers or preachers of trial by a committee, and of appeal; nor members before the society, or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book Concern, nor the charter-fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows and children. Subject to these restrictions, the delegated conference possessed the same powers as when composed of the entire body of preachers. And it will be seen that these relate only to the doctrine of the church, its representation in the general conference, the episcopacy, discipline of its preachers and members, the Book Concern and charter-fund. In all other respects, and in everything else that concerns the welfare of the church, the general conference represents the sovereign power the same as before. This is the view taken by the general conference itself, as exemplified by the usage and practice of that body. In 1820, they set off to the British conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828, they separated the an-

nual conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent church. These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this church in these several conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it. We will add that all the northern bishops, five in number, in council in July, 1845, acting under the plan of separation, regarded it as of binding obligation, and conformed their action accordingly.

§ 31. *The separation of an unincorporated association like a church, effected by competent authority, carries with it as a matter of law a division of the common property of the body.*

It has also been urged, on the part of the defendants, that the division of the church, according to the plan of the separation, was made to depend not only upon the determination of the southern annual conferences, but also upon the consent of the annual conferences north, as well as south, to a change of the sixth restrictive article; and as this was refused, the division which took place was unauthorized. But this is a misapprehension. The change of this article was not made a condition of the division. That depended alone upon the decision of the southern conferences. The division of the Methodist Episcopal Church having thus taken place, in pursuance of the proper authority, it carried with it, as matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, which belonged to the traveling preachers. It would be strange if it could be otherwise, as it respects the Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund.

It has been argued, however, that, according to the plan of separation, the division of the property in this Book Concern was made to depend upon the vote of the annual conferences to change the sixth restrictive article, and that, whatever might be the legal effect of the division of the church upon the common property otherwise, this stipulation controls it, and prevents a division till the consent is obtained. We do not so understand the plan of separation. It admits the right of the church south to its share of the common property, in case of a separation, and provides for a partition of it among the two divisions, upon just and equitable principles; but, regarding the sixth restrictive article as a limitation upon the power of the general conference, as it respected a division of the property in the Book Concern, provision is made to obtain a removal of it. The removal of this limitation is not a condition to the right of the church south to its share of the property, but is a step taken in order to enable the general conference to complete the partition of the property.

We will simply add that, as a division of the common property followed, as matter of law, a division of the church organization, nothing short of an agreement or stipulation of the church south to give up their share of it, could preclude the assertion of their right; and, it is quite clear, no such agreement or stipulation is to be found in the plan of separation. The contrary intent is manifest from a perusal of it. Without pursuing the case further, our conclusion is, that the complainants, and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect. The complainants represent not only all the beneficiaries in the division of the church south, but also the general conference and the annual conferences of the same. The share, therefore, of

this Book Concern belonging to the beneficiaries in that church, and which its authorities are entitled to the safe-keeping and charge of, for their benefit, may be properly paid over to the complainants as the authorized agents for this purpose.

We shall accordingly direct a decree to be entered, reversing the decree of the court below, and remanding the proceedings to that court, directing a decree to be entered for the complainants against the defendants; and a reference of the case to a master to take an account of the property belonging to the Book Concern, and report to the court its cash value, and to ascertain the portion belonging to the complainants, which portion shall bear to the whole amount of the fund the proportion that the traveling preachers in the division of the church south bore to the traveling preachers in the church north, at the time of the division of said church. And on the coming in of the report, and confirmation of the same, a decree shall be entered in favor of the complainants for that amount. (a)

BOULDIN v. ALEXANDER.

(13 Otto, 330-336. 1890.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The bill in this case was filed by Joseph Alexander and others against Albert Bouldin and others, to determine which of two contending boards of trustees of the "Third Colored Baptist Church" was entitled to the possession and control of the church property, including the church building erected by the association as a place of worship, to correct a mistake in a deed executed by Bouldin to the trustees of the church, and to obtain a settlement with him of his accounts as the agent and pastor of the church, and the cancellation and discharge of certain notes secured by real or pretended deeds of trust which had been, from time to time, executed to him. The first and second of these things were accomplished by a decree affirmed in this court at the December term, 1872, and reported in 15 Wall., 131. The complainants were, by that decree, adjudged to be the lawful trustees; the mistake in the deed was corrected, and the present appellants, defendants below, were ordered to deliver the possession of the church building and the lot on which it stood to the complainants. This left nothing to be disposed of ~~but the matters of account between Bouldin and the church and the notes which had been given to him.~~ With a view to ~~this end,~~ the original decree, affirmed here on the former appeal, ~~was that~~ the cause be referred to the auditor of the court below "to ~~examine~~ and report the facts on the following questions:

"1st. Whether the defendant, Albert Bouldin, purchased, under the direction of the church, the entire lot of ground on the corner of Fourth and L streets of George H. Varnell, for the use and benefit of said church; and whether the money collected by said Bouldin from or on behalf of the church was by him used to aid in the payment of said lot, and, if so, to what amount. 2d. To state the accounts between the said Albert Bouldin and the plaintiffs, as trustees of the said church, and the trustees of whom they are the successors; to report the amounts of money received by said Bouldin from the said church and from other persons on behalf of said church, and the amounts to which he was entitled for his services in behalf of said church, and has expended therein and

about the same, and to state the balance due either way, and for these purposes that he may call witnesses and take testimony. That the plaintiffs, until the further order of this court, are enjoined and restrained from selling, disposing of, or in any way incumbering the title of said church property so as to weaken the security of said Bouldin upon the church property."

When our mandate went down on that appeal, the complainants moved that a writ of possession issue at once; but the court withheld it for the coming in of the auditor's report, and, with the consent of the defendants, the order of reference was made to include the following additional questions: "3. In whose possession has the church building and property on the corner of Fourth and L streets, Washington, D. C., been since the commencement of this suit? 4. What is the fair value of the rents, issues and profits arising and accruing to the party in possession of said property from and since this suit?"

There was no claim in the bill for compensation for the use and occupation of the property, though it was alleged that the defendants unlawfully and by force kept the complainants, who were the only duly elected trustees, out of possession. As to the notes, it was alleged in the bill that on the 28th of July, 1862, six notes were made to Bouldin, five for the sum of \$100 each, payable in one, two, three, four and five years from date, and the other for \$120, payable in six years; and that these notes were secured by a deed of trust to one J. W. Barnaclo. In addition to this, according to the averments in the bill, four other notes of \$400 each were afterwards executed to Bouldin, on a settlement of his accounts for the erection of the church building. It was also alleged that the defendants who claim to be trustees of the church property had executed a deed of trust to one Callan, to secure all the notes originally given to Bouldin. The claim on the part of the complainants was that, on a full settlement of all the accounts of Bouldin, and a correction of the mistakes that had occurred in former settlements, it would be found there was nothing due on the notes, and that Bouldin would be largely in debt to the church. The defendants, in their answer, claimed that the notes for \$620 were given and secured by deed of trust to Barnaclo, as stated in the bill, and that on the settlement of accounts, when the church building was completed, six notes, of \$400 each, were given to Bouldin instead of four. The execution of the deed of trust by the defendant trustees was also relied on.

On the hearing of the case before the auditor, Bouldin refused to produce the notes that had been given to him, or account for their absence. It was proved, however, that there had been paid to or collected by him divers sums of money, which should be credited on the notes. The aggregate of these sums, including interest from the date of payment to November 1, 1875, is, according to the report of the auditor, \$1,233.47. On account of the failure of Bouldin to present the notes, the auditor made no statement of the amount due upon them, but treated them as withdrawn from the suit by Bouldin. The auditor also found that the entire lot of ground on the corner of Fourth and L streets, bought from Varnell, was for the use of the church, and charged Bouldin with the proceeds of a sale made of part of the lot. He also reported that the defendants had been in the possession of the church property since the commencement of the suit, and that the value of the rents, issues and profits accruing to them by reason of such possession was six per cent. per annum on the value of the property, or \$498.33 a year. He, therefore, in his accounting, charged the defendants with that amount, payable quarterly each year, from September 28, 1867, the date of the commencement of the suit, until October

1, 1875, and interest on each quarterly instalment as it fell due. The total amount of his allowances in this way, on account of rents, was \$4,910.26, as of October 1, 1875.

Upon the filing of the report, the complainants excepted because rents had not been charged from July 28, 1867, instead of September 28th. The defendants excepted, 1, because they had been charged with mesne profits; 2, because Bouldin was not credited for the amount of his notes; 3, because Bouldin was charged for the proceeds of the part of the lot bought from Varnell which he had sold; 4, because no allowance had been made to Bouldin for his services; and 5, because of the amount allowed for payments made to Bouldin. The court below, at special term, overruled the exceptions of the complainants, and sustained the exceptions of the defendants to the allowance against Bouldin for the proceeds of the sale of part of the lot bought from Varnell, and to the allowance against all the defendants for rents, and returned the case to the auditor for a further stating of the accounts in accordance with certain instructions. From this decree at special term an appeal was taken by the complainants to the general term, where a decree was rendered against all the defendants, the present appellants, for \$4,734.12, "as mesne profits for use and occupation by them of the church premises during the pendency of this suit, to wit, from the commencement of the suit until March 31, 1877, when the said premises were returned to the possession of the plaintiffs." The decree then further goes on to say: "The promissory notes given by the plaintiffs as trustees of the church to the defendant, Albert Bouldin, are not included in this decree, the same having been withdrawn from the consideration of the court. But all other claims by him made against the church or its trustees are rejected and disallowed. The item of interest on mesne profits reported by the auditor in favor of the complainants is disallowed." It was also ordered that the injunction restraining J. W. Barnack from proceeding under the deed of trust to him, and that restraining the complainants from selling, disposing or incumbering the title to the church property, be dissolved.

From this decree the defendants below have alone appealed, and they assign for error the decree against them for the payment of mesne profits, and the disallowance of the claims of Bouldin not embraced in his notes.

§ 32. *Where a church building has been regularly kept open and services performed, no demand for mesne profits or other money compensation can be sustained in favor of the party that has been deprived of the right to control such services.*

As to the mesne profits, we think the decree below cannot be sustained. There is no claim for an allowance of this kind in the bill, and the proofs do not show that the appellants, or those whom they represent, derived individually any such pecuniary advantage from the use of the property pending the suit as to make it proper they should be held personally accountable in that way. Bouldin was the founder of the society. He gathered the congregation together. He bought the church lot and superintended the erection of the church building. If money was wanted that could not be got from others, he furnished it himself from his own means, and, in the end, as the case shows, while the society had secured a property worth, according to the report of the auditor, a little more than \$8,000, there was a debt owing to him of over \$3,000. The congregation had increased under his administration to several hundred members. Afterwards dissensions grew up, and two parties were formed, the complainants representing one and the defendants the other.

Each sought to control the property and govern the society. The defendants kept possession, and apparently a part of the time with the approbation of the court, for a writ to put them out was denied when applied for. At last the complainants were successful, and Bouldin and his party were required to submit to their government. The contest all along was not so much for possession of the property as for the control of the church affairs. During the entire controversy the church property has been kept exclusively for church purposes. Every member of the congregation was permitted to worship there if he chose. It is possible that the parties officiating at the religious services and controlling the property may not at all times have been such as the complainants and their adherents wanted, but no person was excluded from the church building for the purposes of worship if he wanted to go in. Under these circumstances it seems to us that the defendants are not in equity chargeable personally with the value of the use and occupation of the property during the time they were litigating to keep the control of the society and its affairs.

§ 33. *One who withdraws or withholds his notes from an auditor in a judicial account cannot complain that no allowance is made him on such notes.*

In other respects the decree below is right, so far as it goes. Upon the evidence, Bouldin is not entitled to any further credits than have been allowed. He voluntarily withdrew or withheld his notes from the auditor and the court, and cannot have any affirmative relief on their account. His rights under the Barnacle deed of trust are saved by the decree, and as the persons who executed the Callan deed were not lawful trustees, all proceedings under that deed were properly enjoined. We think, however, some order should have been made giving the complainants the benefit of the finding in their favor by the auditor in respect to the moneys paid to or collected by Bouldin to apply on his notes. From the answer of Bouldin, it seems probable that a part of these payments have already been indorsed on the notes; but this cannot be determined with certainty without an inspection of the notes themselves. If he will produce the notes, or satisfactorily account for their absence, so that the proper application of all payments can be made under the direction of the court and the notes discharged to the extent of the application, that should be done. But if, on an order to that effect, he shall fail to produce the notes, or fail satisfactorily to account for their absence, a decree should be entered against him personally for the several amounts reported by the auditor as having been paid to or collected by him on that account. As this last proceeding has been rendered necessary by his failure to produce the notes on the former hearing, he should be charged with the costs consequent upon such refusal.

The decree will be reversed so far as it charges the appellants with any sum for mesne profits and use and occupation, and the cause remanded for such further proceedings in conformity with this opinion as may appear to be necessary; and it is so ordered.

TOWN OF PAWLET v. CLARK.

(9 Cranch, 292-338. 1815.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Vermont.

STATEMENT OF FACTS.—Case stated: "In this cause it is agreed, on the part of the plaintiffs, that the lands, demanded in the plaintiff's declaration, are

a part of the right of land granted in the charter of the town of Pawlet, by the former governor of the province of New Hampshire, as a glebe for the Church of England, as by law established; and that in the year 1802 there was, in the town of Pawlet, a society of Episcopalians duly organized agreeably to the rules and regulations of that denomination of Christians heretofore commonly known and called by the name of the Church of England. That in the same year the said society contracted with the Reverend Bethuel Chittenden, a regular ordained minister of the Episcopal Church, who then resided in Shelburn, in the county of Chittenden (but had not any settlement as a clerk or pastor therein), to preach to the said society in the town of Pawlet at certain stated times, and to receive the avails of the lands in question, and that the said Chittenden thereupon gave a lease of the said land to Daniel Clark and others, who went into possession of the premises and still hold the same under the said lease, and that the said Chittenden regularly preached and administered the ordinances to the people of the said society, according to his said contract, and received the rents and profits of the said land until the year of our Lord Christ 1809, when the said Chittenden deceased; and that in 1809 the said society contracted with the Reverend Abraham Brownson, a regular ordained minister of the Episcopal Church, residing in Manchester, and officiating there a part of the time, to preach to the said society a certain share of the time, and to receive the rents and profits of the said land; and that the said Brownson has regularly attended to his duty in the said church, and administered ordinances in the same until September, 1811, about which time the said society regularly settled the Reverend Stephen Jewett, who now resides in the said town of Pawlet, and who, from the time of his settlement, is to receive all the temporalities of the said church. And it is further agreed by the said parties that the general assembly of the state of Vermont, on the 5th of November, 1805, did grant to the several towns in this state, in which they respectively lie (reference being had to the act of the general assembly aforesaid), all the lands granted by the king of Great Britain to the Episcopal Church by law established (reference being had to the charter of the town of Pawlet, aforesaid, for the said grant of the king of Great Britain), and that the lands, in the plaintiff's declaration mentioned and described, are part of the lands so granted by the king of Great Britain to the Episcopal Church." The substantial parts of the charter are quoted in the opinion of the court.

By the act of November 5, 1805, it was enacted as follows: "Whereas, the several glebe rights granted by the British government to the Church of England, as by their law established, are in the nature of public reservations, and as such became vested, by the revolution, in the sovereignty of this state; therefore, Be it enacted by the general assembly of the state of Vermont, that the several rights of land in this state granted under the authority of the British government to the Church of England, as by law established, be and the same are hereby granted severally to the respective towns in which such lands lie, and to their respective use and uses forever, in manner following, to wit: It shall be the duty of the selectmen in the respective towns, in the name and behalf, and at the expense of such towns, if necessary, to sue for and recover the possession of such lands, and the same to lease out according to their best judgment and discretion, reserving an annual rent therefor, which shall be paid into the treasury of such town, and appropriated to the use of schools therein, and shall be applied in the same manner as moneys arising from school lands are, by law, directed to be applied."

§ 34. *Jurisdiction of federal courts in controversies concerning title to lands.*

Opinion by MR. JUSTICE STORY.

The first question presented in this case is whether the court has jurisdiction. The plaintiffs claim under a grant from the state of Vermont, and the defendants claim under a grant from the state of New Hampshire, made at the time when the latter state comprehended the whole territory of the former state. The constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of the same state claiming lands under grants of different states." It is argued that the grant under which the defendants claim is not a grant of a different state, within the meaning of the constitution, because Vermont, at the time of its emanation, was not a distinct government, but was included in the same sovereignty as New Hampshire. But it seems to us that there is nothing in this objection. The constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed that a state tribunal might not stand indifferent in a controversy, where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact whether grants arose under the same or under different states. Now it is very clear that, although the territory of Vermont was once a part of New Hampshire, yet the state of Vermont, in its sovereign capacity, is not and never was the same as the state of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of Vermont; that of the defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same, although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same than the circumstance that a part of the members of one corporation constitutes a component part of another corporation makes the corporation the same. Nor can it be affirmed, in any correct sense, that the grants are of the same state; for the grant of the defendants could not have been made by the state of Vermont, since that state had not at that time any legal existence; and the grant of the plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the constitution. It would, indeed, have been a sufficient answer to the objection that the constitution and laws of the United States, by the admission of Vermont into the Union as a distinct government, had decided that it was a different state from that of New Hampshire.

§ 35. *Construction of a charter granting land to several persons in shares.*

The other question which has been argued is not without difficulty. It is contended by the plaintiffs that the original grant, in the charter of Pawlet, of "one share for a glebe for the Church of England as by law established," is either void for want of a grantee, or, if it could take effect at all, it was as a public reservation, which, upon the revolution, devolved upon the state of Vermont. The material words of the royal charter of 1761 are, "do give and grant in equal shares unto our loving subjects, etc., their heirs and assigns forever, whose names are entered on this grant, to be divided amongst them into

sixty-eight equal shares, all that tract or parcel of land, etc., and that the same be and hereby is incorporated into a township by the name of Pawlet; and the inhabitants that do or shall hereafter inhabit the said township are hereby declared to be enfranchised with and entitled to all and every the privileges and immunities that other towns within our province by law exercise and enjoy. To have and to hold the tract of land, etc., to them and their respective heirs and assigns forever, upon the following conditions," etc. Upon the charter are indorsed the names of sixty-two persons, and then follows this additional clause: "His excellency, Benning Wentworth, a tract of land to contain five hundred acres, as marked in the plan B. W., which is to be accounted two shares; one share for the incorporated society for the propagation of the gospel in foreign parts; one share for a glebe for the Church of England as by law established; one share for the first settled minister of the gospel; one share for the benefit of a school in said town." Thus making up, with the preceding sixty-two shares, the whole number of sixty-eight shares stated in the charter.

Before we proceed to the principal points in controversy, it will be proper to dispose of those which more immediately respect the legal construction of the language of the charter. And, in our judgment, upon the true construction of that instrument, none of the grantees, saving Governor Wentworth, could legally take more than one single share, or a sixty-eighth part of the township. This construction is conformable to the letter and obvious intent of the grant, and, as far as we have any knowledge, has been uniformly adopted in New Hampshire. It is not for this court, upon light grounds, or ingenious and artificial reasoning, to disturb a construction which has obtained so ancient a sanction, and has settled so many titles, even if it were at first somewhat doubtful. But it is not in itself doubtful; for it is the only construction which will give full effect to all the words of the charter. Upon any other, the words "in equal shares," and "to be divided amongst them in sixty-eight equal shares," would be nugatory or senseless. We are further of opinion that the share for a glebe is not vested in the other grantees having a capacity to take, and so in the nature of a condition, use or trust, attaching to the grant. It is nowhere stated to be a condition binding upon such proprietors, although other conditions are expressly specified. Nor is it a trust or use growing out of the sixty-eighth part granted to the respective proprietors, for it is exclusive of these shares by the very terms of the charter. The grant is in the same clause with that to the society for the propagation of the gospel, and in the same language, and ought, therefore, to receive the same construction, unless repugnant to the context, or manifestly requiring a different one. It is very clear that the society for the propagation of the gospel take a legal, and not a merely equitable estate; and there would be no repugnancy to the context, in considering the glebe, in whomsoever it may be held to vest, as a legal estate. We are further of opinion that the three shares in the charter, "for a glebe," "for the first settled minister," and "for a school," are to be read in connection, so as to include in each the words, "in the said town," i. e., of Pawlet; so that the whole clause is to be construed, one share for a glebe, etc., in the town of Pawlet, one share for the first settled minister in the town of Pawlet, and one share for a school in the town of Pawlet.

§ 36. *The Church of England is not a corporation; cannot receive a donation in its collective capacity.*

We will now consider what is the legal operation of such a grant at the com-

mon law; and how far it is affected by the laws of New Hampshire or Vermont. At common law, the Church of England, in its aggregate description, is not deemed a corporation. It is, indeed, one of the great estates of the realm; but is no more, on that account, a corporation, than the nobility in their collective capacity. The phrase, "the Church of England," so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered, in the aggregate, under the superintendence of its spiritual head. In this sense, the Church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state. In this sense it is used in Magna Charta, c. 1, where it is declared: "*Quod ecclesia Anglicana libera sit, et habeat omnia jura sua integra, et libertates suas illæsas;*" and Lord Coke, in his commentary on the text, obviously so understands it. 2 Inst., 2, 3. The argument, therefore, that supposes a donation "to the Church of England," in its collective capacity, to be good, cannot be supported, for no such corporate body exists, even in legal contemplation.

§ 37. *Rights and powers of the Church of England of a particular parish.*

But it has been supposed that the "Church of England, of a particular parish," must be a corporation for certain purposes, although incapable of asserting its rights and powers, except by its parson, regularly inducted. And, in this respect, it might be likened to certain other aggregate corporations acknowledged in law, whose component members are civilly dead and whose rights may be effectually vindicated through their established head, though during a vacancy of the headship they remain inert; such are the common law corporations of abbot and convent, and prior and monks of a priory. Nor is this supposition without the countenance of authority. The expression, parish church, has various significations. It is applied sometimes to a select body of Christians, forming a local spiritual association; and sometimes to the building in which the public worship of the inhabitants of a parish is celebrated; but the true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial, and the administration of the sacraments. Com. Dig. Eglise, C. Seld. de Decim., 265; 2 Inst., 363; 1 Burns' Eccles. Law, 217; 1 Woodes., 314. Doctor Gibson, indeed, holds that the church, in consideration of law, is properly the cure of souls, and the right of tithes. Gibs., 189; 1 Burns' Eccles. Law, 332. Every such church, of common right, ought to have a manse and glebe as a suitable endowment; and without such an endowment it cannot be consecrated; and until consecration it has no legal existence as a church. Com. Dig. Dismes, B. 2; 3 Inst., 203; Gibs., 190; 1 Burns' Eccles. Law, 233; Com. Dig. Eglise, A.; Dort. of Plural, 80. When a church has thus acquired all the ecclesiastical rights, it becomes in the language of law a rectory or parsonage, which consists of a glebe, tithes and oblations established for the maintenance of a parson or rector to have cure of souls within the parish. Com. Dig. Eccles. Persons, c. 6. These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of a legal perpetuity, must be invested in some natural or corporate body; for in no other way can they be exercised or vindicated. And so is the opinion of Lord Coke, in 3 Inst., 201, 202, where he says: "Albeit they" (i. e., subjects) "might build churches without the king's license, yet they could not erect a spiritual politic body to continue in succession, and capable of endowment,

without the king's license; but by the common law, before the statute of mortmain, they might have endowed the spiritual body once incorporated *perpetuis futuris temporibus*, without any license from the king or any other."

This passage points clearly to the necessity of a spiritual corporation to uphold the rectorial rights. We shall presently see whether the parish church, after consecration, was deemed, in legal intendment, such a corporation. In his learned treatise on tenures, Lord Chief Baron Gilbert informs us that anciently, according to the superstition of the age, abbots and prelates "were supposed to be married to the church, inasmuch as the right of property was vested in the church, the estate being appropriated, and the bishop and abbot, as husbands and representatives of the church, had the right of possession in them; and this the rather because they might maintain actions and recover and hold courts within their manors and precincts as the entire owners; and that crowns and temporal states might have no reversions of interest in their feuds and donations. Therefore, since they had the possession in fee they might alien in fee; but they could not alien more than the right of possession that was in them, for the right of propriety was in the church." But as to a parochial parson, "because the cure of souls was only committed to him during life, he was not capable of a fee, and therefore the fee was in abeyance." *Gilb., Tenures*, 110, etc. Conformable herewith is the doctrine of Bracton, who observes that an assize *juris utrum* would not lie in cases of a gift of lands to cathedral and conventual churches, though given in *liberam eleemosynam*, because they were not given to the church solely, but also to a parson to be held as a barony, "*non solum dantur ecclesiis, sed et personis tenenda in baronia;*" and, therefore, they might have all the legal remedies applicable to a fee. But he says it is otherwise to a person claiming land in right of his church, for, in cases of parochial churches, gifts were not considered as made to the parson, but to the church, "*quia ecclesiis parochialibus non fit donatio personæ, sed ecclesiæ, secundum perpendi poterit per modum donationis.*" *Bracton*, 286, b; 1 *Reeve's Hist. Law*, 369. And in another place, Bracton, speaking of the modes of acquiring property, declares that a donation may well be made to cathedrals, convents, parish churches and religious personages, "*poterit etiam donatio fieri in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus, vivis religiosis;*" etc. *Bracton*, 27, b; 1 *Reeve's Hist. Law*, 303.

The language of these passages would seem to consider cathedral, conventual and parochial churches as corporations of themselves capable of holding lands. But upon an attentive examination it will be found to be no more than an abbreviated designation of the nature, quality and tenure of different ecclesiastical inheritances, and that the real spiritual corporations, which are tacitly referred to, are the spiritual heads of the particular church, namely, the bishop, the abbot, and, as more important to the present purpose, the parson, *qui gerit personam ecclesiæ*. Upon this ground it has been held in the year books (11 H. 4, 84, b), and has been cited as good law by Fitzherbert and Brook (*Fitz.; Feofft.*, pl. 42; *Bro. Estate*, pl. 49; *S. C.*, *Viner*, ab. L., pl. 4), that if a grant be made to the church of such a place, it shall be a fee in the parson and his successors. "*Si terre soit done per ceuz parolz, dedit et concessit ecclesiæ de tiel lieu, le parson et ses successeurs serra inheriter.*" And in like manner, if a gift be of chattels to parishioners, who are no corporation, it is good, and the church-wardens shall take them in succession, for the gift is to the use of the church. 37 H., 6, 30; 1 *Kyd., Corp.*, 29.

§ 38. *Where there is a grant of land made to a particular parish, the parson takes the freehold as a sole corporation.*

In other cases the law looks to the substance of the gift, and, in favor of religion, vests it in the party capable of taking it. And, notwithstanding the doubts of a learned but singular mind (Perk., s. 55), in our judgment the grant in the present charter, if there had been a church actually existing in Pawlet at the time of the grant, must, upon the common law, have received the same construction. In the intendment of law the parson and his successors would have been the representatives of the church, entitled to take the donation of the glebe. It would, in effect, have been a grant to the parson of the Church of England in the town of Pawlet, and to his successors, of one share in the township, as an endowment to be held *jure ecclesiæ*; for a glebe is emphatically the dowry of the church: "*Gleba est terra qua consistit dos ecclesiæ.*" Lind., 254. Under such circumstances, by the common law, the existing parson would have immediately become seized of the freehold of the glebe, as a sole corporation capable of transmitting the inheritance to his successors. Whether, during his life, the fee would be in abeyance, according to the ancient doctrine (Litt., s. 646, 647; Co. Lit., 342; 5 Edw., 4, 105; Dyer, 71, pl. 43; Hob., 338; Com. Dig., Abeyance, A.; id., Ecclesiastical Persons, C. 9; Perk., s. 709), or whether, according to learned opinions in modern times, the fee should be considered as *quodam modo* vested in the parson for the benefit of his church and his successors (Co. Lit., 341, a; Com. Dig., Ecclesiast. Persons, C. 9; Fearne, Cont. Rem., 513, etc.; Christian's note to 2 Black. Com., 107, note 3; Gilb. tenures, 113; 1 Woodeson, 312), is not very material to be settled; for at all events the whole fee would have passed out of the crown. Litt., s. 648; Co. Lit., 341, a; Christian's note, *ubi supra*; Gilb. tenures, 113. Nor would it be in the power of the crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be divested; though by consent of all parties interested, namely, the patron and ordinary, and also the parson, if the church were full, it might be alienated or incumbered. Litt., s. 648; Co. Lit., 343; Perk., s. 35; 1 Burn's Ecclesiast. Law, 585. But inasmuch as there was not any church duly consecrated and established in Pawlet at the time of the charter, it becomes necessary further to inquire whether, at common law, a grant so made is wholly void for want of a corporation having a capacity to take.

§ 39. *A grant cannot take effect unless there is a grantee in existence. A grant to an aggregate corporation during the vacancy of the headship, void. Endowment of parish church, how made.*

In general, no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further; for if there be an aggregate corporation, having a head, as a mayor and commonalty, a grant or devise made to the corporation during the vacancy of the headship is merely void; although, for some purposes, as for the choice of a head, the corporation is still considered as having a legal entity. 13 Ed. 4, 8; 18 Ed. 4, 8; Bro. Corporation, 58, 59; Dalison, 31; 1 Kyd. Corp., 106, 107; Perk., s. 33, 50. Whether this doctrine has been applied to parochial churches, during an avoidance, has not appeared in any authorities that have fallen within our notice, and perhaps can be satisfactorily settled only by a recurrence to analogous principles, which have been applied to the original endowments of such churches. We have already seen that no parish church, as such,

could have a legal existence until consecration; and consecration was expressly inhibited, unless upon a suitable endowment of land. The canon law, following the civil law, required such endowment to be made, or at least ascertained, before the building of the church was begun. Gibs., 189; 1 Burn's Eccles. Law, 233. This endowment was, in ancient times, commonly made by an allotment of manse and glebe, by the lord of the manor, who thereupon became the patron of the church. Other persons also at the time of consecration often contributed small portions of ground, which is the reason, we are told, why, in England, in many parishes, the glebe is not only distant from the manor, but lies in remote, divided parcels. Ken. Par. Aut., 222, 233, cited in 1 Burn's Eccles. Law, 234. The manner of founding the church and making the allotment was for the bishop or his commissioner to set up a cross, and set forth the ground where the church was to be built, and it then became the endowment of the church. Degge, p. 1, c. 12, cited Burn's Eccles. Law, 233.

§ 40. *A donation by the crown for the use of a non-existing parish church, valid as a dedication to pious uses. A legislative grant cannot be resumed by the state.*

From this brief history of the foundation of parsonages and churches, it is apparent that there could be no spiritual or other corporation capable of receiving livery of seizin of the endowment of the church. There could be no parson, for he could be inducted into office only as a parson of an existing church, and the endowment must precede the establishment thereof. Nor is it even hinted that the land was conveyed in trust, for at this early period trusts were an unknown refinement. The land, therefore, must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. And, under such circumstances, until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance, or be like the *hæreditus jacens* of the Roman code in expectation of an heir. This would conform exactly to the doctrine of the civil law, which, as to pious donations, Bracton has not scrupled to affirm to be the law of England. "Res vero sacræ, religiosæ, et sanctæ in nullius bonis sunt, quod enim divini juris est, id in nullius hominis bonis est, immo in bonis dei hominum censura, etc. Res quidem nullius dicuntur pluribus modis, etc. Item censura (ut dictum est), sicut res sacræ religiosæ et sanctæ. Item casu, sicut est hæreditus, jacens ante additionem, sed fallit in hoc, quia sustinet vicem personæ defuncti, vequia speratur futura hæreditas ejus, qui adibit." Bracton, 8, a; Justin. Instit., lib. 2, tit. 1; Co. Lit., 342, on Litt., s. 447. Nor is this a novel doctrine in the common law. In the familiar case where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. *Lade v. Shepherd*, 2 Strange, 1004; *Hale in Harg.*, 78. So if the parson or a stranger purchase a bell with his own money, and put it up, the property passes from the purchaser, because, when put up, it is consecrated to the church. 11 H. 4, 12; 1 Kyd. Corp., 29, 30. These principles may seem to savor of the ancient law; but in a modern case in which, in argument, the doctrine was asserted, Lord Hardwicke did not deny it, but simply decided that the circumstances of that case did not amount to a donation of the land, on which a chapel had been built, to public and pious uses. *Attorney-General v. Foley*, 1 Dick., 363. And in an intermediate period, Lord Chief Justice Dyer held

that if the crown, by statute, renounced an estate, the title was gone from the crown, although not vested in any other person, but the fee remained in abeyance. It is true that Weston, J., was, in the same case, of a different opinion; but Lord Chief Baron Comyns has quoted Dyer's opinion without any mark of disapprobation. Com. Dig., Abeyance, A. 1.

For the reasons, then, that have been stated, a donation by the crown for the use of a non-existing parish church may well take effect by the common law as a dedication to pious uses, and the crown would thereupon be deemed the patron of the future benefice when brought into life. And after such a donation it would not be competent for the crown to resume it at its own will, or alien the property without the same consent which is necessary for the alienation of other church property, namely, the consent of the ordinary and the parson, if the church be full, or in a vacancy, of the ordinary alone. And the same principles would govern the case before the court, if it were to be decided upon the mere footing of the common law. If the charter had been of a township in England, the grant of the glebe would have taken effect as a dedication to the parochial church of England to be established therein. Before such church were duly erected and consecrated, the fee of the glebe would remain in abeyance, or at least be beyond the power of the crown to alien without the ordinary's consent. Upon the erection and consecration of such a church, and the regular induction of a parson, such parson and his successors would, by operation of law, and without further act, have taken the inheritance *jure ecclesiæ*.

§ 41. *New Hampshire made a royal province; laws of England in force therein.*

Let us now see how far these principles were applicable to New Hampshire at the time of issuing of the charter of Pawlet. New Hampshire was originally erected into a royal province in the thirty-first year of Charles II., and from thence until the revolution continued a royal province, under the immediate control and direction of the crown. By the first royal commission granted in 31 Charles II., among other things, judicial powers in all actions were granted to the provincial governor and council, "so always that the form of proceedings in such cases, and the judgment thereupon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid (that is, of the province), and the circumstances of the place will admit." Independent, however, of such a provision, we take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies, unless so far as it is inapplicable to their situation or repugnant to their other rights and privileges. *A fortiori*, the principle applies to a royal province.

§ 42. *Legislation on the subject of religion.*

By the same commission or charter, the crown granted to the subjects of the province, "that liberty of conscience shall be allowed to all Protestants, and that such especially as shall be conformable to the rites of the Church of England shall be particularly countenanced and encouraged." By a subsequent commission of 15 Geo. II., the governor of the province, among other things, is authorized "to collate any person or persons to any churches, chapels or other ecclesiastical benefices within our said province as often as any shall happen to be void," and this authority was continued and confirmed in the same terms by royal commissions in 1 Geo. III., and 6 Geo. III. By the provincial

statute of 13 Ann, c. 43, the respective towns in the province were authorized to choose, settle and maintain their ministers, and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship according to another persuasion should be excused from taxes. And the respective towns were further authorized to build and repair meeting houses, ministers' houses and school-houses, and to provide and pay school-masters. This is the whole of the provincial and royal legislation upon the subject of religion. Inasmuch as liberty of conscience was allowed, and the Church of England was not exclusively established, the ecclesiastical rights to tithes, oblations and other dues had no legal existence in the province. Neither, upon the establishment of churches, was a consecration by a bishop, or a presentation of a parson to the ordinary, indispensable; for no bishopric existed within the province.

§ 43. *Parsons possessed the corporate capacity to take in succession. Churches erected by the crown entitled to the glebe.*

But the common law, so far as it respected the erection of churches of the Episcopal persuasion of England, the right to present, or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, seems to have been fully recognized and adopted. It was applicable to the situation of the province, was avowed in the royal grants and commissions, and explicitly referred to in the appropriation of glebes in almost all the charters of townships in the province. And it seems to be also clear that it belonged to the crown exclusively, at its own pleasure to erect the church in each town that should be entitled to take the glebe, and upon such erection to collate through the governor a parson to the benefice.

§ 44. *The glebe not alienable by the crown without the town's consent.*

The respective towns in their corporate capacity had no control over the glebe; but inasmuch as they were bound, by the provincial statute, to maintain public worship, and had, therefore, an interest to be eased of the public burden, by analogy to the common law, in relation to the personal property of the parish church, the glebe could not, before the erection of a church, be aliened by the crown without their consent; nor, after the erection of a church and induction of a parson, could the glebe be aliened without the joint consent of the crown, as patron, the parson as *persona ecclesiae*, and the parishioners of the church as having a temporal as well as spiritual interest, and thereby in effect representing the ordinary.

§ 45. *A voluntary society of Episcopalians, unauthorized by the crown, not entitled to the glebe.*

But a mere voluntary society of Episcopalians within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshiping therein. The church entitled must be a church recognized in law for this particular purpose. Whenever, therefore, within the province, previous to the revolution, an Episcopal church was duly erected by the crown, in any town, the parsons thereof, regularly inducted, had a right to the glebe in perpetual succession.

§ 46. *Where the crown did not erect a church, the glebe remained as an hæreditas jacens.*

Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state which succeeded to the rights of the crown might, with the assent of the town, alien or incumber it; or might erect an Episcopal church therein, and collate, either directly or through the vote of

the town, indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance. Such, in our judgment, are the rights and privileges of the Episcopal churches of New Hampshire, and the legal principles applicable to the glebes reserved in the various townships of that state previous to the revolution. And without an adoption of some of the common law in the manner which I have suggested, it seems very difficult to give full effect to the royal grants and commissions, or to uphold that ecclesiastical policy which the crown had a right to patronize, and to which it so explicitly avowed its attachment.

§ 47. *State of Vermont succeeded to crown rights.*

It seems to be tacitly if not openly conceded, that, before the revolution, no regular Episcopal church was established in Pawlet. By the revolution, the state of Vermont succeeded to all the rights of the crown, as to the unappropriated as well as appropriated glebes.

§ 48. *Vermont legislation; towns authorized to take the care and inspection of glebes and to lease and recover possession thereof. Exception as to Episcopal ministers.*

It now, therefore, becomes material to survey the statutes which the state of Vermont has, from time to time, passed on this subject. By the statute of 26th of October, 1787, the selectmen of the respective towns were authorized during the then septenary (which expired in 1792) to take the care and inspection of the glebes, and to lease the same for and during the same term; and further, to recover possession of the same, where they had been taken possession of by persons without title; but an exception is made in favor of ordained Episcopal ministers, who, during their ministry within the same term, were allowed to take the profits of the glebes within their respective towns. The statute of 30th October, 1794, granted to their respective towns the entire property of the glebes, therein situate, for the sole use and support of religious worship; and authorized the selectmen of the towns to lease and recover possession of such glebes. This act was repealed by the statute of the 5th of November, 1779. But by the statute of the 5th of November, 1805, the glebes were again granted to the respective towns, for the use of the schools of such towns; and power was given to the selectmen to sue for possession of, and to lease the same. By the operation of these statutes, and especially of that of 1794, which, so far as it granted the glebes to the towns, could not afterwards be repealed by the legislature so as to divest the rights of the towns under the grant, the towns became respectively entitled to all the glebes situate therein which had not been previously appropriated by the regular and legal erection of an Episcopal church within the particular town; for in such case the towns would legally represent all the parties in interest, namely, the state which might be deemed the patron and the parish.

§ 49. *Glebe lands could not be applied to other uses than public worship, without the authority of the state.*

Without the authority of the state, however, they could not apply the lands to other uses than public worship; and in this respect the statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure. Upon these principles the plaintiffs are entitled to recover, unless the defendants show, not merely that before the year 1794 there was a society of Episcopalians in Pawlet, regularly established according to the rules of that sect, but that such society was erected by the crown, or the state, as an Episcopal church (that is, the Church of England), established in the town of Pawlet.

For, unless it have such a legal existence, its parson cannot be entitled to the glebe reserved in the present charter. The statement of facts is not, in this particular, very exact; but it may be inferred from it that the Episcopal society or church was not established in Pawlet previous to the year 1802. In what manner and by what authority it was then established does not distinctly appear. As the title of the plaintiffs is, however, *prima facie* good, and the title of the defendants is not shown to be sufficient, upon the principles which have been stated, the plaintiffs would seem entitled to judgment.

§ 50. *The share for the first minister, and for the school, vested in the town in its corporate capacity.*

There is another view of the subject which, if any doubt hung over that which has been already suggested, would decide the cause in favor of the plaintiffs. And it is entitled to the more weight, because it seems in analogous cases to have received the approbation and sanction of the state courts of New Hampshire. In the various royal charters of townships, in which shares have been reserved for public purposes (and they are numerous), it has been held that the shares for the first settled minister, and for the benefit of a school, were vested in the town in its corporate capacity, in the latter case as fee simple absolute, in the former case as a base fee, determinable upon the settlement of the first minister by the town. The foundation of this construction is supposed to be that the town is, by law, obliged to maintain public worship and public schools, and that, therefore, the legal title ought to pass to the town, which is considered as the real *cestui que use*. By analogy to this reasoning, the share for a glebe might be deemed to be vested in the town for the use of an Episcopal church; and then, before any such church should be established, and the use executed in its parson, by the joint assent of the legislature and the town, the land might at any time be appropriated to other purposes. We do not profess to lay any particular stress on this last consideration, because we are entirely satisfied to vest the decision upon the principles which have been before asserted. On the whole, the opinion of the majority of the court is that, upon the special statement of facts by the parties, judgment ought to pass for the plaintiffs.

Opinion by MR. JUSTICE JOHNSON.

The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England. I find no difficulty in getting a sufficient trustee to sustain the fee until the uses shall arise. It is not material whether the corporation of Pawlet consists of the proprietors or inhabitants. The grant certainly vests the legal interest in the proprietor; and it is in nothing inconsistent with this idea to admit that the corporate powers of the town of Pawlet are vested in the inhabitants. The proprietors may still well be held trustees, but the application of the trust may be subject to the will of the whole combined population. I therefore construe this grant thus: we vest in you so much territory, by metes and bounds, in trust to divide the same into sixty-eight shares; to assign one share in fee to each of you, the grantees, two to the governor, one to the Church of England as by law established, etc. This certainly would be a sufficient conveyance to support the fee for the purposes prescribed.

§ 51. *Meaning of "Church of England as by law established."*

But the difficulty arises on the meaning of the words "Church of England as by law established." This was unquestionably meant to set apart a share of

the land granted for the use of that class of Christians known by the description of Episcopalians. But was it competent for any man, or any number of men, to enter upon this land, without any legal designation or organization identifying them to come within the description of persons for whose use this reservation was made? I think not. Some act of the town of Pawlet, or of the legislature of the state, or at least of Episcopal jurisdiction, became necessary to give form and consistency to the *cestui que use*, until such person or body became constituted and recognized. I see nothing to prevent the legislature itself from making an appropriation of this property. Their controlling power over the corporate body denominated the town of Pawlet certainly sanctioned such an act; and before the act passed in this case, there does not appear to have been in existence a person or body of men in which the use could have vested. I therefore concur in the decision of the court.

NACHTRIEB v. THE HARMONY SETTLEMENT.

(Circuit Court for Pennsylvania: 8 Wallace, Jr., 66-87. 1855.)

STATEMENT OF FACTS.—Nachtrieb, a seceding or expelled member of a community called the Harmony Settlement, filed a bill against that association and its managers, claiming his share of its assets. The association held their property in common; whoever entered the community was obliged to put into the common stock all that he possessed; whoever left it, willingly or unwillingly, got little or nothing. Nachtrieb had been a member for many years, and either withdrew or was expelled, and afterwards having married, sought some compensation for his long service in the community. Whether his departure was voluntary or compelled was one of the questions of fact in the case. Further facts appear in the opinion of the court.

§ 52. *Persons wrongfully expelled from a voluntary association have a right to redress, in a proper case, which courts will enforce.*

Opinion by GRIER, J.

Although by the contract and agreement of the several members of this association each had an equal right to and interest in their common property, and had estopped himself from even setting up any claim for property or labor contributed to the common stock, in case of a *voluntary withdrawal from the society*, yet it contained no enumeration of offenses by which a member should forfeit his rights and interest in their common property; it pointed out no tribunal which had a power to inflict the punishment of expulsion or forfeiture of all title to an immense property gained by their common contributions and labor. In dealing with rights of persons and property, the court can only look at the agreements of the parties as written and signed by themselves. In these we have found no power conferred on Rapp to expel, at his mere whim and caprice, any unoffending or even offending member, and divest his title to the common property, after the labor of a life spent in assisting to accumulate it. If he could expel *one* member in this way, he could another, and thus get rid of all the partners but himself, and retain the property for his own use.

That parties wrongfully expelled would have a right to the interference of courts of justice has not been disputed. Nor has it been pretended that the evidence shows any case which could justify the expulsion of the complainant. He had been a faithful, diligent and laborious member of the association for thirty of the best years of his life, obeying every command and ordinance of Rapp, even to that of enforced celibacy. The only offense charged against

him was holding a few minutes' conversation with some of his friends *out* of the society, who were anxious for some information as to the fortune of certain claims which they had made on the Harmony Society. No charge seems to have been made against him, save that of *thinking and speaking* about the concerns of the society to which he belonged.

§ 53. *Free will cannot be predicated of actions performed under the orders of a religious ruler who has long been believed to hold the keys both in this world and the next.*

We come, therefore, to the point on which this case turns. Did the complainant voluntarily and of his own accord abandon and forsake the society? or was he wrongfully and unjustly excluded or expelled therefrom? As we have seen, there is no proof of any act of the complainant which would justify his expulsion. The argument has therefore turned entirely on the *fact* of expulsion or voluntary abandonment. Nachtrieb's receipt, in which he in terms declared that he has *withdrawn* from the society, is much relied on; and so have his own declarations soon after he went away, that he had left the society voluntarily.

In regard to the receipt, when we consider the nature and extent of the authority exercised by Rapp over his followers—their reverence and fear of him, and their unbounded submission to his command,—it must be evident that the signature of such a receipt would be but slender evidence that the complainant acted voluntarily in withdrawing himself from the society. It is plain that if Rapp commanded him to go he would feel bound to go, and that unless, after a servitude of thirty years, he was willing to go penniless, he must sign the receipt. It was the consideration for the means of departing without being reduced to beggary. As yet the complainant was not free from the shackles of the spiritual and temporal slavery to which he had been all his life subject; a power which forbade him to learn English, to marry, or, if married, denied him intercourse with his wife. Free will can hardly be predicated of actions performed at the command of a ruler believed to possess the keys both in this world and the next, and who taught that disobedience to his orders was a sin against the Holy Ghost, not to be forgiven here or hereafter. If the complainant departed from the society in obedience to the commands of Rapp, it may be said he obeyed them voluntarily, as there was no physical compulsion. But we may easily conceive of a social or spiritual excommunication, or a combination of both, which would leave as little choice to the party who feared them as the rack or the inquisition.

§ 54. *Imperfections incident to evidence of conversations or declarations.*

So also the declarations of the complainant, that he went away voluntarily, can have very little or no weight against the clear evidence of his expulsion. This sort of testimony is seldom worthy of any reliance. It cannot be contradicted. Conversations are always but partially recollected, never truly stated, and often purposely misrepresented. Besides, if the conversations stated were literally and strictly true they amount to nothing. I presume every member of this society felt uneasy as to what would be the state of it after Rapp's death; and may well have doubted whether a community of property can well exist without an infallible apostle with patriarchal or absolute power, so that unity may be attained by having but *one will* in the society. That the complainant after his expulsion may have exulted in his first taste of the sweets of liberty; that he may have frequently said that he came away of his own accord, may well be admitted. Probably there are few instances where a man has

been expelled from any respectable society, in which his personal vanity would not soften the word *expulsion* into *withdrawal*, in speaking of his change of connection with it. An expelled member seldom expresses much respect for those who have wrongfully ejected him, or affects to regret the loss of their society. The plaintiff is therefore entitled to a decree, and the only question which remains is, what is the character and extent of the relief which we shall give him? We shall not consider the objection to the form of the pleadings; for the case having been argued and considered on the merits, without objections, until a late time as to that point, we shall not go back to decide a game of sharps between the parties.

§ 55. *One who is a member of a voluntary association, which by labor has accumulated property, is a partner in that property and entitled to the protection of the law in his rights as such.*

The complainant demands pay for his labor during the time he was a member. This would be the extreme and longest rate of compensation. The defendants, on the contrary, without tendering in their answer a reconciliation with the complainant, and a restoration of him to his rights, or intimating a willingness to receive his wife and children as members, *now* insist that the court can decree no other remedy than restoration to his rights as a member. Such a decree would compel him, perhaps, to forsake his wife and children, for the small hope of the survivorship in the tontine. This, we think, would be rendering very scant justice or recompense to a man for half his life's labor. The Pennsylvania case cited [Commonwealth v. St. Patrick's Benevolent Society, 2 Binn., 441] has no resemblance to the present. That was a corporation for benevolent purposes, where membership, and not the ownership and enjoyment of property to the corporator's own use, was the object. Its members accumulated to give away or to expend on charitable purposes. These accumulated for themselves. They have, by joint labor, accumulated property of great value which they hold as joint owners. The complainant had an equal ownership with his three hundred and twenty partners. By their contract it is to remain joint and indivisible stock forever, but the complainant has his right to enjoy it equally with his fellows. Their articles of partnership or association provide for the case of any partner who chooses to withdraw or depart from it; but makes no provision for those who are unjustly driven away and expelled.

§ 56. *All societies, religious or of any other character, are subject to the control of the law.*

Whether the society be governed by prophet, priest, king or majority, they are subject to the law of the land; and if the complainant has been wrongfully deprived of valuable rights of property, the law should afford him a remedy. I know of no other measure of satisfaction or compensation more just than to give the expelled and injured party his several share of their joint assets.

§ 57. *The expulsion of a member of a voluntary association operates a dissolution of the partnership inter sese.*

The dissolution of the partnership by the wrongful act of the majority of the firm or association necessarily dissolves, *inter sese*, viz., as between the expelled and the remaining partners, the covenants as to the indivisibility of their joint property. If this were otherwise, a majority could at any time expel the minority and retain all the joint property. They who break the agreement as to perpetuity of the benefits of membership cannot be heard to allege it as to destination of the property. By their wrongful expulsion of the complainant the whole power and force of the articles as between them is broken and *inter sese*

annulled; and the complainant has a right to the separate use of his heretofore undivided interest in the property, because he is wrongfully deprived of his joint use of it. The wrong done to plaintiff is capable of a compensation in money, without compelling him to leave his family, and spend his days among those who have injured him. And the proper measure of his compensation is the amount of his interest or share at the time of his expulsion. It is not like a mere corporate privilege or office, to which a court of equity may restore a corporator who has been wrongfully expelled. It is a question of the enjoyment of property. His copartners have ejected him from his joint use and enjoyment of their common property; they have severed the tenure, as between him and themselves, and he has a right to his share in severalty. This is the proper measure of the complainant's compensation, and not wages for his labor during the time of his membership. Let the decree be for the one three hundred and twenty-first part of the whole property of the society, \$901,723.42, at the time of his expulsion, with interest from that date; deducting what the complainant has received.

Decree accordingly.

§ 58. The Christian religion is a part of the common law of Pennsylvania. But under the article in the bill of rights of that state which declares "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or maintain any ministry against his consent; no human authority can in any case whatever control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship," the proposition must be taken in the qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. A devise of property to a city as trustee to support a college, which provides that no ecclesiastic of any sect shall hold or exercise any station or duty in the college, but which does not prevent Christianity to be taught by laymen, is not for that reason void. *Vidal v. Girard's Executors*, 2 How., 127.

§ 59. Community of property.—Members of a religious society called Separatists came from Germany in 1817, and settled in Ohio. They established a like society there, and purchased a large tract of land, taking the title in the name of one of their members as trustee. They did not contemplate a community of property at the time of their settlement, but they afterwards entered into and signed articles of association uniting in a communion of property, and renouncing all individual ownership of property, both present and future, real and personal, and transferring the same to three directors, elected by themselves annually, who were to conduct the business of the society and account to the society for all transactions. Members leaving the society were to receive no compensation for their labor or property contributed, unless by vote of a majority of the members. It was held, in a suit for partition by the heirs of a deceased member, that no title descended to such heirs; that they could not compel a partition; that there was no legal objection to the society, and that its articles did not constitute a perpetuity. *Goesele v. Bimeler*, 14 How., 539; *Goesele v. Bimeler*, * 5 McL., 221.

§ 60. Episcopal Church.—After the revolution, when the Protestant Episcopal Church ceased to be the established church in Virginia, the vestries ceased to have power to tax their respective parishes, and therefore were no longer obliged to keep the churches in repair. The word parish in Virginia, after the revolution, meant the Protestant Episcopal Church in that parish. *Mason v. Muncaster*, * 2 Cr. C. C., 274.

§ 61. The congregation of Alexandria did not separate themselves from the parish of Fairfax in Virginia and establish a distinct religious society, and the vestry and wardens of that congregation were the vestry and wardens of the Protestant Episcopal Church in the parish of Fairfax. And this because (1) the minutes of the election of the vestry by that congregation were entered in the vestry-book of the parish of Fairfax; (2) there was no other parish which the vestry elected by this congregation could serve as vestrymen; (3) the vestries have uniformly held the glebe and the church and all the church property of the parish; (4) there is no evidence to prove that the Alexandria congregation abandoned the parish of Fairfax; (5) they could not do so consistently with the canons of the church then in force. *Ibid.*

§ 62. It is no sacrilege for a vestry to suffer a useless church building to go to decay. *Ibid.*

§ 63. The parishioners of the whole parish of Fairfax, in Virginia, are not the *cestuis que trust* of the glebe and other parochial property, for they have individually no right to the property. It is the property of the parish in its corporate and aggregate capacity, to be applied and disposed of for parochial purposes, under the authority of the vestry. The parishioners need not be made parties to a bill to dispose of the property. *Mason v. Muncaster*,* 9 Wheat., 445.

§ 64. The vestry of the Episcopal Church of Alexandria is the regular vestry in succession of the parish of Fairfax, in Virginia. The fact that the entries in the parish books style them the vestry of the Protestant Episcopal Church of Alexandria will not change the nature of the vestry proceedings or divest them of their authority, since there existed no right on the part of the congregation of the Episcopal Church at Alexandria to choose a vestry of its own, which should not be the vestry of the parish; it being within the parish, at that time the only one within the parish, and to be governed by the vestry of the parish by the canons of the church made in conformity with the laws of Virginia. An agreement for renting pews and soliciting voluntary subscriptions for the support of the minister of the church, who was the rector of the parish, cannot be construed as an abandonment of all connection with the parish by the Alexandria congregation. It is no objection that the vestry was chosen not by the parishioners of Fairfax, but by the subscribers to the Episcopal Church at Alexandria, since that was the only church in the parish at that time, and the canons of the church after the revolution confined the right to elect vestries to house-keepers and freeholders who were members of the church within the parish and regularly contributed to the support of the minister and the common exigencies of the church within the parish. *Ibid*.

§ 65. The religious establishment of England was adopted at an early period by the colony of Virginia, and also the common law on that subject, so far as it was applicable. There were parishes for ecclesiastical purposes, and the church was capable of receiving endowments of land. The minister was seized of the freehold of its inheritable property, and capable of transmitting that inheritance to his successors. The church-wardens were a corporate body, in charge of the repairs and personal property of the church. The other temporal concerns of the parish were submitted to a vestry. *Terrett v. Taylor*,* 9 Cr., 43.

§ 66. The property acquired by the established church of England, adopted in Virginia, remained unimpaired notwithstanding the revolution. But it could no longer retain its character as an exclusive religious establishment. *Ibid*.

§ 67. The statutes of the state of Virginia of 1776 and 1784, confirming the rights of the church to the property acquired by it before the revolution, and creating it into a new corporation, were not infringements of any rights secured by the constitution, either civil, political or religious. *Ibid*.

§ 68. The act of Virginia of 1786, repealing the act incorporating the Episcopal churches, and the act of 1783, providing for the appointment of trustees to take charge of the property of the churches, and the act of 1801, asserting a right in the state to all the property of the churches, and authorizing the overseers of the poor to sell all their vacant lands, could not operate to divest the churches of the property acquired previous to the revolution. *Ibid*.

§ 69. Church-wardens cannot hold real estate at common law, but a warranty deed to them may vest the land in the church by estoppel. *Ibid*.

§ 70. The vestry of a church cannot alien its lands without the consent of the minister. *Ibid*.

§ 71. One, not a member, received a pew in the Protestant Episcopal Church in St. John's Parish in the city of Washington in payment for a debt, and received a certificate stating that he was the owner of the pew, valued at a certain sum, and subject to such annual tax as should be fixed by the vestry of the church, and to be sold at auction for arrearage of such taxes upon the requisite notice given. The vestry had no power to levy any personal tax upon any person except members of the church. There being no other power in the vestry to tax, it was held that the purchaser of the pew was not personally liable for taxes assessed by the vestry on such pew. *Mauro v. St. John's Parish*, 4 Cr. C. C., 116.

§ 72. Dedication of land.—The owner of a piece of land contiguous to a town laid it out in town lots, and marked one lot "for the Lutheran Church." This addition was afterwards incorporated with the town. The plat of the addition so marked was recorded in the clerk's office. At that time the Lutherans were not organized in that place. But they afterwards formed themselves into a voluntary association, took charge of the lot, built a church thereon and used it for a burial ground. Services were not held continuously in the house, and the Lutherans often used it as a school-house. They also permitted others besides members of their church to be buried there. The building eventually went to decay and fell, but the ground was always kept inclosed by the church and used by them for internments. The owner who had thus made the dedication recognized its validity for many years and until his death. It was held that members of this association, in behalf of themselves and other members,

might restrain the heir from taking possession of the lot, and that the dedication would be upheld as a dedication to public and pious uses, although there was no express grant, and no particular grantees at the time of the dedication, the bill of rights of the state having recognized the validity of such a gift. *Beatty v. Kurtz*, 2 Pet., 565; 2 Cr. C. C., 699.

§ 72. **Holding land.**—A religious corporation may, under the laws of New York, acquire title to lands by adverse possession during the statutory period, although they took possession under a devise to them of the lands, when they were incapable by law of taking the property by will. *Harpending v. The Dutch Church*, 16 Pet., 455.

§ 74. It being the policy of the laws of Illinois to steadily encourage the organization of societies for benevolent, religious and missionary objects, and to endow them with capacity to acquire by purchase, gift or devise, real estate for the purpose of their creation, it is held that a devise of lands in that state to a religious corporation of New York, which had power to take the lands, is not void. The heirs of the testator cannot object that the devise to the corporation included a greater amount of land than by its charter it was allowed to hold, the amount not being inconsistent with the laws of Illinois. *Christian Union v. Yount*, 11 Otto, 352.

§ 75. The statute of mortmain was never in force in Pennsylvania, and a religious corporation created under the laws of that state, with power to take, receive and hold land to be employed and disposed of according to the objects and conditions of its charter, provided that the yearly income or value of the messuages did not exceed \$2,000, can hold land for such purposes and to that amount. If lands to a greater amount be devised to it, it becomes a trustee for the heir of the testator. *Miller v. Lerch*, 1 Wall. Jr., 210.

§ 76. It is held that Quaker societies have a right to take personal and real estate by devise, without a charter of incorporation, and have a right to enjoy the same for their own uses as bodies united for the purposes of religion, charity and education. *Magill v. Brown*,* 14 Haz. Pa. Reg., 305.

§ 77. **Jurisdiction of courts.**—A court has no jurisdiction to decide whether a particular doctrine of a church is true or false. *Newton v. Carbery*, 5 Cr. C. C., 626. See §§ 3-5.

§ 78. **Wills; religious influence.**—The influence of the general doctrines of the Roman Catholic Church is not such influence as will invalidate a will. *Ibid.*

As to Charitable Uses, see **USES AND TRUSTS**.

See **SUNDAY LAWS**.

CINCINNATI.

See **CORPORATIONS**.

CIRCUIT COURT.

See **COURTS**.

Appellate Jurisdiction, see **APPEALS AND WRITS OF ERROR, III**.

CIRCUIT COURT OF DISTRICT OF COLUMBIA.

See **COURTS**.

CIRCUMSTANTIAL EVIDENCE.

See **EVIDENCE**.

CITATION.

See **APPEALS AND WRITS OF ERROR, XII; WRITS**.

CITIES.

See CORPORATIONS.

Power to contract debts and issue bonds, see BONDS.

CITIZENS AND ALIENS.

- I. CITIZENSHIP AND ALLEGIANCE, §§ 1-132.
- II. EXPATRIATION, §§ 133-153.
- III. ALIENS, §§ 156-3 3.
- IV. NATURALIZATION, §§ 334-408.

I. CITIZENSHIP AND ALLEGIANCE.

SUMMARY — *Joint occupation by two nations, § 1.— Effect of fourteenth and fifteenth amendments, § 2.— In 1776, § 3.— Capture of a city, § 4.— Marriage with an alien, § 5.— Change of allegiance by treaty, § 6.— Right of election, § 7.— Transfer of allegiance, § 8.— Acts and declarations, § 9.*

§ 1. A person born in the allegiance of the United States is born a citizen thereof; but where the country of one's birth is under the joint jurisdiction of two nations, the citizenship of the parent determines that of the child. *McKay v. Campbell*, §§ 10-17.

§ 2. The fourteenth and fifteenth amendments do not confer citizenship upon persons not born subject to the jurisdiction of the United States; Indians, however, are not citizens. *Ibid.* See §§ 47, 344.

§ 3. In October, 1776, a sovereign state asserting its right to the allegiance of its citizens was entitled to the same. And their condition was not changed by their subsequent adherence to the enemy or by the treaty with Great Britain. *McIlvaine v. Coxe's Lessee*, §§ 18-20.

§ 4. The capture of a city does not permanently change the allegiance of its inhabitants. *Shanks v. Dupont*, §§ 31-33.

§ 5. Where a woman marries an alien her allegiance is not thereby destroyed; coverture does not destroy her right of election, and unless she withdraws from the country and permanently adheres to the side of the enemies of the state, she retains her prior rights of citizenship. *Ibid.*

§ 6. In what manner one's allegiance or citizenship may be changed by treaty. *Ibid.*

§ 7. A right of election given by a treaty must be exercised according to the provisions of the latter. *Tobin v. Walkinshaw*, §§ 34-36.

§ 8. A country may contract to transfer the allegiance of its native-born citizens; not, however, that of its naturalized citizens. *Ibid.*

§ 9. Acts and declarations of a party as to his intention in removing from a country, when admissible. *Ibid.*, § 35.

[NOTES.— See §§ 37-132.]

MCKAY v. CAMPBELL.

(District Court for Oregon: 2 Sawyer, 118-135. 1871.)

Opinion by DEADY, J.

STATEMENT OF FACTS.— This action is brought to recover a penalty of \$500, given by section 2 of an act of congress entitled "An act to enforce the rights of citizens of the United States to vote in the several states of the Union, and for other purposes," approved May 13, 1870 (16 Stat., 140). It was commenced July 1, 1870, and on September 26th the court gave judgment on a demurrer to the complaint that it was insufficient — because it did not allege that the defendant refused or omitted "to swear the plaintiff as to his qualifications as an elector, on account of his race, color or previous condition of servitude." The court at the same time ruled that under the election law of the state of Oregon,

when a person who is a citizen of the United States offers to vote at any poll therein, and his right to do so is challenged, it becomes the duty of the judges of election at such poll to tender such person the prescribed oath as to his qualification as an elector, the taking of which, after such challenge, is a necessary prerequisite to his right to vote; and that if any judge of election wilfully omits or refuses to furnish such person an opportunity to take such an oath, and thereby qualify himself to vote at such poll, on account of race, color or previous condition of servitude, then he is liable to such person for the penalty prescribed by section 2 of such act of congress. 1 Saw., 374. On October 29th, the plaintiff, upon leave obtained, filed an amended complaint, alleging that the defendant, as judge of a certain election therein mentioned, wilfully refused to permit the plaintiff to become qualified to vote thereat, on account of his being an Indian. The defendant by his answer, filed December 7, 1870, alleged that the plaintiff was an alien and not a citizen of the United States, and therefore defendant refused as alleged in the complaint, and not otherwise. To this answer the plaintiff filed a replication, the allegations of which are not material to state.

On February 4, 1871, the parties filed the following statement of facts in the case, which they then and there stipulated in writing should "be taken and considered as the special verdict of a jury therein;" and also that "if the court is of opinion that the law arising thereon is with the plaintiff, then judgment shall be given for him for the penalty for which the action is brought;" but "if the court is of opinion that the law arising thereon is with the defendant, then judgment shall be given for him in bar of the action, and for his costs and disbursements."

"Alexander McKay, the plaintiff's paternal grandfather, was born in Scotland, and emigrated to Canada, where he married Margaret Bruce, a woman having one-fourth Indian blood. The issue of this marriage was Thos. McKay, the plaintiff's father, who was born in Canada. About the latter part of the year 1810, Alexander McKay joined the expedition of John Jacob Astor, as a partner of the American Fur Company, and sailed from New York in the ship Tonquin, for the mouth of the Columbia river, taking with him his wife and son Thomas, the latter being then about thirteen years of age. They arrived at the mouth of the Columbia in 1811, and soon afterwards Alexander McKay perished by the destruction of the Tonquin. Thomas McKay afterwards entered into the service of the Northwest Fur Company, a corporation organized under the laws of Great Britain, having its principal office in Montreal. The trading post of Astor at Astoria was transferred to this Northwest Fur Company on the 11th day of October, 1813, and afterwards called Fort George. In 1821, by an act of parliament, the Northwest and Hudson Bay Company were united under the name of the Honorable Hudson Bay Company, and as such held possession and control of Fort George as a trading post from that time until the treaty between the United States and Great Britain in 1846.

"Thomas McKay married a Chinook Indian woman, and the plaintiff was the issue of that marriage, born at Fort George (now Astoria), in 1823, while his father, Thomas McKay, was in the service of the Hudson Bay Company, and is seven-sixteenths white and nine-sixteenths Indian blood. Thomas McKay continued in the service of that company until about the year 1835; and his son, the plaintiff, was also in its service subsequent to the treaty between the United States and Great Britain, in 1846. The plaintiff has always lived in

Oregon except from 1838 to 1843, while in the state of New York to obtain an education.

"Neither the plaintiff nor his father, nor his grandfather McKay, were ever naturalized under the laws of the United States. The plaintiff resided in Wasco county, Oregon, and in East Dalles precinct in said county, for five years prior to the election on June 6, 1870. On that day, at a general election, the plaintiff offered to vote at the place of holding elections in East Dalles precinct, where the defendants, James A. Campbell, T. M. Ward and George Corum, were the judges of election. His right to vote was challenged by one of the judges, when the plaintiff offered to take the oath required by law, as to his qualifications to vote. The judges, or one of them, stated to plaintiff as a reason for not allowing him to vote, that he was not a citizen of the United States, but was a half-breed Indian, and refused to administer the oath to him as to his qualifications, and did not permit him to vote at that election."

§ 10. *Persons born within the allegiance of the United States are citizens.*

Upon this state of facts, counsel maintains that the plaintiff was born in the allegiance of the United States, because he was born in its territory, and is, therefore, a citizen thereof, and was entitled to vote at such election. If the premises are admitted, the conclusion follows. The rule of the common law upon this subject is plain and well settled, both in England and America. Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the king is born his subject, without reference to the political *status* or condition of its parents. Birth and allegiance go together. 1 Black Com., 366; 2 Kent's Com., 39, 42; *Inglis v. Sailor's Snug Harbor*, 3 Pet., 120; *United States v. Rhodes*, 1 Abb., 40; *Lynch v. Clarke*, and authorities there cited; 1 Sandf. Ch., 630.

§ 11. *During the joint occupation of Oregon, the country was British soil as to British subjects, and American soil as to American citizens.*

Counsel for defendant, while admitting the major premise of plaintiff's proposition, that any person born in the allegiance of the United States is born a citizen thereof, disputes the minor one, that the plaintiff was so born, and insists that he was born in the allegiance of the crown of Great Britain; because the British subjects in Oregon at the date of the plaintiff's birth must be presumed to have occupied or dwelt in the country in pursuance of the treaty of joint occupation of June 15, 1846, and therefore as British subjects. Defendant's proposition concerning the allegiance in which plaintiff was born is based upon article 3 of the convention of October 20, 1818, between the United States and Great Britain, which reads as follows:

"Art. 3. It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony mountains, shall, together with its harbors, bays and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers, it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country, the only object of the high contracting parties in that respect being to prevent disputes and differences amongst themselves." 8 Stat., 249.

By the convention of August 6, 1827, between the same parties, it was pro-

vided as follows: "Art. 1. All the provisions of the third article of the convention concluded between the United States of America and his majesty, the king of the United Kingdoms of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are, hereby further indefinitely extended and continued in force in the same manner as if all the provisions of the said article were herein specifically recited." 8 Stat., 360. By article 2 of this convention it is also agreed that either party to it may abrogate said article 3 on twelve months' notice to the other, after October 20, 1828.

On April 27, 1846, congress passed a "joint resolution concerning the Oregon territory" (9 Stat., 109), by which the president was authorized, "at his discretion, to give the government of Great Britain the notice required" for the abrogation of said article 3. In the preamble of this resolution it is recited: "And whereas it has now become desirable that the respective claims of the United States and Great Britain should be definitely settled, and that said territory may, no longer than need be, remain subject to the evil consequences of the divided allegiance of its American and British population, and of the confusion and conflict of national jurisdictions, dangerous to the cherished peace and good understanding of the two countries." This led to the convention of June 15, 1846, "in regard to limits westward of the Rocky mountains" (9 Stat., 869), by which the forty-ninth parallel of north latitude was made the boundary between the two countries. In the preamble to this convention it is admitted and declared by the parties thereto "that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America lying westward of the Rocky or Stony mountains should be finally terminated by an amicable compromise of the right mutually asserted by the two parties over the said territory."

The place of plaintiff's birth — Fort George — now is, and, I suppose, in contemplation of law from an American standpoint, was, at the date thereof, within the territory or realm of the United States. But as a matter of fact, the title to the country was then regarded as doubtful, unsettled and obscure; and this is apparent from the admissions above quoted from the respective preambles to the resolution and convention of April 27 and June 15, 1846. Even the country itself was regarded by a large portion of the people of the United States as a desert waste not worth disputing with England about. In February, 1844, when a motion to give notice to abrogate article 3 of the convention of 1818 was being debated in the senate, Mr. Dayton, of New Jersey, read from the columns of the *National Intelligencer* an article on Oregon taken from Prentice's *Louisville Journal*, of which the following extracts are average specimens: "What there is in the territory of Oregon to tempt our national cupidity, no one can tell. Of all the countries on the face of this earth, it is one of the least favored of heaven. It is the mere riddlings of creation. It is almost as barren as the desert of Africa and quite as unhealthy as the Campagna of Italy. . . . If the United States should ever need a country to which to banish its rogues and scoundrels, the utility of such a region as Oregon will be demonstrated." Cong. Globe, vol. 13, p. 275. He also read from the *Christian Advocate* of February 7, 1844, as follows: "We have some opportunity, from our position, to found a correct estimate of the soil, climate, productions and facilities of the country from the Rocky mountains to the Pacific ocean, as we have had a large mission there for several years, distributed in small parties over the territory; and from all we have learned we should prefer migrating to Botany bay. With the exception of the lands of the Wallamot,

and strips along a few of the smaller water-courses, the whole country is among the most irreclaimable barren wastes of which we have read, except the desert of Sahara."

Under this state of things as to the title and occupancy of the country, and while his alien father is in the service of a British corporation, then exercising in the territory, by authority of the British parliament, large municipal power, the plaintiff is born within the lines of a post then occupied by said corporation as a place of business and defense. This being so, in my judgment he was not born in the allegiance of the United States, but in that of the British crown. The plaintiff being the child of an unnaturalized alien, and unnaturalized himself, cannot claim to be an American citizen, except upon the single ground that he was born upon the soil and subject to the jurisdiction of the United States. Nothing that has happened since his birth can add to or take away from the strength of his claim. The treaty of 1846, which definitely acknowledged the country south of the forty-ninth parallel to belong to the United States, contains no provision naturalizing the British subjects living south of that line who may elect to become American citizens by remaining there, or otherwise. The case turns upon the single point, Was the plaintiff born subject to the jurisdiction of the United States—under its allegiance? Suppose the government of the United States had undertaken to exercise jurisdiction over the plaintiff before the treaty of 1846, when for the first time it actually obtained exclusive jurisdiction over the country? Suppose it had attempted, by means of laws applicable to American citizens under like circumstances, to draft or tax him? How natural and forcible would have been the objection: "I am the child of a British father—a natural-born British subject. True, I was born in Oregon, but by a treaty stipulation the country was then, and is now, for the time being, British soil as to a British subject. I was, therefore, born subject to the jurisdiction and in the allegiance of the king of Great Britain, and am as truly a British subject as though I had been born on the banks of the Thames."

When, in 1818, the two governments entered into the treaty of "joint occupation," as it has been aptly called, they thereby agreed that this then unsettled and unknown country might be occupied by the people of both nations—that it should "be free and open" "to the vessels, citizens and subjects of the two powers"—without either of them losing their nationality, changing their allegiance or passing beyond the jurisdiction and protection of their separate governments. As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense American soil. Neither government was entitled to exercise any authority over the citizens or subjects of the other, or to assert the power and rights of a sovereign over them or their effects, within this particular territory. If, prior to 1846, the plaintiff had died intestate and without heirs, leaving a large amount of personal property in the territory, there is no doubt but that the British crown would have claimed the escheat without a word of objection from the government of the United States.

§ 12. *Common law rule explained.*

When it is said that by the common law a person born of alien parents and in the allegiance of the United States is born a citizen thereof, it is necessarily understood that he is not only born on soil over which the United States has or claims jurisdiction, but that such jurisdiction for the time being is both actual and exclusive, so that such person is in fact born within the power, pro-

tection and obedience of the United States. Generally speaking, the various places in the world are claimed, or admitted for the time being, to be under the exclusive jurisdiction of some particular sovereign or government, so that a person born at any one of them is without doubt born in the allegiance of such particular sovereign or government. But that is not this case, which in this respect is a singular one. Its parallel has not been found in the books. The country of the plaintiff's birth was, at the time thereof, jointly occupied by the citizens and subjects of two governments, in pursuance of a treaty to that effect. Under the circumstances neither government can be considered as exercising general exclusive jurisdiction over the country and its inhabitants. It seems to me that the only practical and just solution of the problem is to consider the country, for the time being, only to have been in the exclusive jurisdiction of each government as to its own citizens or subjects; and this is the view which congress appears to have taken of the matter in 1816, when, in the preamble to the resolution of April 27th, it deprecated "the evil consequences of the divided allegiance of its American and British population," and "the confusion and conflict of national jurisdiction" growing out of the continued joint occupation of the country.

A parallel case may hereafter arise out of the present joint occupation of the island of San Juan, at the head of the straits of Fuca. It is well known that the title to this island is in dispute between the United States and Great Britain, and that in the meantime, in pursuance of an informal convention or understanding between the two governments, the island is occupied by the forces of each. Now, if hereafter the island is given up to the exclusive jurisdiction of the United States, and in the meantime a child of a British subject is born there within the portion occupied by the British forces, could it be considered as born in the allegiance of the United States? Certainly not. The child, although born on soil which is subsequently acknowledged to be the territory of the United States, was not, at the time of its birth, under the power or protection of the United States, and, without these, the mere place of birth cannot impose allegiance or confer citizenship.

§ 13. *Doctrine of allegiance.*

Chancellor Kent says (2 Com., 42): "To create allegiance by birth the party must be born not only within the territory, but within the allegiance, of the government. If a portion of the country be taken and held by conquest in war the conqueror requires (acquires) the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that, during such hostile occupation of a territory, if the parents be adhering to the enemy as subjects *de facto*, their children born under such temporary dominion are not born under the allegiance of the conquered." For this latter clause the author refers to Calvin's case, and (note c) quotes Lord Coke as saying in that case: "An alien is a person out of the ligeance of the king. It is not *extra regnum*, nor *extra legem*, but *extra ligeantiam*. To make a subject born the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience, as well as within his dominion."

Now, in 1823, the plaintiff's "place of birth"—Fort George—was no more within the obedience of the United States than is the "tower of London" to-day. In *Inglis v. Sailor's Snug Harbor*, 3 Pet., 126, the supreme court, on

a certificate of a difference of opinion from the circuit court for the southern district of New York, held that, as a general rule, all persons born in the state of New York prior to July 4, 1776, were born British subjects, but might thereafter elect to remain so or not, and that all persons born therein after such date were born citizens of such state, but that Inglis, who was born of a British subject in the city of New York after that date, and while the city was in the actual occupation of the British army, "was born a British subject, under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York." The necessary conclusion from the rule announced in this case is also that a person, to be born in the allegiance of a particular government, must not only be born within its territory, but under its obedience — exclusive jurisdiction and power. Of course it matters not whether the exclusive jurisdiction of the United States was excluded from the place of birth of this plaintiff by force of arms or by treaty with Great Britain. The result is the same in each case.

§ 14. *The fourteenth and fifteenth amendments to the constitution, as to citizenship, considered.*

Articles 14 and 15 of the constitution, commonly called the fourteenth and fifteenth amendments, have been cited by counsel for plaintiff as bearing upon this question of the plaintiff's citizenship and consequent right to vote.

The latter simply provides that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude." But as to who are "citizens of the United States" this article is silent — it being understood that that matter had been regulated or defined by article 14, section 1, which enacts: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Eliminate the words having reference to naturalized citizens, and the clause reads: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens," etc. This is nothing more than declaratory of the rule of the common law as above stated. To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction — that is, in its power and obedience.

The only other construction of this clause that I can imagine possible is the following: Taken literally, it does not appear to require that the person should be born "subject to the jurisdiction of the United States;" but if he was born within its territorial limits, whether under its jurisdiction or not, and afterwards becomes subject to such jurisdiction, he then, and so long as this *status* continues, becomes and remains a citizen of the United States. Assuming, as matter of fact, that the plaintiff was born in the United States, although in the allegiance of the king of Great Britain, this construction of the fourteenth amendment would include him as a citizen, because he is now, and since 1846 has been, subject to the jurisdiction of the United States. But I think such construction fanciful and artificial. It is not to be presumed that the amendment was made to the constitution to change the rule of the common law, but rather to declare and enforce it uniformly throughout the United States and the several states, and especially in the case of the negro.

Counsel for plaintiff, in reply to the fact that his client was born at a post under the flag of the Hudson Bay Company, a *quasi* public and political Brit-

ish corporation, endeavored by citations from the state papers to establish the fact that in 1817 the British government only held Fort George (Astoria) as a captured place, and that about that time it was delivered up to the United States. Astoria was in fact delivered to the United States in pursuance of article 1 of the treaty of Ghent (8 Stat., 218), for the restoration of places captured during the war of 1812, on October 6, 1818. Cong. Globe, vol. 113, p. 218. But the fact, so far as this action is concerned, is not material. It is not claimed that Fort George was held by the British government at the time of plaintiff's birth therein as a captured port or otherwise, but that it was occupied by a British corporation — British subjects — in pursuance of the treaty of joint occupation. It appears from the special verdict that the Northwest Company obtained possession of the place in 1813; and that thereafter the same was in the exclusive occupation and control of said company until its union with Hudson Bay Company in 1821, who thereafter occupied it exclusively until 1846.

But I do not rest the conclusion, that the plaintiff was born in the allegiance of the king of Great Britain, and not in that of the United States, on the mere fact that the plaintiff was born at a post of the Hudson Bay Company, rather than at any other point or place in the territory included in the treaty of joint occupation. It is admitted that the plaintiff's father was a British subject by birth, and while he lived in the territory — at least between 1818 and 1846 — he was in the allegiance of the king of Great Britain, and his children, wherever born therein, were born in the same allegiance and are British subjects. It was also urged by counsel for plaintiff, that both Alexander and Thomas McKay — the plaintiff's grandfather and father — came to Oregon before the treaty of 1818, and therefore were not settlers under it. The fact is admitted, but I think the conclusion both illogical and irrelevant. The treaty operated upon those who were in the territory when it went into effect, to the same extent that it did upon those who came afterward. It placed them equally under the allegiance of their respective sovereigns, and limited them to the same use and occupation of the territory. It is immaterial whether plaintiff's ancestors came to the country or occupied it under the treaty or not. They were British subjects in any view of the matter, and if, when the plaintiff was born, the territory by reason of treaty was British soil as to British subjects, without doubt he was born one.

Again, it being admitted by the special verdict that Alexander McKay joined the expedition of Astor as a partner in the so-called American Fur Company, and sailed from the American port of New York, in the Tonquin, for the territory of Oregon, it is claimed that these facts show that the plaintiff's ancestors did not come to the country or occupy it under the treaty of joint occupation, and therefore the plaintiff was not born in the allegiance of the king of Great Britain. In the settlement of Oregon, Alexander McKay is a historical character. He was a British subject and a member of the Northwest Fur Company. The new company which he formed in conjunction with Astor, and of which he was the principal partner, was substantially a company of Canadians and British subjects. All the partners, except Astor, and three-fourths of the clerks and employees, were British subjects. McKay went from Montreal to New York *en route* to the mouth of the Columbia in a birch bark canoe, transporting it on a wagon across the portages between the St. Lawrence and the Hudson. While at New York, there being then apprehensions of a war between the United States and Great Britain, McKay had an interview with the

British minister for the purpose of getting his advice how to act in case of a rupture between the two nations, in which he represented that himself and associates were British subjects going to the Columbia to trade under the American flag. Northwest Coast of America, chap. 1., Gabriel Franchere. I see nothing in these facts to cast doubt upon the conclusion that the plaintiff was born of a British subject, in the allegiance of the British crown. Alexander and Thomas McKay came to the country British subjects, and the mere fact that they embarked at an American port, and that the former was a partner in a fur company, that called itself American for the convenience of trade or the exigencies of war, in no way affected their political *status* or that of the plaintiff's.

§ 15. *Indian tribes are independent communities, and a child a member of such a tribe is not a citizen of the United States.*

It is also insisted that the plaintiff is a citizen of the United States, and a voter under the operation of articles XIV and XV of the constitution, on the ground that they apply to and include Indians—at least half-breeds—born within the limits of the United States. Article XV secures the right of suffrage, irrespective of race, color or condition of servitude, to citizens of the United States, as defined by article XIV. It follows that an Indian, whether of the whole or half blood, who is a citizen of the United States, is entitled to vote, or rather he cannot be excluded from this privilege on the ground of being an Indian, as that would be to exclude him on account of race. But the Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States. *Worcester v. Georgia*, 6 Pet., 575. They have the right of use in the soil, which can only be divested by the United States, with their consent by purchase, or without it, by war. *Godfrey v. Beardsley*, 2 McL., 412. The special verdict states that the plaintiff was born of a Chinook woman, but does not state who the Chinook Indians were, or where they lived. I suppose the court has judicial knowledge of a fact so well-known in the history of Oregon, as that the Chinook Indians, at the period of the plaintiff's birth, were a well-known tribe living at or near the mouth of the Columbia river. Its language was the basis and principal element of the "jargon" which, during the first half of this century, was the general medium of communication between the white and the Indian tribes from the Umpqua river on the south, to the straits of Fuca on the north, while their one-eyed chief, "Old King Comcomly," has been immortalized in the classic pages of Irving's *Astoria*.

§ 16. *The child follows the condition of the mother.*

As the northwestern boundary was finally acknowledged or established, this tribe was within the limits of the United States. The plaintiff is nine-sixteenths Indian, eight of which he gets from his Chinook mother, and the other one from his Canadian father. As a matter of fact, the Indian blood predominating, he is not a half-breed, as claimed on the argument by his counsel. But I cannot perceive that it is material to consider whether he is a half-breed or not. In legal contemplation he is an American Indian, by virtue of his mother being a member of the Chinook tribe, or a British subject, without reference to his race, by virtue of being the son of Thomas McKay, and his birth in the allegiance of the British crown. According to the case of *United States v. Sanders, Hemp.*, 483, the plaintiff follows the condition of his mother, and is an alien. It was held in that case that the issue of an Indian woman and a white man

is an Indian, and *vice versa*; that the rule of the civil law — *partus sequitur ventrem* — prevailed. But the contrary is the rule of the common law in the analogous case of the issue of a marriage between a freeman and a neif. 2 Black. Com., 94. In such case, by that rule, the child follows the condition of the father. My impression is that the plaintiff ought to be deemed to follow the condition of his father. Congress seems to have taken this view of the matter in the passage of the act of September 27, 1850, granting land to settlers in Oregon, commonly called the "Donation Act." 9 Stat., 496. Section 4 of this act grants land to each white settler on the public lands, who is a citizen of the United States, or who has or will declare his intention to become such, "American half-breed Indians included;" thereby excluding half-breeds, the children of alien fathers, as not Americans, but aliens. But it is not necessary to absolutely determine this question.

Suppose that the plaintiff should be held to follow the condition of his mother, and is therefore a Chinook Indian; is he then a citizen of the United States under article XIV of the constitution? According to the doctrine that has been uniformly held in regard to the *status* of the Indian tribes in the United States he is not. Being born a member of "an independent political community" — the Chinook — he was not born subject to the jurisdiction of the United States — not born in its allegiance. On the other hand, if the plaintiff is held to follow the condition of his father he is a Canadian of mixed blood, born in the allegiance of the British crown, and therefore a British subject. In neither case was he born a citizen of the United States, and can only become one by complying with the laws for the naturalization of aliens. True, as the law now stands, the plaintiff cannot be admitted to citizenship, because he is neither a "white alien" nor a person of "African nativity or descent." But that is a matter within the exclusive cognizance of congress.

§ 17. *Denial of right to vote; no right of action in federal courts.*

By the constitution of Oregon (art. II, sec. 2) no person is entitled to vote at any election therein, unless, among other things, he is a citizen of the United States or has declared his intention to become such, "conformably to the laws of the United States upon the subject of naturalization." This description of persons is broader than that contained in article XV of the constitution of the United States, which does not include persons who have merely declared their intentions to become citizens. The act of congress under which this action is brought is enacted in pursuance of article XV, and only applies to citizens of the United States. 16 Stat., 140. On June 6, 1870, the plaintiff was not a citizen of the United States. This being so, he is not within the purview of the act and cannot maintain this action. If the defendant's refusal to permit the plaintiff to take the preliminary oath as to his qualifications, so as to give him a *prima facie* right to vote, was wrongful, as I think it was under the state law, the case is not within the act of congress. That only gives a remedy for such refusal in case of citizens of the United States.

A word in conclusion: I am aware that the ruling in this case would exclude from the privilege of voting quite a number of persons of mixed blood, persons whose fathers were British subjects, and mothers Indian women, who have heretofore often, if not uniformly, been allowed to vote in this state. They have done so by common consent, and under the authority of a vague public opinion that these persons, by remaining south of the forty-ninth parallel after the treaty of 1846, could, and thereby did, elect to become American citizens. But "public opinion is not any authority on a point of law;" and it appears in

this instance, as in others, "that common consent is sometimes a common error." The remedy, if any is deemed necessary, is with the legislature and not the courts. There must be judgment for the defendant in bar of the action, and for his costs and disbursements.

M'ILVAINE *v.* COXE'S LESSEE.

(4 Cranch, 209-215. 1808.)

ERROR to U. S. Circuit Court, District of New Jersey.

STATEMENT OF FACTS.—Ejectment for land in New Jersey. The lessor of the plaintiff claimed under one Daniel Coxe. It appeared by the evidence that Daniel Coxe was born in New Jersey, and lived there long prior and up to the year 1777, when he moved to Philadelphia, where he held office for two years under the authority of the king of Great Britain; that in 1780 he moved to New York with the British army, remained a stanch loyalist, and exercised civil offices under the king until 1783, when the city was finally evacuated by the British troops. That since the year 1777 he has never resided in any place within United States jurisdiction, but that his places of abode and residence have always been under the actual jurisdiction of the king of Great Britain, and that in 1802, at the date of the death of Rebecca Coxe, he was living in London. That he has always disclaimed allegiance to this country and claimed to be a British subject. It further appeared that in 1778 an inquisition was taken in Hunterdon county, New Jersey, whereby it was found that he had joined the arms of the British sovereign during the year 1778, and had also aided and abetted them; on which account his real and personal property were declared forfeited and vested in the state of New Jersey. Some time in 1779 he was attainted of treason against the state of Pennsylvania, in consequence of not surrendering pursuant to a proclamation issued by the state council, and of the said treason was pardoned on December 6, 1802, by the governor of Pennsylvania.

Opinion by MR. JUSTICE CUSHING.

The court deems it unnecessary to declare an opinion upon a point which was much debated in this cause, whether a real British subject, born before the 4th of July, 1776, who never from the time of his birth resided within any of the American colonies or states, can, upon the principles of the common law, take lands by descent in the United States; because Daniel Coxe, under whom the lessor of the plaintiff claims, was born in the province of New Jersey, long before the declaration of independence, and resided there until some time in the year 1777, when he joined the British forces.

§ 18. *Persons resident in New Jersey after October 4, 1776, owed allegiance to the state.*

Neither does this case produce the necessity of discriminating very nicely the precise point of time when Daniel Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the king of Great Britain; because he remained in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government. The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by the ties of allegiance. This opinion

is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted. We do not mean to intimate an opinion that even a law of a state, whose form of government had been organized prior to the 4th of July, 1776, and which passed prior to that period, would not have been obligatory. The present case renders it unnecessary to be more precise in stating the principle; for although the constitution of New Jersey was formed previous to the general declaration of independence, the laws passed upon the subject now under consideration were posterior to it.

§ 19. — *and they could not throw off their allegiance by removal and adherence to the British.*

Having thus ascertained the situation of Daniel Coxe, on the 4th of October, 1776, let us see whether it was in any respect changed by his subsequent conduct, in relation to the new government. Without expressing an opinion upon the right of expatriation as founded on the common law, or upon the application of that principle to a person born in the state of New Jersey, before its separation from the mother country, we think it conclusive upon the point, that the legislature of that state, by the most unequivocal declarations, asserted its right to the allegiance of such of its citizens as had left the state, and had not attempted to return to their former allegiance. The act of the 5th of June, 1777, contains an express declaration that all such persons were subjects of the state who had been seduced by the enemy from their allegiance. The law speaks of them as fugitives, not as aliens, and they are invited, not to become subjects, but to return to their duty, which the legislature clearly considered as still subsisting and obligatory upon them. The inquiry which the jury is directed to make by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives, is whether the person had, between the 4th of October, 1776; and the 5th of June, 1777, joined the armies of the king of Great Britain, or otherwise offended against the form of his allegiance to the state. The seventh section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them the inquiry is to be, whether the offender has joined the armies of the king, or otherwise offended against the form of his allegiance to the state.

During all this time, the real estates of these persons remained vested in them; and when, by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be forfeited for their offenses, not escheatable on the ground of alienage. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced. Those who joined the enemy between the 19th of April, 1775, and the 4th of October, 1776 (when an express declaration upon the subject was made), and who had not since returned and become subjects in allegiance to the new government, by taking the oaths of abjuration and allegiance, are pronounced

guilty of high treason, not for the purpose of affecting them personally, which would have been most unjust, but with a view to the confiscation of their estates. And consistent with this distinction, the jury are to inquire in respect to these persons, not as in the case of those who had left the state after the 4th of October, 1776, whether they had offended against the form of their allegiance, but whether they are offenders within this act, that is, by having joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, and not having returned and become subjects in allegiance to the state. Having taken this view of the laws of New Jersey upon this subject, it may safely be asserted that prior to the treaty of peace, it would not have been competent even for that state to allege alienage in Daniel Coxe in the face of repeated declarations of the legitimate authority of the government that he continued to owe allegiance to the state, notwithstanding all his attempts to throw it off. If he was an alien, he must have been so by the laws of New Jersey, but those laws had uniformly asserted that he was an offender against the form of his allegiance to the state. How, then, can this court, acting upon the laws of New Jersey, declare him an alien? The conclusion is inevitable, that, prior to the treaty of peace, Daniel Coxe was entitled to hold, and had a capacity to take lands in New Jersey by descent.

§ 20. *Effect on citizenship of the treaty with Great Britain.*

But it is insisted that the treaty of peace, operating upon his condition at that time, or afterwards, he became an alien to the state of New Jersey in consequence of his election, then made, to become a subject of the king, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression, which, by any implication, could work this effect. It contains an acknowledgment of the independence and sovereignty of the United States, in their political capacities, and a relinquishment on the part of his Britannic Majesty of all claim to the government, property and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period citizens of the United States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective states, who, in their sovereign capacities, had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens who had, by the laws of any of the states, been declared aliens, nor releasing from their allegiance any who had become, and were claimed as, citizens. It repeals no laws of any of the states which were then in force and operating upon this subject, but, on the contrary, it recognizes their validity by stipulating that congress should recommend to the states the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty, nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the states, anterior to, and independent of, the treaty, but its indiscriminate adoption might be productive of more mischief than it is possible for us to foresee. If, then, at the period of the treaty, the laws of New Jersey, which had made Daniel Coxe a subject of that state, were in full force, and were not repealed or in any manner affected by that instrument, if by force of these laws he was incapable of throwing off his allegiance to the state, and derived no right to

do so by virtue of the treaty, it follows that he still retains the capacity which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover.

Judgment must be affirmed, with costs.

SHANKS v. DUPONT.

(3 Peters, 242-268. 1830.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This was a writ of error to the highest court of appeals in law and equity of the state of South Carolina, brought to revise the decision of that court, in a bill or petition in equity, in which the present defendants were original plaintiffs, and the present plaintiffs were original defendants. From the record of the case, it appeared that the controversy before the court respected the right to the moiety of the proceeds of a certain tract of land, which had been sold under a former decree in equity, and the proceeds of which had been brought into the registry of the court. One moiety of the proceeds had been paid over to the original plaintiffs, and the other moiety was now in controversy. The original plaintiffs claimed this moiety also upon the ground that the original defendants were aliens and incapable of taking the lands by descent from their mother, Ann Shanks (who was admitted to have taken the moiety of the land by descent from her father, Thomas Scott), they being British-born subjects.

The facts, as they were agreed by the parties, and as they appeared on the record, were as follows: Thomas Scott, the ancestor and first purchaser, was a native of the colony of South Carolina, and died intestate, seized of the lands in dispute, in 1782. He left surviving him two daughters, Sarah and Ann, who were also born in South Carolina, before the declaration of independence. Sarah Scott intermarried with Daniel Pepper, a citizen of South Carolina, and resided with him in that state until 1802, when she died leaving children, the present defendants in error, whose right to her share of the property is conceded. The British took possession of James Island on the 11th of February, 1780, and Charleston surrendered to them on the 11th of May in the same year. In 1781 Ann Scott was married to Joseph Shanks, a British officer, and at the evacuation of Charleston, in December, 1782, went with him to England, where she remained until her death, in 1801. She left five children, the present plaintiffs in error, British subjects who claimed in right of their mother, and under the ninth article of the treaty of peace between this country and Great Britain of the 19th of November, 1794, a moiety of their grandfather's estate in South Carolina. The decision of the state court was against this claim, as not within the protection of the treaty, because Mrs. Shanks was an American citizen. After the elaborate opinions expressed in the case of *Inglis v. Sailor's Snug Harbor*, 3 Pet., 99, upon the question of alienage growing out of the American revolution, it is unnecessary to do more in delivering the opinion of the court in the present case than to state in a brief manner the grounds on which our decision is founded. Thomas Scott, a native of South Carolina, died in 1782, seized of the land in dispute, leaving two daughters surviving him, Sarah, the mother of the defendants in error, and Ann, the mother of the plaintiffs in error. Without question, Sarah took one moiety of the land by descent, and the defendants in error, as her heirs, are entitled to it. The only question is whether Ann took the other moiety by descent; and if

so, whether the plaintiffs in error are capable of taking the same by descent from her.

§ 21. *A child born in one of the states of the Union, and living there until of age, becomes a citizen of this country; if not of age, he partakes of the natural character or citizenship of the father.*

Ann Scott was born in South Carolina before the American revolution, and her father adhered to the American cause, and remained and was at his death a citizen of South Carolina. There is no dispute that his daughter Ann, at the time of the revolution, and afterwards, remained in South Carolina, until December, 1782. Whether she was of age during this time does not appear. If she was, then her birth and residence might be deemed to constitute her, by election, a citizen of South Carolina. If she was not of age, then she might well be deemed, under the circumstances of this case, to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his national character, as a citizen of that country. Her citizenship, then, being *prima facie* established, and indeed this is admitted in the pleadings, has it ever been lost; or was it lost before the death of her father, so that the estate in question was, upon the descent cast, incapable of vesting in her? Upon the facts stated, it appears to us that it was not lost; and that she was capable of taking it at the time of the descent cast. The only facts which are brought to support the supposition that she became an alien before the death of her father, are, that the British captured James Island in February, 1780, and Charleston in May, 1780; that she was then and afterwards remained under the British dominion in virtue of the capture; that in 1781 she married Joseph Shanks, a British officer, and upon the evacuation of Charleston in December, 1782, she went with her husband, a British subject, to England, and there remained until her death in 1801.

§ 22. *Temporary protection of a capturing foe does not sever former allegiance.*

Now, in the first place, the capture and possession by the British was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance, indeed, to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended, their former allegiance. It did not annihilate their allegiance to the state of South Carolina, and make them *de facto* aliens. That could only be by a treaty of peace, which should cede the territory, and them with it; or by a permanent conquest, not disturbed or controverted by arms, which would lead to a like result.

§ 23. *Marriage of a woman with an alien does not sever her former relations of citizenship.*

Neither did the marriage with Shanks produce that effect; because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens. If it were otherwise, then a *femme* alien would by her marriage become *ipso facto* a citizen, and would be dowable of the estate of her husband; which are clearly contrary to law. See *Kelly v. Harrison*, 2 Johns. Cas., 29; Co. Litt., 31, b.; Com. Dig., Alien, C. 1; Dower, A. 2; Bacon's Abridg., Alien; Dower, A. Our conclusion, therefore, is, that neither of these acts warrants the court in saying that Ann Shanks had ceased to be a citizen of South Carolina at the death of her father. This is not, indeed, controverted in the allegations of the parties.

§ 24. *The treaty of peace of 1783 fixed the citizenship of the colonists in conformity with their status as it then existed.*

The question, then, is, whether her subsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the treaty of peace of 1783. 8 Stats. at Large, 80. Our opinion is that it did. In the first place, she was born under the allegiance of the British crown, and no act of the government of Great Britain ever absolved her from that allegiance. Her becoming a citizen of South Carolina did not, *ipso facto*, work any dissolution of her original allegiance, at least so far as the rights and claims of the British crown were concerned. During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The American states insisted upon the allegiance of all born within the states respectively; and Great Britain asserted an equally exclusive claim. The treaty of peace of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown. All those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article, it was a firm and perpetual peace between his Britannic majesty and the said states, "and between the subjects of the one and the citizens of the other." Who were, then, subjects or citizens, was to be decided by the state of facts. If they were originally subjects of Great Britain, and then adhered to her, and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects, but then adhering to the states, the treaty deemed them citizens. Such, I think, is the natural, and, indeed, almost necessary meaning of the treaty; it would otherwise follow that there would continue a double allegiance of many persons; an inconvenience which must have been foreseen, and would cause the most injurious effects to both nations.

§ 25. *Political rights of femmes covert; may acquire or lose a national character.*

It cannot, we think, be doubted that Mrs. Shanks, being then voluntarily under British protection, and adhering to the British side, by her removal with her husband, was deemed by the British government to retain her allegiance, and to be, to all intents and purposes, a British subject. It may be said that, being *sub potestate viri*, she had no right to make an election; nor ought she to be bound by an act of removal under his authority or persuasion. If this were a case of a crime alleged against Mrs. Shanks, in connection with her husband, there might be force in the argument. But it must be considered that it was at most a mere election of allegiance between two nations, each of which claimed her allegiance. The governments, and not herself, finally settled her national character. They did not treat her as capable by herself of changing or absolving her allegiance, but they virtually allowed her the benefit of her choice by fixing her allegiance finally on the side of that party to whom she then adhered. It does not appear to us that her situation as a *femme covert* disabled her from a change of allegiance. British *femes covert*, residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens, and to have been absolved from their antecedent British allegiance. The incapacities of *femes covert*, provided by the common law,

apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. The case of *Martin v. Commonwealth*, 1 Mass., 347, turned upon very different considerations. There the question was whether a *feme covert* should be deemed to have forfeited her estate for an offense committed with her husband by withdrawing from the state, etc., under the confiscation act of 1779; and it was held that she was not within the purview of the act. The same remark disposes of the case of *Sewall v. Lee*, 9 Mass., 363, where the court expressly refused to decide whether the wife, by her withdrawal with her husband, became an alien. But in *Kelly v. Harrison*, 2 Johns. Cas., 29, the reasoning of the court proceeds upon the supposition that the wife might have acquired the same citizenship with her husband by withdrawing with him from the British dominions. See, also, *Bac. Abridg., Alien, A*; *Cro. Car.*, 601, 602; 4 Term R., 300; *Brook, Abr., Denizen*, 21; *Jackson v. Lunn*, 3 Johns., 109.

§ 26. *What persons are within the treaty of 1783.*

But if Mrs. Shanks' citizenship was not virtually taken away by her adherence to the British at the peace of 1783, still it must be admitted that, in the view of the British government, she was, at that time, and ever afterwards to the time of her death, and indeed at all antecedent periods, a British subject. At most, then, she was liable to be considered as in that peculiar situation, in which she owed allegiance to both governments, *ad utriusque fidem regis*. Under such circumstances, the question arises whether she and her heirs are not within the purview of the ninth article of the treaty with Great Britain of 1794. It appears to us that they plainly are. The language of that article is "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein," etc., etc.; and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be regarded as aliens. Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is, therefore, within the words of the treaty. Why ought she not also to be held within the spirit and intent? It is said that the treaty meant to protect the rights of British subjects, who were not also American citizens; but that is assuming the very point in controversy. If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted? The object of the British government must have been to protect all her subjects holding lands in America from the disability of alienage in respect to descents and sales. The class of American loyalists could, at least in her eyes, have been in as much favor as any other; there is nothing in our public policy which is more unfavorable to them than to other British subjects. After the peace of 1783, we had no right or interest in future confiscation; and the effect of alienage was the same in respect to us, whether the British subject was a native of Great Britain or of the colonies. This part of the stipulation then being for the benefit of British subjects who became aliens by the events of the war, there is no reason why all persons should not be embraced in it who sustained the character of British subjects, although we might also have treated them as

American citizens. The argument supposes that because we should treat them as citizens, therefore Great Britain had no right to insist upon their being British subjects within the protection of the treaty. Now, if they were, in truth and in fact, upon principles of public and municipal law, British subjects, she has an equal right to require us to recognize them as such. It cannot be doubted that Mrs. Shanks might have inherited any lands in England, as a British subject, and her heirs might have taken such lands by descent from her. It seems to us, then, that all British-born subjects, whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the treaty of 1794.

In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rules of interpretation applicable to treaties between independent states, the objections taken to the right of recovery of the plaintiffs cannot prevail. Upon the whole, the judgment of the court is that the plaintiffs in error are entitled to the moiety of the land in controversy, which came by descent to their mother, Ann Shanks, and of course to the proceeds thereof; and that the decree of the state court of appeals ought to be reversed, and the cause remanded, with directions to enter a decree in favor of the plaintiffs in error.

Dissenting opinion by MR. JUSTICE JOHNSON.

This cause comes up from the state court of South Carolina. The question is whether the plaintiffs can inherit to their mother. The objection to their inheriting is that they are aliens, not born in allegiance to the state of South Carolina, in which the land lies. From the general disability of aliens they would exempt themselves. 1. On the ground that their mother was a citizen born, and in that right, though born abroad, they can inherit under the statute of Edward III. 2. That, if not protected by that statute, then that their mother was a British subject, and that she and her heirs are protected as to this land by the treaties of 1783 and 1794. The material facts of their case are that their mother and her father were natives born of the province of South Carolina before the declaration of independence; that in 1781, while Charleston and James Island, where the land lies and she and her father resided, were in possession of the British, their mother married their father, a British officer; that the descent was cast in 1782, and in December of that year, when the town was evacuated, she went to England with her husband, and resided there until her death in 1801, in which interval the appellants were born in England. There is no question about the right of the appellees, if the right of the appellants cannot be maintained.

The first of the grounds taken below, to wit, the statute of Edward III., was not pressed in argument here, and must be regarded as abandoned. The second requires, therefore, our sole attention. Was Mrs. Shanks to be regarded as a British subject within the meaning of our treaties with Great Britain? If so, then the land which was acquired in 1782 has the peculiar incident attached to it of being inheritable by aliens, subjects of Great Britain.

§ 27. *Allegiance and land titles prior to adoption of constitution.*

Until the adoption of the federal constitution, titles to land and the laws of allegiance were exclusively subjects of state cognizance. Up to the time, therefore, when this descent was cast upon the mother, the state of South Carolina was supreme and uncontrollable on the subject now before us.

§ 28. — *power of the states modified by the constitution.*

By the adoption of the constitution, the power of the states in this respect was subjected to some modification. But although restrained in some measure from determining who cannot inherit, I consider her power still supreme in determining who can inherit. On this subject, her own laws and her own courts furnish the only rule for governing this or any other tribunal. By an act of the state, passed in 1712, the common law of Great Britain was incorporated into the jurisprudence of South Carolina. In the year 1782, when this descent was cast, it was the law of the land; and it becomes imperative upon these appellants, after admitting that their parent was a native-born citizen of South Carolina, daughter of a native-born citizen of South Carolina, to show on what ground they can escape from the operation of these leading maxims of common law: *Nemo potest exuere patriam*, and *proles sequitur sortem paternam*. The unyielding severity with which the courts of Great Britain have adhered to the first of these maxims in Dr. Story's Case, furnished by Sir Mathew Hale (1 Hale P. C., 96), and in *Æneas M'Donald's Case*, to be found in Foster, 59, leaves no ground of complaint for its most ordinary application in the case of descent, and its most liberal application when perpetuating a privilege.

The treaty of peace can afford no ground to the appellants, nor the construction which has extended the provisions of that treaty to the case of escheat; for the question here is not between the alien and the state, but between aliens and other individual claimants. The words of the sixth article of the treaty of 1783 are the same as those in the preliminary treaty of 1782. 8 Stats. at Large, 54. "There shall be no future confiscations made or future prosecutions commenced against any person or persons by reason of the part which he or they may have taken in the present war." Conceding that escheat may be comprised under confiscation, a decision between individuals claiming under no act of force imputable to the state cannot possibly be considered under that term. Nor will her case be aided by the following words of that article, to wit, "nor shall any person on that account (the part which he or they may have taken in the present war) suffer any future loss or damage either in person, liberty or property." The decision of the state court gives the most liberal extension possible to this provision of the treaty, since it declares that Mrs. Shanks never was precluded by any act of hers from claiming this property. It never entered into the minds of that court that the very innocent act of marrying a British officer was to be tortured into "taking a part in the present war," nor that following that officer to England, and residing there under coverture, was to be imputed to her as a cause of forfeiture.

I consider it very important to a clear view of this question that its constituents or several members should be viewed separately. The state court has not pretended to impugn the force of the treaty of 1794, or denied the obligation to concede every right that can be fairly and legally asserted under it, but has only adjudged that the case of the appellants is not one which, on legal grounds of construction, can be brought within its provision. The words of the treaty are: "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty," shall continue to hold and transmit to their heirs, etc.

The decision of the state court which we are now reviewing presents two propositions: 1. That Mrs. Shanks was in the year 1782, when the descent was cast, and continued to be in 1794, when the treaty was ratified, a citizen of

South Carolina. 2. That she was not a British subject in the sense of the treaty.

As to the first of these two propositions, I consider it as altogether set at rest by the decision itself. It is established by paramount authority; and this court can no more say that it is not the law of South Carolina than they could deny the validity of a statute of the state passed in 1780, declaring that to be her character and those her privileges. The only question, therefore, that this court can pass upon is whether, being recognized under that character, and possessing those rights, she is still a British subject within the provisions of the treaty. It is no sufficient answer to this question that it cannot be denied that Mrs. Shanks was a British subject. She was so in common with the whole American people. The argument, therefore, proves too much, if it proves anything, since it leads to the absurdity of supposing that Great Britain was stipulating for the protection of her enemies, and imposing on us an obligation in favor of our own citizens. It also blends and confounds the national character of those to separate and distinguish whom was the leading object of the treaty of 1783.

§ 29. *Construction of the treaties of 1783 and 1794.*

It cannot be questioned that the treaty of 1783 must have left Mrs. Shanks a British subject, or the treaty of 1794 cannot aid her offspring. And the idea of British subject, under the latter treaty, will be best explained by reference to its meaning in that of 1783. The two treaties are *in pari materia*. The provisions of the third article show that persons who come within the description of people of the United States were distinguished from subjects of Great Britain. That article stipulates for a right in the people of the United States to resort to the Gulf of St. Lawrence for fishing; a stipulation wholly nugatory if not distinguishable from subjects of Great Britain. The fifth article is more explicit in the distinction. It first contains a provision in favor of real British subjects, then one in favor of persons resident in districts in possession of his majesty's arms, and then stipulates that persons of any other description shall have liberty to go to and remain twelve months in the United States to adjust their affairs. These latter must have included the loyalists who had been banished or in any way subjected to punishment, who are explicitly distinguished from real British subjects, and thus classed in order to avoid the question to whom their allegiance was due, or rather because, by the same treaty, the king, having renounced all claim to their allegiance, could no longer distinguish them as British subjects.

§ 30. *Test of allegiance and citizenship.*

Can those any longer be denominated British subjects whose allegiance the king of Great Britain has solemnly renounced? I know of no test more solemn or satisfactory than the liability to the charge of treason; not by reason of temporary allegiance, for that is gone with change of domicile. Were those who could claim the benefit of the king's renunciation to the colonies subject to other than temporary allegiance while commorant in Great Britain? I say they were not. Their right to inherit is not a sufficient test of that liability as to other nations, for that right results from a different principle, the exemption of a British subject from being disfranchised while free from crime. Was Mrs. Shanks an individual to whose allegiance the king had renounced his claim? The commencement of the revolution found us all, indeed, professing allegiance to the British crown, but distributed into separate communities, altogether independent of each other, and each exercising within his own limits sovereign

powers, legislative, executive and judicial. We were dependent, it is true, upon the crown of Great Britain, but, as to all the world beside, foreign and independent. It lies, then, at the basis of our revolution, that, when we threw off our allegiance to Great Britain, every member of each body politic stood in the relation of subject to no other power than the community of which he then constituted a member. Those who owed allegiance to the king, as of his province of South Carolina, thenceforward owed allegiance to South Carolina. The courts of this country all consider this transfer of allegiance as resulting from the declaration of independence; the British, from its recognition by the treaty of peace. But, as to its effect, the British courts concur in our view of it. For, in the case of *Thomas v. Acklam*, 2 Barn. & Cress., 779, the language of the British court is this: "A declaration that a state shall be free, sovereign and independent is a declaration that the people composing that state shall no longer be considered as the subjects of that sovereign by whom the declaration is made." From the previous relations of the colonies and mother country, it is obvious that the declaration of independence must have found many persons resident in the country besides those whose allegiance was marked by the unequivocal circumstance of birth. Many native-born British subjects voluntarily adhered to the Americans, and many foreigners had, by settlement, pursuits or principles, devoted themselves to her cause.

Whatever questions may have arisen as to the national character or allegiance of these, as to the case under review, which is that of a native-born citizen of South Carolina, there would be no doubt. And the courts of that state have put it beyond a doubt that the revolution transferred her allegiance to that state. Whoever will weigh the words, "real British subjects," used in the fifth article, and consider the context, can come to but one conclusion, to wit, that it must mean British subjects to whose allegiance the states make no claim. "Estates that have been confiscated belonging to real British subjects," are the words. Now, it is notorious that, although, generally speaking, the objects of those confiscations were those to whose allegiance the states laid claim, yet, in many instances, the estates of British subjects resident in England or this country, or elsewhere, were confiscated, because they were British subjects, on the charge of adhering to the enemy. But if the right of election had ever been contemplated, why should the term real have been inserted? The loyalists were British subjects, and had given the most signal proofs of their election to remain such. What possible meaning can be attached to the term real, unless it raised a distinction to their prejudice? And, historically, we know that Great Britain acknowledged their merits by making large provisions for their indemnification, because for them there was no provision made for restoring their property.

§ 31. *As to the right of election on the part of a citizen or subject.*

It has been argued that the British courts, in construing the treaty of peace, have recognized this right of election; and the case of *Thomas v. Acklam*, before cited, is supposed to establish it. But a very little attention to that case will prove the contrary. It is, in fact, the converse of the present case. Mrs. Thomas was the daughter of Mr. Ludlow, an American citizen born before the revolution, and was born in America long after the separation; so that her alien character was unquestionable, unless protected by the statute of George II. explaining those of Anne and Edward. The decision of the court of king's bench is, that, to bring herself within the provisions of the statute, her father must be shown at her birth to have been both a native born and a subject of

Great Britain; that, by the treaty of peace, the king had renounced all claim to his allegiance, and his subsequent residence in America proved his acceptance of that renunciation. But when did South Carolina renounce the allegiance of Mrs. Shanks? We have the evidence of the state's having acquired it; when did she relinquish it? Or, if it be placed on the footing of an ordinary contract, when did South Carolina agree to the dissolution of this contract? Or when did she withdraw her protection, and thus dissolve the right to claim obedience or subjection? It is true, the treaty of 1794 drops the word real, and stipulates generally for British subjects and American citizens, construing the two treaties as instruments *in pari materia*. This circumstance is of little consequence, and however we construe it, the argument holds equally good, that the treaty could have been only meant to aid those who needed its aid, not those who were entitled under our own laws to every right which the treaty meant to secure; that is, those whose alien character prevented their holding lands, unless aided by some treaty or statute. Mrs. Shanks was not of this character or description; her right at all times to inherit has been recognized by paramount authority. But it is contended that it was at her election whether to avail herself of her birthright as a citizen of the state, or her birthright as a subject of Great Britain. To this there may be several answers given. And first, the admission of this right would make her case no better under the construction of the treaty; for, having no need of its protection, as has been authentically recognized by the state decision, it cannot be supposed that she was an object contemplated by the treaty; she was not a British subject in the sense of those treaties, especially if the two treaties be construed on the principle of instruments *in pari materia*.

Secondly, if she had the right of election, at what time did she exercise it? for she cannot claim under her election, and against her election. If she exercised it prior to her father's death, then was she an alien at his death, and could not take even a right of entry by descent, as has been distinctly recognized in *Fairfax v. Hunter*, 7 Cranch, 619, and I think in some other cases. She then had nothing for the treaty to act upon. But if her election was not complete until subsequent to her father's death, then it is clearly settled that taking the oath of allegiance to a foreign sovereign produces no forfeiture, and she still had no need of a treaty to secure her rights to land previously descended to her. If the facts be resorted to, and the court is called upon to fix the period of her transit, it would be obliged to confine itself to the act of her marrying against her allegiance. It is the only free act of her life stated upon the record, for from thence she continued *sub potestate viri*, and if she or her descendants were now interested in maintaining her original allegiance, we should hear it contended, and be compelled to admit, that no subsequent act of her life could be imputed to her because of her coverture, and even her marriage was probably during her infancy.

§ 82. *The right of election of citizenship did not exist in South Carolina.*

But lastly, I deny this right of election altogether, as existing in South Carolina, more especially at that time. I had this question submitted to me on my circuit some years since, and I then leaned in favor of this right of election. But more mature reflection has satisfied me that I then gave too much weight to natural law and the suggestions of reason and justice, in a case which ought to be disposed of upon the principles of political and positive law, and the law of nations. That a government cannot be too liberal in extending to individuals the right of using their talents and seeking their fortunes wherever their

judgments may lead them, I readily agree. There is no limit short of its own security, to which a wise and beneficent government would restrict its liberality on this subject. But the question now to be decided is of a very different feature; it is not one of expediency, but of right. It is, to what extent may the powers of government be lawfully exercised in restraining individual volition on the subject of allegiance, and what are the rights of the individual when unaffected by positive legislation?

§ 33. *The common law denies the right of throwing off one's allegiance.*

As the common law of Great Britain is the law of South Carolina, it would here perhaps be sufficient to state that the common law altogether denies the right of putting off allegiance. British subjects are permitted, when not prohibited by statute (as is the case with regard to her citizens), to seek their fortunes where they please, but always subject to their natural allegiance. And although it is not regarded as a crime to swear allegiance to a foreign state, yet their government stands uncommitted on the subject of the embarrassments in which a state of war between the governments of their natural, and that of their adopted, allegiance may involve the individual. On this subject the British government acts as circumstances may dictate to her policy. That policy is generally liberal; and as war is the calling of many of her subjects, she has not been rigorous in punishing them, even when found with arms in their hands, where there has been no desertion and no proclamation of recall. The right, however, to withdraw from their natural allegiance is universally denied by the common law.

It is true that, without any act of her own, Mrs. Shanks found herself equally amenable to both governments under the application of this common law principle. But from this only one consequence followed, which is, that, so far as related to the rights to be claimed or acquired, or duties to be imposed under the laws of either government, she was liable to become the victim of the will or injustice of either. If we were called upon to settle the claims of the two governments to her allegiance, upon the general principles applicable to allegiance even as recognized by the contending governments, we should be obliged to decide that the superior claim was in South Carolina. For, although before the revolution a subordinate state, yet it possessed every attribute of a distinct state; and upon principles of national law, the members of a state or political entity continue members of the state, notwithstanding a change of government. The relations between the body politic and its members continue the same. The individual member and the national family remain the same, and every member which made up the body continues, in the eye of other nations, in his original relation to that body. Thus we see that the American government is at this day claiming indemnity of France for the acts of those who had expelled the reigning family from the throne, and occupied their place. But it is obvious that, although the common law be the law of South Carolina, and its principles are hostile to the right of putting off our national allegiance, the constitution and legislative acts of South Carolina, when asserting her independence, must be looked into to determine whether she may not then have modified the rigor of the common law, and substituted principles of greater liberality.

South Carolina became virtually independent on the 4th of June, 1775. The association adopted by her provincial congress on that day constituted her in effect an independent body politic; and if, in international affairs, the fact of exercising power be the evidence of legally possessing it, there was no want of

facts to support the inference there; for officers were deposed, and at one time the most influential men in the state were banished under the powers assumed and exercised under that association. It required the indiscriminate subscription and acquiescence of all the inhabitants of the province, under pain of banishment. Neither of the constitutions adopted in 1776 or 1778 contains any definition of allegiance or designation of the individuals who were held bound in allegiance to the state; but the legislative acts passed under those constitutions will sufficiently show the received opinion on which the government acted in its legislation upon this subject. Neither the ordinance for establishing an oath of abjuration and allegiance, passed February 13, 1777, nor the act of March 28, 1778, entitled "An act to oblige every free male inhabitant of this state, above a certain age, to give assurance of fidelity and allegiance to the same," holds out any idea of the right of election. The first requires the oath to be taken by any one to whom it is tendered, and the last requires it to be taken by every male inhabitant above sixteen, under the pain of perpetual banishment. The preamble to the latter act, indeed, admits that protection and allegiance are reciprocal; but the whole course of its legislation shows that the legislature understands the right of election to belong to the state alone, and an election to withdraw allegiance from the state as a crime in the individual. The eleventh, or penal clause, is very explicit on this subject. It runs thus: "That if any person refusing or neglecting to take the oath prescribed by this act, and withdrawing from this state, shall return to the same, then he shall be adjudged guilty of treason against this state, and shall, upon conviction thereof, suffer death as a traitor."

Now, therefore, where there is no allegiance, there can be no treason. Since, then, the common law of England was the law of allegiance and of descents in South Carolina, when this descent was cast upon the mother, and since remained unaltered by any positive act of legislation of the only power then possessing the right to legislate on the subject, it follows that the representatives of Mrs. Shanks can derive no benefit from her election, unless the right to elect is inherent and unalienable in its nature, and remains above the legislative control of society, notwithstanding the social compact. All this doctrine I deny. I have already observed that governments cannot be too liberal in extending the right to individuals; but as to its being unalienable, or unaffected by the social compact, I consider it to be no more so than the right to hold, devise or inherit the lands or acquisitions of an individual. The right to enjoy, transmit and inherit the fruits of our own labor, or of that of our ancestors, stands on the same footing with the right to employ our industry wherever it can be best employed; and the obligation to obey the laws of the community on the subject of the right to emigrate is as clearly to be inferred from the reason and nature of things as the obligation to use or exercise any other of our rights, powers or faculties, in subordination to the public good. There is not a writer who treats upon the subject, who does not qualify the exercise of the right to emigrate, much more that of putting off or changing our allegiance, with so many exceptions as to time and circumstances as plainly to show that it cannot be considered as an unalienable or even perfect right. A state of war, want of inhabitants, indispensable talents, transfer of knowledge and wealth to a rival, and various other grounds, are assigned by writers on public law, upon which a nation may lawfully and reasonably limit and restrict the exercise of individual volition in emigrating or putting off our allegiance. All this shows that, whenever an individual proposes to remove, a

question of right or obligation arises between himself and the community, which must be decided on in some mode. And what other mode is there but a reference to the positive legislation or received principles of the society itself? It is, therefore, a subject for municipal regulation; and the security of the individual lies in exerting his influence to obtain laws which will neither expose the community unreasonably on the one hand, nor restrain one individual unjustly on the other.

Nor have we anything to complain of in this view of the subject. It is a popular and flattering theory, that the only legitimate origin of government is in compact, and the exercise of individual will. That this is not practically true is obvious from history; for, excepting the state of Massachusetts and the United States, there is not, perhaps, on record, an instance of a government purely originating in compact. And even here, probably, not more than one-third of those subjected to the government had a voice in the contract. Women, and children under an age arbitrarily assumed, are necessarily excluded from the right of assent, and yet arbitrarily subjected. If the moral government of our Maker and our parents is to be deduced from gratuitous benefits bestowed on us, why may not the government that has shielded our infancy claim from us a debt of gratitude to be repaid after manhood? In the course of nature, man has need of protection and improvement long before he is able to reciprocate these benefits. These are purchased by the submission and services of our parents; why, then, should not those to whom we must be indebted for advantages so indispensable to the development of our powers be permitted, to a certain extent, to bind us apprentice to the community from which they have been and are to be procured? If it be answered that this power ought not to be extended unreasonably, or beyond the period when we are capable of acting for ourselves, the answer is obvious,—by what rule is the limit to be prescribed, unless by positive municipal regulation? It is of importance here that it should be held in view that we are considering political, not moral, obligations. The latter are universal and immutable, but the former must frequently vary according to political circumstances. It is the doctrine of the American courts, that the issue of the revolutionary war settled the point that the American states were free and independent on the 4th of July, 1776. On that day, Mrs. Shanks was found under allegiance to the state of South Carolina, as a natural-born citizen to a community, one of whose fundamental principles was, that natural allegiance was unalienable; and this principle was at no time relaxed by that state, by any express provision, while it retained the undivided control over the rights and liabilities of its citizens.

But it is argued that this lady died long after the right of passing laws of naturalization was ceded to the United States; and the United States have, in a series of laws, admitted foreigners to the right of citizenship, and imposed an oath which contains an express renunciation of natural and every other kind of allegiance. And so of South Carolina; she had previously passed laws to the same effect. In 1704 she passed a law "for making aliens free of this province," which remained in force until 1784, when it was superseded by the act of the 26th of March, "to confer the right of citizenship on aliens;" to which succeeded that of the 22d of March, 1786, entitled "An act to confer certain rights and privileges on aliens, and for repealing the act therein mentioned." In both the latter acts, the oath of allegiance is required to be taken; and that oath, as prescribed by the act of the 28th of March, 1778, contains an abjuration of allegiance to any other power, and particularly to the king of

Great Britain. These legislative acts, it cannot be denied, do seem to hold out the doctrine of the right to change our allegiance, and do furnish ground for insisting that it is absurd in a government to deny to its own citizens the right of doing that which it encourages to be done by the citizens of other states.

Most certainly it is to be regretted that congress has not long since passed some law upon the subject, containing a liberal extension of this right to individuals, and prescribing the form and circumstances under which it is to be exercised, and by which the act of expatriation shall be authenticated. A want of liberality in legislating on this subject might involve the government in inconsistency; but the question here is, whether, in absence of such declaration of the public will or opinion, courts of justice are at liberty to fasten upon the government, by inference, a doctrine negatived by the common law, and which is in its nature subject to so many modifications. I think not. Great Britain exercises the same power either by the king's patent or by legislative enactment; and permanent laws exist in that country which extend the rights of naturalization to men by classes, or by general description. Yet this implication has never been fastened upon her; nor is the doctrine of her common law less sternly adhered to, or less frequently applied, even to the utmost extent of the punishing power of her courts of justice. In practice, she moderates its severities; but in this, it is will and policy that guides her, not any relaxation of the restriction upon individual rights. There is, indeed, one prominent difficulty hanging over this argument which it is impossible to remove. If it proves anything, it proves too much; since the inference, if resulting at all, must extend to put off one's allegiance, as well to adopted citizens as to natural-born citizens, and to all times and all circumstances. What, then, is that obligation, that allegiance, worth which may be changed an hundred times a day? or by passing over from one army to another, perhaps in the day of battle? The truth is, it leaves but a shadow of a tie to society, and converts that which is considered as one of the most sacred and solemn obligations that can be entered into, although confirmed by the sanctity of an oath, into nothing but an illusory ground of confidence between individuals and their governments. The idea brings man back to a state of nature; at liberty to herd with whom he pleases, and connected with society only by the caprice of the moment.

Upon the whole, I am of opinion that Mrs. Shanks continued, as she was born, a citizen of South Carolina; and of course unprotected by the British treaty. I have taken a general view of the subject, although it does not appear precisely whether or not Mrs. Shanks had attained an age sufficiently mature to make an election before marriage, or was ever discoverd during her life, so as to be able to elect after marriage. I have reasoned on the hypothesis most favorable to her, admitting that she had made an election in authentic form. Nor have I confined myself to authority; since I wished, as far as I was instrumental, to have this question settled on principle. But it does not appear to me that in the case of *M'Ilvaine v. Coxe*, 4 Cranch, 209 (§§ 18-20, *supra*), this court has decided against the right of election most expressly; for if ever the exercise of will or choice might be inferred from evidence, it is hardly possible for a stronger case to be made out than that which is presented by the facts in that case.

With regard to state decisions upon this question, I would remark that it is one so exclusively of state cognizance, that the courts of the respective states must be held to be best acquainted with their own law upon it. Though every

other state in the Union, therefore, should have decided differently from the state of South Carolina, their decisions could only determine their own respective law upon this subject, and could not weaken that of South Carolina with regard to her own law of allegiance and descents. It does appear singular that we are here called upon to overrule a decision of the courts of South Carolina on a point on which they ought to be best informed, and to decide an individual to be a British subject, to whose allegiance the British courts have solemnly decided the king has no claim. On this point the case of Ludlow, in *Thomas v. Acklam*, 2 Barn. & Cress., 779, is the case of *Mrs. Shanks*; it is impossible to distinguish them. The state of South Carolina acknowledges her right to all the benefits of allegiance; the king of Great Britain disavows all claim to her allegiance; and yet we are called upon to declare her a British subject. I have not had opportunity for examining the decisions of all the states upon this subject, but I doubt not they will generally be found to concur in principle with the court of South Carolina, except so far as they depend upon local law. This is certainly the case in Massachusetts. The decision in the case of *Palmer v. Downer*, 2 Mass., 179, note, does, it is true, admit the right of the election; but besides that that case is very imperfectly, and I may add unauthentically reported, it is most certainly overruled in the subsequent case of *Martin v. Woods*, 9 Mass., 377.

Before I quit the cause, it may be proper to notice a passage in a book recently published in this country, and which has been purchased and distributed under an act of congress; I mean *Gordon's Digest*. There is no knowing what degree of authority it may be supposed to acquire by this act of patronage; but if there is any weight in the argument in favor of expatriation drawn from the acts of congress on this subject, I presume the argument will at some future time be applied to the doctrines contained in this book. If so, it was rather an unhappy measure to patronize it; since we find in it a multitude of *nisi prius* decisions, *obiter dicta*, and certainly some striking misapprehensions, ranged on the same shelf with acts of congress. On the particular subject now under consideration, art. 1649, we find the following sentence: "Citizens of the United States have a right to expatriate themselves in time of war as well as in time of peace, until restrained by congress;" and for this doctrine the author quotes *Talbot v. Janson*, 3 Dal., 133, and the case of *The Santissima Trinidad*, 7 Wheat., 348; in both which cases the author has obviously mistaken the argument of counsel for the opinion of the court; for the court in both cases expressly waive expressing an opinion, as not called for by the case, since, if conceded, the facts were not sufficient to sustain the defense. The author also quotes a case from 1 Pet., 161, which directly negatives the doctrine, and a case from 4 Hall's L. J., 462, which must have been quoted to sustain the opposite doctrine. It is the case of *The United States v. Williams*, in which the chief justice of the United States presided and in which the right of election is expressly negated, and the individual who pleaded expatriation is convicted and punished.

TOBIN v. WALKINSHAW.

(Circuit Court for California: 1 McAllister, 186-196. 1856.)

STATEMENT OF FACTS.—Ejectment. Defendants pleaded to the jurisdiction, that Forbes, one of their number, was not an alien and subject of Great Britain, as alleged in the complaint. There was an issue and a verdict that Forbes was an alien. A motion was made to set aside the verdict.

Opinion by McALLISTER, J.

To sustain their plea, defendants relied on the admitted facts, that said Forbes, a native of Great Britain, was at the date of the treaty of Guadalupe Hidalgo a naturalized citizen of Mexico, that he has continued to reside in California since the execution of the treaty, and that he has never made any declaration of an intention to retain the rights of a Mexican citizen. These facts, it was contended, with the subsequent admission of California into the Union, fixed at once and by mere operation of law, the *status* of American citizenship upon the defendant Forbes. To disaffirm the plea, and sustain the allegation that defendant was an alien, plaintiff proved that in 1851 the defendant, against whom two actions at law had been instituted in the courts of this state, petitioned for their removal, and had them removed, from the state courts into the district court of the United States for the northern district of the state of California (then exercising circuit court powers), on the ground that he was, at the time, an alien, and subject of the kingdom of Great Britain. That, to accomplish that object, he executed bonds reciting that fact, and his attorney, under his instructions, swore to the fact. It was also in proof, that, in the same year (1851), a suit was brought on the equity side of said district court; and to the bill filed the answer of defendant admitted that he was at that time an alien, and subject of Great Britain. Lastly, it was deposed by a witness whose testimony was not attempted to be impeached, that the defendant, in 1851, told him he was not a citizen of the United States; that he did not intend to become one at present, because he desired to be able to litigate in the courts of the United States. To the testimony sustaining the plea, objections were made by attorney for defendants, on the ground of incompetency, and were overruled by the court. This verdict is, in the opinion of the court, fully sustained by the testimony given, and the only ground on which it can be set aside is, that the evidence was improperly admitted to go to the jury. In the view the court will hereafter take of this case, the question of the competency of the testimony might be dispensed with. But as it may not be inappropriate to allude to this testimony, the court will briefly advert to the objections made to its competency.

§ 34. *Where, by a treaty, the citizens of a country are given the right to elect of which of the two countries they will become citizens, such right must be exercised according to the strict letter of the treaty.*

The argument of counsel is, that the provisions of the treaty of "Guadalupe Hidalgo," with the residence of defendant in California, being a naturalized citizen of Mexico, for a year after the date of that instrument; the fact that no evidence was produced to prove defendant ever made a declaration of his intention to retain the rights of a Mexican citizen, together with the admission of California into the Union, all fixed, once and forever, upon the defendant the *status* of an American citizen, which cannot be altered by the testimony. The consideration of this argument involves, to some extent, a construction of the article of the treaty of Guadalupe Hidalgo upon which it is predicated. This article stipulates as to those Mexicans who should prefer to remain in the ceded territory, that they may either retain the title and rights of Mexican citizens, or acquire those of American citizens; but declares that they shall be under the obligation to make their election, within one year from the date of the exchange of the ratification of the treaty, and those who shall remain after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become

citizens of the United States. We will first consider this article as giving a right of election. If he elected to retain the character of a Mexican, he was to manifest it by a declaration, whether in writing, verbally or by matter of record, is not stated. The treaty is more indefinite as to the manner in which he is to manifest a contrary intention. In fact, it prescribes no way in which he is to manifest his intent *not* to become a citizen of the United States. The omission to make a declaration to continue a Mexican, and his residence for a year after the date of the treaty, would be *prima facie* evidence of his election to become a citizen of the United States. There is also one rule of evidence prescribed by the treaty as to his intention, the fact of his remaining in the country without having made any declaration of his intention. This cannot be deemed conclusive testimony, for election presupposes intention; it is an operation of the will. If the legal conclusion be absolutely fixed upon him in despite of the intent or the purpose of his residence, what becomes of the right of election?

§ 35. *Under what circumstances acts and declarations of a party as to his intention of remaining in or removing from a country are admissible evidence.*

In *Inglis v. Sailors' Snug Harbor*, 3 Pet., 123, the court say, "How, then, is his father, Charles Inglis, to be considered? — was he an American citizen? He was here at the time of the declaration of independence, and *prima facie* may be deemed to have become thereby an American citizen. But this *prima facie* presumption may be rebutted; otherwise there is no force or meaning in the right of election." Considering, then, for the present, that the right of election had been clearly given to the defendant, the question is, not what do his feelings or interests now prompt him to do, but what did he do within the year his right of election existed. On one side, we have the *prima facie* evidence prescribed by the treaty, his continued residence, and the fact that in the year 1851 he had voted at a corporation election. To counteract these, we have solemn legal instruments executed by defendant, describing himself as an alien and subject of Great Britain. Availing himself of that allegation, he removed cases brought against him from the state to the federal courts, filing an answer in a court of equity, in which he swore to the fact — his attorney, under his instructions, swearing to the same fact, and himself not only stating that he was not a citizen of the United States, but did not intend to be, as he wished to be able to litigate in the courts of the United States. To all these acts and declarations, it is urged, they are incompetent evidence, because done and said after the expiration of the time within which the right of election was to have been exercised. The general rule of evidence undoubtedly is, that acts and declarations not done and made simultaneously with the *factum probandum*, and not forming part of the *res gestæ*, are inadmissible. Yet, if an alleged fact cannot exist together with other facts, the proof of the latter facts disproves the existence of the former. If the declarations and acts of Forbes in 1851 were established, they would necessarily disprove the alleged fact that he had previously elected to become a citizen of the United States. They were, therefore, to be left to the jury. It is settled that the declarations and acts of a party are admissible to qualify and explain his intention in removing or the character of his residence in a question of domicile. And it is to be borne in mind that we are considering the admissibility of this testimony in view of a construction of the treaty which gives to a party a right to elect whether he will retain the title and rights of a Mexican, or take those of a citizen of the United States. To exercise this right, there was no necessity under the treaty that there should have been an actual

removal, nor is such actual removal the only evidence that the right of election has been exercised. In the case of *Inglis v. Sailors' Snug Harbor*, 3 Pet., 123, the court say, "It surely cannot be said that nothing short of actually removing from the country before the declaration of independence will be received as evidence of election." And the court proceeds to consider the acts of the party adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts beside that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar, defendant remained in this country, and, with a view to ascertain his intention in remaining, his acts and declarations, though made subsequently to the time, were left to the jury to find in what manner he had elected.

But there is another aspect in which the testimony may be received. It constitutes by reason of its character an exception to the general rule that declarations and acts not forming a part of the *res gestæ* are inadmissible. That exception applies to cases where the intention of a party becomes material, in which cases facts evidencing the intention, although collateral and foreign to the main subject, still, as having a bearing upon the question of intent, are admissible. In *Wood v. United States*, 16 Pet., 360, it is said, in questions "where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." Now, if the right of election was awarded to the defendant, and it was not the intention, by the rule of evidence the treaty creates, to force upon the party who remained in the country American citizenship contrary to his intent (which we think is not the case), then the *intent* of the party in remaining becomes a material question; and matter *en pais*—such as the acts and declarations of the party—although not forming a part of the *res gestæ*, are admissible so far as they serve to show the intent. In the *Inglis* case, hereinbefore cited, the court went into the consideration of the acts and doings of the party for a series of years, to ascertain what election he had made at a particular time anterior to them; and say, "Those lead to the conclusion that it was the fixed determination of the party, at the declaration of independence, to adhere to his native allegiance." In fact, intent is best known to the party; is often secret until developed by acts and speech. "*Acta exteriora indicunt interiora secreta.*" Lastly, this testimony is admissible as admissions made by a party through his declarations and acts spoken and done *ante litem motam*, and opposed to the right he now seeks to maintain.

§ 36. *Change of allegiance by change of sovereignty; transfer of allegiance of native born and naturalized citizens.*

But the court does not consider that the right of election was given to the defendant by the treaty of Guadalupe Hidalgo; and therefore the discussion as to the admissibility of testimony might have been dispensed with. The intention of the ninth article of that instrument was to fix the *status* of all *Mexicans* who should prefer to remain in the ceded territory. By a principle of international law, on a transfer of territory by one nation to another, the relations of the inhabitants towards each other undergo no change; but their relations with their former sovereign are dissolved and new ones between them and the government which has acquired their territory are created. The same act which transferred their territory transfers the allegiance of those who re-

main in it, and the law which may be denominated political is changed. *American Ins. Co. v. Canter*, 1 Pet., 542. This right to change the political relations of the inhabitants of a ceded territory arises out of the character of those relations as recognized by the law of nature and nations. Birth binds man by the tie of natural allegiance to his native soil, and such allegiance gives, by the principles of universal law, to the country in which he was born rights unknown to mere voluntary or statutory allegiance. Upon the right to transfer this natural allegiance has been engrafted this right of election in the party whether he will retain his allegiance to his old sovereign or pay allegiance to the new. Should he elect to retain his allegiance, he must do so without injury to the new government; and such election is generally accompanied by removal from the country, unless regulated by treaty. The object of the treaty of "Guadalupe Hidalgo" was to regulate the exercise of this right of election by such parties as by the principles of international law were subject to their jurisdiction as contracting parties. The Mexican government stipulated for a right for *Mexicans* resident in the territory to elect at any time within a year after the date of the treaty to retain their title and rights as *Mexicans*; the government of the United States guarded against the abuse of the right by limiting the time within which it was to be executed, and stipulating that if the election was not made within the time limited they should be considered as having elected to become citizens of the United States. The right of the two governments thus to stipulate in relation to native-born Mexicans, under the law of nations, is unquestionable. It was evidently proper that the *status* of all such should be fixed. If they were neither to continue Mexican citizens nor become citizens of the United States, a whole people would become disfranchised. They would have no *status* as citizens, owe no allegiance, and be left in the anomalous position of a people without a country. Not so with the defendant Forbes. So soon as he had been released from the voluntary allegiance to Mexico, he was remitted to his original *status*. No power existed in one government to transfer, or in the other to receive, the voluntary or statutory allegiance of a naturalized citizen. Neither had the right to say to such, "You shall continue your allegiance to Mexico, although she has conveyed it away, or you shall become a citizen of the United States."

The allegiance of the naturalized citizen is the offspring of municipal law. Unlike natural allegiance, its support does not rest upon the law of nature and the code of nations. The only relations that Mexico or the United States could change were those arising from those sources. Nor does the language of the treaty authorize the conclusion that the contracting parties intended to include within the word "*Mexicans*" naturalized citizens of foreign countries. The language of the treaty of Guadalupe Hidalgo differs materially from that used in the treaty by which Florida was acquired in 1819, and the treaty of Paris in 1803, by which Louisiana was ceded to the United States. In the eighth article of the treaty of Guadalupe Hidalgo, *Mexicans* are only mentioned as entitled to the rights of election. The whole of this article refers to *Mexicans*; and the ninth article speaks of "*Mexicans*" only, and provides that those who do not preserve the character of Mexican citizens shall be subsequently incorporated into and become entitled to all the rights of citizens of the United States. Naturalized citizens are nowhere included, *eo nomine*, within the provisions of the treaty; and, in the opinion of the court, it was not intended to include them. This construction of the treaty is sought to be defeated by the assumption that the change in the political rela-

tions of the inhabitants of the ceded territory was contemplated to be made by the treaty with their consent, by giving to them the right of election; hence, that it is to be reasonably concluded that naturalized citizens were intended to be included in the term "*Mexicans*." The answer is, first, it is a violence to the language of the treaty so to construe it; secondly, the allegiance of the naturalized citizen was not a subject of transfer between the contracting parties; and thirdly, the argument surrenders the whole question, because, if the defendant was included in the treaty, his consent was essential to entitle him to exercise the right of election. This is the very question found by the jury on the trial of the issue of election or no election upon evidence the court considers competent on the trial of such an issue. In a word, if the defendant Forbes, a naturalized citizen of Mexico, is to be brought within the provisions of the treaty because he consented to them, then his consent, involving intention and election, is an issuable fact which has been found against defendants by the jury. But in the opinion of the court, the election was given only to *Mexicans* who remained in the ceded territory longer than one year after the date of the treaty, who were during that interval to select to retain Mexican rights, or be considered citizens of the United States. Both governments had the right so to negotiate in regard to Mexicans; but in relation to the defendant Forbes, a naturalized citizen, his voluntary allegiance might be released by Mexico — not transferred. On his release, he was remitted to his original *status* of a British subject, derived from his birth; and the courts know no principle of law which would authorize the government of the United States to compel the transfer of the defendant's voluntary allegiance from Mexico to themselves. The contracting parties did not intend so to do. The court considering the defendant without the provisions of the treaty, his claim to be a citizen of the United States under them cannot be sustained; and he stood at the execution of the treaty, and now stands, where his acts and declarations and original *status* have placed him — an alien, and subject of Great Britain.

The motion to set aside the verdict in this case must be overruled.

§ 37. In general.—Citizenship means membership in the nation. *Minor v. Happersett*, 21 Wall., 162.

§ 38. Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual and collective rights. *United States v. Cruikshank*, 2 Otto, 542.

§ 39. The question whether a person was a citizen of the United States at a given time, or had declared his intention, is a question of fact to be passed upon by a jury. *North Noonday M. Co. v. Orient M. Co.*, 8 Saw., 304.

§ 40. The *status* or civil and political capacity of a person is determined, in the first instance, by the law of the domicile where he is born, but the legal effect on persons, arising from the operation of the law of that domicile, is not indelible, but a new *status* or capacity may be acquired by a change of domicile. Questions of *status* are closely connected with considerations arising out of the social and political organization of the state where they originate, and each sovereign power must determine them within its own territories. (Per CAMPBELL, J.) *Dred Scott v. Sandford*, 19 How., 494.

§ 41. The words "people" of the United States and "citizens," as used in the constitution, are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what are familiarly termed the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. *Ibid*.

§ 42. **Duties.**—The federal government has a right to require the service of all of its citizens, if necessary, at the seat of government, or it has a right to call them at any other point where its offices and departments are situated, and their services are required. The citizen has the right to approach the seat of government, or its officers, or departments, and the right of free access to all the ports of the nation. The states, therefore, violate these correlative rights between the United States and its citizens, as such, by taxing passengers when carried into such states or out of them. *Crandall v. State of Nevada*, 6 Wall., 85.

§ 43. **Women** are citizens of the United States, in like cases with men, and are entitled to all the privileges and immunities of citizenship. They have always been citizens, and their citizenship does not depend on the fourteenth amendment. *Minor v. Happersett*, 21 Wall., 162. See *infra*, IV. See §§ 53, 383.

§ 44. **Right to assemble.**—The right of the people peaceably to assemble for lawful purposes does not derive its source from the constitution, but existed before the adoption of the constitution, as derived from those laws whose authority is acknowledged by civilized man throughout the world. The first amendment to the constitution, which prohibits congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances," simply protects the right against the infringement of congress. The people must therefore look to the states for the protection of this right. The right to assemble and petition congress alone is protected by the general government. Such is an attribute of national citizenship and entitled to the protection of the federal government. *United States v. Cruikshank*, 2 Otto, 542.

§ 45. **Right to bear arms.**—The right of the people to bear arms for lawful purposes is not a right granted by the constitution. The second amendment protects it from infringement by congress, but leaves the people to look for their protection against any violation of it by their fellow citizens to the powers which relate to municipal legislation, and which are not surrendered or restrained by the constitution of the United States. *Ibid.*

§ 46. **Protection abroad.**—A citizen of the United States cannot claim the intervention of the government in his behalf, for loss caused to his property situate in a foreign country, by a bombardment of the place by belligerents with whom such foreign country was at war. *Bombardment of Valparaiso*,* 12 Op. Att'y Gen'l, 21.

§ 47. **Indians**, though born in the United States, are not citizens of the United States unless the United States has, by legislative or other acts, incorporated them into the body politic. *Ex parte Reynolds*, 5 Dill., 398. See §§ 2, 384.

§ 48. It seems that where the members of an Indian tribe scatter themselves among the people of the United States and live among them, they become merged in the mass of our people, owing complete allegiance to the government of the United States, and, equally with the citizens thereof, subject to the jurisdiction of the courts thereof. *Ibid.*

§ 49. The Pueblo Indians of New Mexico have the same right to purchase or sell lands as any other citizens of the territory, unless congress sees fit to take away that right. *United States v. Lucero*,* 1 Ch. Leg. N., 169.

§ 50. The Pueblo Indians, being citizens of the republic of Mexico at the date of the treaty of Guadalupe Hidalgo, by the terms of the eighth and ninth articles of that treaty, they became citizens of the United States, and of right entitled to all the privileges of citizens of the United States. *Ibid.*

§ 51. **Foreign domicile.**—When a citizen of the United States becomes domiciled in a foreign country he becomes, as a general rule, subject to its laws and authorities like one of its citizens. But if, by his acts or declarations, he continues to assert his United States citizenship, and takes no oaths or public or official obligations inconsistent therewith, it is the duty of the government of the United States, though he may have at the time no real intention of returning, to protect him against special acts of wrong or injustice by the government of the country in which he resides, and from the imposition upon him of duties inconsistent with his allegiance to the United States. *Expatriation*,* 14 Op. Att'y Gen'l, 295.

§ 52. As between foreign nations domicile does not affect the fact of citizenship, and a mere foreign residence does not of itself work a forfeiture of political rights. *Brown v. United States*,* 5 Ct. Cl., 571.

§ 53. **Women** who are citizens of the United States by birth, but who are married to citizens of France, and reside there with their husbands, are not citizens residing abroad within the meaning of the acts of congress of 1864 and 1867, imposing certain taxes on citizens resident abroad. *Citizenship*,* 13 Op. Att'y Gen'l, 128. See § 43.

§ 54. **Right of suffrage.**—The right of suffrage is not a necessary attribute of national citizenship, but the exemption from discrimination in the exercise of that right on account of race, color or previous condition is. Interference with the right to vote, except on account of race, color, etc., cannot, therefore, be redressed by the national government. *United States v. Cruikshank*, 2 Otto, 542.

§ 55. Though the enjoyment of the elective franchise is not essential to citizenship, yet it is the chief attribute of citizenship under the constitution, and the just and constitutional possession of this right is decisive evidence of citizenship of the United States. (Per CURTIS, J., dissenting.) *Dred Scott v. Sandford*, 19 How., 581.

§ 56. There is no necessary or uniform relation in the United States between the right to vote and citizenship. Either may exist without the other; and the fact that an alien, on filing his declaration of intention in a certain state, is entitled to vote and hold office, does not make him a citizen of the state or of the United States. *Lanz v. Randall*, 4 Dill., 430.

§ 57. Suffrage was not co-extensive with citizenship at the time of the adoption of the constitution. The fourteenth amendment did not make it so, and suffrage is not necessarily one of the immunities and privileges of a citizen. And hence a law or constitutional provision of a state, confining the right of suffrage to males, is constitutional, and prohibits women from voting. The United States has no voters of its own, and the federal constitution confers the right of suffrage on no one. *Minor v. Happersett*, 21 Wall., 162.

§ 58. To what citizens the elective franchise shall be confided is a question to be determined by each state in accordance with its own views of the necessities or exigencies of its own condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, and how they may be gained or lost, are determined in the same way. (Per CURTIS, J., dissenting.) *Dred Scott v. Sandford*, 19 How., 583.

§ 59. A corporation is held not to be a citizen within the meaning of the several provisions in the constitution. *Railway Co. v. Whitton*, 13 Wall., 270; *Covington Drawbridge Co. v. Shepherd*, 20 How., 233. But in cases in the federal courts, in which a corporation is a party, it will be presumed that all the corporators are citizens of the state in which the corporation was created and exists. *Covington Drawbridge Co. v. Shepherd*, 20 How., 233.

§ 60. The provision in the constitution, "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," cannot be applied to corporations. *Warren Manuf'g Co. v. Etna Ins. Co.*, 2 Paine, 501.

§ 61. Alien parents.—The statute of 7 Anne, c. 5, § 3, is held not to affect the citizenship of children born under the same allegiance with that of their father. *Contee v. Godfrey*, 1 Cr. C. C., 479. See § 403.

§ 62. Under the act of April 14, 1802, children born abroad, of aliens, who subsequently emigrated to this country with their families, and were naturalized here during the minority of their children, are citizens of the United States. *Citizenship*,* 10 Op. Att'y Gen'l, 329.

§ 63. A free white person born in the United States, of foreign parents, is a citizen of the United States. *Citizenship*,* 9 Op. Att'y Gen'l, 373.

§ 64. Children born abroad, of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States. *Expatriation*,* 14 Op. Att'y Gen'l, 293.

§ 65. Although a person was born in a foreign country, yet if his father and mother were American citizens, and did not have the design of moving to the foreign country, but touched there in the course of a voyage, which the father made as a sea captain, the child would still be regarded as an American citizen. *United States v. Gordon*, 5 Blatch., 20.

§ 66. A Spanish subject having become naturalized on the 16th day of February, 1878, on the same day his child of the age of about twenty years, who intends immediately to return to the Spanish dominions to take up his residence there, makes application for a passport as a minor child of a naturalized citizen. It is held that such minor, residing in the United States, is a citizen of the United States, by virtue of the act of congress declaring that "the children of persons who have been duly naturalized under the laws of the United States, . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof," and that he is entitled to a passport as such. *Citizenship*,* 15 Op. Att'y Gen'l, 114.

§ 67. Residents in rebellious states.—A citizen of Alabama, who, at the outbreak of hostilities, removed with his family beyond the lines of the insurgent states and put himself within the military lines of the United States, and who adhered to the government of the United States, and acknowledged his allegiance to that government by obeying its laws, continued to be a citizen of the United States, notwithstanding that he left his property in Alabama and intended to return there when hostilities should cease. *Planters' Bank v. St. John*, 1 Woods, 585.

§ 68. Citizens of the United States who were faithful to the Union, and who escaped from the rebel states, and resided in loyal states or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country. *The Peterhoff*, 5 Wall., 28.

§ 69. Citizens of the United States who resigned commissions in the naval service of the United States, and accepted employment in the rebel naval service, did not forfeit their citi-

zenship by becoming traitors. They are, therefore, competent to be officers of the vessels of the United States, according to the act of June 28, 1864, if otherwise qualified. Citizenship of Rebel Enemies,* 11 Op. Att'y Gen'l, 817.

§ 70. Suits.—A citizen of a state, whether a citizen of the United States or not, has the right to maintain suits in the federal courts. (Per McLEAN, J., dissenting.) *Dred Scott v. Sandford*, 19 How., 532.

§ 71. The law of a state, limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there, to which they may be legally or equitably entitled. *Union Bank of Tennessee v. Jolly*, 18 How., 503.

§ 72. Change.—In order to constitute a change of citizenship, there must be a *bona fide* intention of removal and a real change of domicile. If a person wishing to commence suits in the courts of the United States, instead of the state courts, chooses to remove into another state, and executes such intention *bona fide*, he may thereby change his citizenship. But his removal must be a real one, *animo manendi*, and not merely ostensible. *Case v. Clarke*, 5 Mason, 70.

§ 73. In order that the citizenship of a person be changed from one state to another, it is necessary that there be a change of residence to the latter with a *bona fide* intention of remaining there as a resident, and of abandoning the former residence. The party's acts must correspond with such intention; and where there has been a removal, the party may testify to his intention, though his testimony will not control if the facts do not correspond to such expressed intention. After such removal a merely temporary sojourn in the place of former residence will not change the acquired citizenship. *Kemna v. Brockhaus*, 5 Fed. R., 763.

§ 74. Mere change of residence is *prima facie* proof of change of citizenship, though, when it is explained and shown to be for temporary purposes only, the presumption is repelled. *Butler v. Farnsworth*, 4 Wash., 108.

§ 75. The intention of a party in changing the place of his residence is a material ingredient in the question of citizenship as it concerns federal jurisdiction. This intention is to be collected from the acts, and not from the declarations, of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicile, however frequent and public his declarations to the contrary may have been. If, on the other hand, the sincerity of the removal for the purpose of permanently residing in the state which the person has selected be not questioned, and his acts correspond with such purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile, although he may have uniformly declared that he considered himself as still a citizen of the state from whence he had removed. It is a conclusion of law upon certain facts, which constitutes him a citizen of the state where he permanently resides, which neither his private intentions nor public declarations can alter. *Ibid.*

§ 76. A passport is a certificate of citizenship, and a person receiving one is certified to be entitled to such protection as the government can give its citizens in foreign countries. Citizenship — Passports,* 18 Op. Att'y Gen'l, 89.

§ 77. The granting of passports to citizens is not obligatory in any case. They are only permitted when not prohibited by law. *Ibid.*

§ 78. Service under foreign power.—It seems that an American citizen may engage in foreign naval or military service without compromising the neutrality of his government. *Case of the Santissima Trinidad*, 1 Marsh., 486.

§ 79. A citizen of the United States, fitting out a vessel in her ports for a cruise against the vessels of a friendly nation, is not protected by a commission from a power with whom such friendly nation is at war, against the consequences of offenses committed against an American vessel. *United States v. Furlong*, 5 Wheat., 201.

§ 80. Persons of foreign birth.—A citizen of Spain came to Philadelphia in 1793, and in the same year took and subscribed, before the mayor of the city, the oath specified in the act of the legislature of Pennsylvania of March 13, 1789, providing for the naturalization of citizens. This act, at the time the oath was taken, being in conflict with the new constitution of the state, it was held that this person was not a citizen, and could not, therefore, be guilty of treason against the United States. *United States v. Villato*,* Whart. St. Tr., 185.

§ 81. Under the second article of our treaty with Great Britain of 1794, which, after stipulating on the part of Great Britain for an evacuation of all the posts within the United States, on or before the 1st day of June, 1796, provided that the settlers within the jurisdiction of those posts should continue to enjoy their property, and declared that "all persons who shall continue there after the expiration of the said year without having declared their intention of remaining subjects of his Britannic Majesty, shall be considered as having elected to be-

come citizens of the United States," it is held that one so remaining did not *ipso facto* become a citizen, inasmuch as in 1795 congress passed a uniform rule of naturalization, by conformity with which such residents could become citizens. Citizenship,* 5 Op. Att'y Gen'l, 716.

§ 82. Proof of citizenship.— Isaac Williams was indicted, as a citizen of the United States, or accepting, in 1797, a commission in a French armed vessel and for serving in the same against Great Britain. In defense he offered to prove that in 1793 he received from the consul-general of France a warrant appointing him third lieutenant on board a French seventy-four gun ship; that pursuant to this appointment he went on board the ship and arrived in France in the same year, and was duly naturalized as a citizen of France, renouncing all allegiance to the United States, and that immediately afterwards he was commissioned by the French republic as an officer of another vessel, and had remained in the French republic as a citizen thereof ever since. The district judge was doubtful as to the legal operation of the evidence, and was of opinion that it should be left to the jury. The chief justice of the United States was of opinion that it did not affect the case, and should be withdrawn from the jury. It was admitted, however, and Williams was found guilty. *United States v. Williams*,* Whart. St. Tr., 552.

§ 83. Colored persons who have been emancipated are, equally with white persons, citizens of the United States. And under the act of congress of April 9, 1872, assuring to all citizens, without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons," an indenture of apprenticeship binding a negro child, which does not contain the provisions for the security and benefit of the apprentice which are required by the law of the state in case of white apprentices, is void. *In re Turner*, 1 Abb., 84.

§ 84. The amendment to the constitution of the United States guarantying to all native-born male persons the full rights of citizenship, irrespective of race, color or previous condition, implies the right of suffrage, and includes the African race, though not specifically named in the amendment. *United States v. Canter*, 2 Bond, 389.

§ 85. The first section of the Civil Rights Act of 1866, providing that "all persons within the jurisdiction of the United States shall have the same right in every state to make and enforce contracts as is enjoyed by white citizens, and shall be subject to like punishments," etc., does not allow the intermarriage of negroes with white persons contrary to the laws of a state. *Ex parte Kinney*, 3 Hughes, 1.

§ 86. Neither the constitution of Maryland, nor any statute of that state, nor of the United States, deprives a colored person, merely as such, of any of the civil rights of a citizen, and hence it was held not actionable to say of a white man in that state that he is a "yellow negro." *Johnson v. Brown*, 4 Cr. C. C., 235.

§ 87. By the constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of his race or color. A state statute providing that "all white male persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors, except as herein provided" (the exception being state officials), thus denying to colored persons the right to sit on juries, is a discrimination against a colored man when he is put on trial for an alleged offense against the state. It is a discrimination on account of race and color, and is in conflict with the constitution. *Strauder v. West Virginia*, 10 Otto, 303.

§ 88. Emancipation of a slave, whether effected by the direct act and assent of the master, or by causes operating in contravention of his will, will not produce such a change in his status and capacities as will transform him from a mere subject of property into a being possessing social, civil and political equality with a citizen. Emancipation will not make him a citizen of the state within which he was previously a slave. (Per DANIEL, J.) *Dred Scott v. Sandford*, 19 How., 477.

§ 89. A slave, being the property of a master, and possessing within himself no civil or political rights or capacities, cannot become a citizen. The word "citizen," both by etymology and general use, imputes to the person to whom it is applied the actual possession and enjoyment of an entire equality of privileges, civil and political. (Per DANIEL, J.) *Ibid*.

§ 90. The African race, not being citizens of the United States under the constitution at the time of its adoption, for the reason that they were not citizens of the several states adopting it, are permanently excluded from such citizenship, notwithstanding the fact that in some states negroes are admitted to citizenship. The right of citizenship which a state can confer within its own limits is not to be confounded with the rights conferred by citizenship of the United States. The rights which the several states exercised, previous to the adoption of the constitution, of admitting persons to citizenship within its borders, is retained by the several states, yet such rights do not confer upon their possessor citizenship of the United States. The right to establish a uniform system of naturalization, conferred by the

constitution upon congress, is exclusive, and consequently no state can confer upon a foreigner the privileges of citizenship of the United States, though it may confer all the privileges of citizenship within its own limits. It is clear, therefore, that no state can, by law of its own, introduce a new member into the political community created by the constitution of the United States, i. e., it cannot itself make any person a citizen of the United States. It cannot, since the adoption of the constitution, make him a member of such community by making him a member of its own. It cannot, therefore, introduce into the political community created by the constitution any class or description of persons not included in it. (MCLEAN and CURTIS, JJ., dissenting.) *Ibid*.

§ 91. A negro whose ancestors were imported into this country and sold and held as slaves cannot become a member of the political community brought into existence by the constitution of the United States, so as to become entitled to all the rights, privileges and immunities guarantied by that instrument to citizens of the United States. The African race in this country, in view of their condition, and of the legislation of the various colonies and states in reference to them, were not, at the time of the adoption of the constitution, considered eligible to citizenship, or as included among the "people" by whom the constitution was adopted. (MCLEAN and CURTIS, JJ., dissenting.) *Ibid*.

§ 92. Change of sovereignty.—When the territory and government of a kingdom pass to, and become merged in, the territory and government of another nation, all its subjects pass also; not by bodily presence, but by allegiance. And hence a native of Hanover, resident in this country at the time of the incorporation of Hanover into the kingdom of Prussia by conquest, became a citizen of Prussia. *Brown v. United States*,* 5 Ct. Cl., 571.

§ 93. On the establishment in New Mexico of the provisional government by General Kearney, although the former political relations of the inhabitants were dissolved by the substitution of a new supremacy, though the former political relations of the inhabitants were dissolved, yet their private relations, their rights vested under the government of their former allegiance, and those arising from contract and usage, remained in full force and unchanged, except so far as they were, in their nature and character, found to be in conflict with the constitution and laws of the United States, or with the regulations prescribed by the provisional authorities. *Leitensdorfer v. Webb*, 20 How., 177.

§ 94. All persons who were citizens of Texas at the date of the annexation, December 29, 1845, became citizens of the United States by virtue of the collective naturalization effected by that act. Citizenship—Passports,* 13 Op. Att'y Gen'l, 397.

§ 95. The citizens of Texas adopted into the citizenship of the United States were of three classes: (1) All persons residing in Texas on the day of the declaration of independence, except Africans, the descendants of Africans, and Indians, and except persons who left the country for the purpose of evading a participation in the war against Mexico, or who refused to participate in it, or gave aid to the enemy. (2) Persons born in that republic during its independence. (3) Persons naturalized in the republic of Texas. It is held that all persons born abroad who seek passports as citizens of the United States, founded on an alleged citizenship in Texas at the time of annexation, are entitled to passports as such if they belong either to the first or third of the above classes. *Ibid*.

§ 96. Abandonment of land.—A native of the United States who removed to Mexico and was naturalized there, and received a grant of lands in the then Mexican territory of California, from the governor, did not forfeit his right to the lands by joining the forces of the United States in the war in which the United States acquired California. Nor was such action considered to be an abandonment of the lands. *United States v. Reading*, 18 How., 1.

§ 97. Under the colonization laws of Coahuila and Texas, an abandonment of the country by a citizen of that state worked a forfeiture of his lands. *Held*, that a Spaniard who left the country and went to reside in Louisiana at the order of the party eventually successful in the revolution, that all Spaniards should leave the country, did not thereby forfeit the right to his lands. *White v. Burnley*, 20 How., 235.

§ 98. Under the colonization laws of Coahuila and Texas, any one removing his domicile without the republic of Mexico forfeited all title to his lands. After the separation of that state from Mexico, its constitution identified as citizens only such persons as resided in Texas on the day of the declaration of independence, or should be naturalized according to its provisions. The same instrument provided that no alien should hold land in Texas, except by titles emanating directly from the government of the republic. Other provisions were made in behalf of alien heirs of deceased citizens. It was held that citizens of Texas who removed into other parts of Mexico at the beginning of revolutionary movements, and continued to reside there, forfeited their right to their lands in that state, and being aliens could not transmit the inheritance of them to other citizens of Mexico. *McKinney v. Saviego*, 18 How., 235.

§ 99. Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives. The subject or citizen owes a permanent and absolute

allegiance; the resident alien, a temporary and local one. *Carlisle v. United States*, 16 Wall., 147.

§ 100. Allegiance is a mutual contract between the sovereign and the subject and cannot be dissolved without the concurrence of both. But an act of attainder, banishing a person from a state, and declaring that he shall be deemed guilty of treason if he returns, must be considered as releasing the person attainted from his allegiance. *Inglis v. Sailors' Snug Harbor*, 8 Pet., 125.

§ 101. The duty of allegiance depends on the duty of protection. *Brig Armstrong v. United States*, * Dev., 21.

§ 102. The citizens of every state owe a permanent allegiance to the United States notwithstanding the secession of their native state and its armed rebellion. And though the citizen of such a state is absent from the state within the loyal lines during the continuance of the war, he still retains his citizenship and allegiance to the United States. *Planters' Bank v. St. John*, 1 Woods, 590.

§ 103. Every citizen who, during a war, carries on intercourse with the enemy's country, without his sovereign's permission, is faithless to his allegiance, and subjects himself personally to such punishment as his sovereign may impose, and the property shipped to confiscation as lawful prize. *United States v. 100 Barrels of Cement*, * 12 Am. L. Reg., 735.

§ 104. A citizen of the United States and also of one of the states owes a paramount allegiance to the United States. *Planters' Bank v. St. John*, 1 Woods, 585.

§ 105. The duty of allegiance to the United States is co-extensive with the constitutional jurisdiction of their government, and is to this extent independent of, and paramount to, any duty of allegiance to a state. *United States v. Greiner*, * 4 Phil., 396.

§ 106. The paramount allegiance which a citizen owes to the United States continues so long as its government is able to maintain its peace through its own courts in his own state, and thus extend to him there that protection which affords him security in his allegiance, and is the foundation of his duty of allegiance. And it was held that a citizen who was a member of the artillery company of the state of Georgia, which took Fort Pulaski in that state from the possession of the United States, was guilty of treason against the United States. The courts of the United States being open at that time in that state, the allegiance of such a citizen to the United States could not be affected by any enforced conflicting allegiance to the state of Georgia. *Ibid.*

§ 107. Of state and federal governments.—We have in our political system a government of the United States and a government of each of the states. Each of these governments has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The government of the United States can protect no rights of citizenship, except those coming within its jurisdiction as a government of delegated powers. *United States v. Cruikshank*, 2 Otto, 542.

§ 108. For all privileges and immunities guaranteed to a citizen by the laws of his state he must look to the state and her tribunals for protection and redress; but for immunities and privileges which belong to him as a citizen of the United States, as such, he can seek his redress in the courts of the United States. The Supplemental Civil Rights Act of 1875, so far as it seeks to inflict penalties for the violation of any and all rights which belong to a citizen of a state and not to citizens of the United States, as such, was the exercise of a power not authorized by any provision of the constitution of the United States, and as the privilege to use for local travel any public conveyance is not a right arising under the constitution of the United States, but belongs to a person as a citizen of a state, a denial of such a privilege cannot be redressed under the above act. *Gully v. Baltimore & Ohio R. Co.*, 1 Hughes, 536.

§ 109. The first section of the fourteenth amendment, which declares that "all persons born in the United States are citizens of the United States, and of the state in which they reside," and that "no state shall make or enforce any law which shall abridge the privileges of citizens of the United States," recognizes the classification of privileges of citizens into those which they have as "citizens of the United States" and those which they have as "citizens of the state in which they reside." The rights which a person has as a citizen of a state are those which pertain to him as a member of society, and which would belong to him if his state were not a member of the American Union. Over these the states have the usual powers belonging to government, and these the fourteenth amendment does not prohibit them to abridge. Marriage is a privilege belonging to persons as members of society and as citizens of the states, and the fourteenth amendment does not prohibit the states from forbidding the inter-marriage of a white person with a colored person. *Ex parte Kinney*, 3 Hughes, 1.

§ 110. A state cannot make an alien a citizen of the state in any other mode than that provided by the naturalization laws of congress. When the constitution says that congress shall have the power "to establish a uniform rule of naturalization . . . throughout the United

States," it designed these rules, when established, to be the only rules by which a citizen or subject of a foreign government can become a citizen or subject of one of the states of this Union, and thereby owe allegiance to such state and to the United States, and cease to owe it to his former sovereign. *Lanz v. Randall*, 4 Dill., 429.

§ 111. Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may be well presumed to be a citizen of such state, unless the contrary appears, especially where the business engaged in was the carrying on and improvement of a plantation which he claimed to own. *Shelton v. Tiffin*, 6 How., 185.

§ 112. A person may be a citizen of a state, and entitled to that character, though he may not possess all the rights which may be exercised by other citizens, as, for example, the right to vote or hold office. But when he goes into another state he is entitled to be recognized there as a citizen, though the state may measure his rights by the rights which it allows to persons of a like character or class resident in the state. *Dred Scott v. Sandford*, 19 How., 421.

§ 113. Only those persons who are citizens of the several states are citizens of the United States. (Per CURTIS, J., dissenting.) *Ibid*.

§ 114. Persons born within the several states, who, by force of their respective constitutions and laws, are citizens of the state, are thereby citizens of the United States. (Per CURTIS, J., dissenting.) *Ibid*.

§ 115. A person may reside in one state and be a citizen of another, provided he still claims to be a citizen of such other state, and his acts are consistent with his declarations. *Evans v. Davenport*, 4 McL., 575.

§ 116. Under the fourteenth amendment to the constitution citizens of the United States are citizens of the state in which they reside, though it seems that there may be a residence in a state for a mere temporary purpose which will not confer citizenship in such state. *Bradwell v. The State*, 16 Wall., 188.

§ 117. The protection of citizens in the enjoyment of equal rights is a duty incumbent on the states; the only obligation resting on the United States is to see that the states do not deny this right. The fourteenth amendment guaranties no more. *United States v. Cruikshank*, 2 Otto, 542.

§ 118. The rights of life and personal liberty can be protected by the sovereignty of the states alone, and citizens of the states cannot look to the United States for protection in the enjoyment of these rights. *Ibid*.

§ 119. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient, though the person did not actually vote. *Shelton v. Tiffin*, 6 How., 185.

§ 120. A person may be a citizen of the United States and not a citizen of any particular state; as, a citizen residing in the District of Columbia, or in the territories of the United States, or a citizen who has taken up his residence abroad. *Prentiss v. Brennan*, 2 Blatch., 162.

§ 121. A citizen of the District of Columbia is not a citizen of a state within the meaning of the laws conferring jurisdiction upon the federal courts in cases between aliens and citizens of states. *Cissel v. McDonald*, 16 Blatch., 152.

§ 122. A citizen of a territory is a citizen of the United States, but is not a citizen of a state in such a sense that an action is maintainable by or against him in a federal court. *Picquet v. Swan*, 5 Mason, 54.

§ 123. Upon the separation of the District of Columbia from the state of Maryland, the inhabitants of that District ceased to be citizens of Maryland. And a discharge, under the insolvent laws of that state, of a resident of the District, after the separation, is invalid. *Reilly v. Lamar*, 2 Cr., 344.

§ 124. Privileges and immunities.—The clause in the constitution which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" secures those privileges which belong to citizenship only, and not those attached by law to contracts, by reason of the place where such contracts are made. So, where the laws of Louisiana provide that a contract of marriage in that state, or the residence of persons there in the relation created by marriage, shall give rise to certain rights on the part of each in the property acquired within that state, the constitutional provision referred to does not secure to all citizens of the United States, wherever married and residing, the same rights in property acquired in Louisiana during marriage. *Conner v. Elliott*, 18 How., 591.

§ 125. Said clause does not apply to a citizen of a state who migrates to another state, for, on such migration, he becomes subject to the laws of the state in which he lives, and is no longer a citizen of the state from which he removed. The state in which he resides may then

determine his *status* or condition, and place him among a class of persons not recognized as citizens, and may deny to him the privileges and immunities enjoyed by its citizens. *Dred Scott v. Sandford*, 19 How., 422.

§ 126. It is confined, so far as mere rights of person are concerned, to citizens of a state who are temporarily in another state without taking up their residence there. It gives them no political rights in the state as to voting and holding office, or in any other respect. A citizen of one state has no right to participate in the government of another. But if he ranks as a citizen of the state in which he belongs, within the meaning of the constitution of the United States, then, whenever he goes into another state, the constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to the citizen of the state. *Ibid.*

§ 127. Under this provision the legislature, in regulating the use of the common property of the citizens of the state, is not bound to extend to the citizens of all other states the same advantages as are secured to its own citizens. No constitutional right of citizens of other states is therefore infringed by the act of the legislature of New Jersey which excludes citizens of other states from participation in the right to take oysters within the waters of that state. *Corfield v. Coryell*, 4 Wash., 371.

§ 128. And the citizens of one state are not invested with any interest in the common property of the citizens of another state. And hence the state of Virginia can prohibit the citizens of other states from planting oysters in Ware river, a stream in that state where the tide ebbs and flows, its own citizens having that privilege. *McCready v. Virginia*, 4 Otto, 391.

§ 129. That clause of the constitution granting to the citizens of each state the privileges and immunities of citizens in the several states has no application to a citizen of the state whose laws are complained of. *Bradwell v. The State*, 16 Wall., 138.

§ 130. With respect to the immunities which the rights of citizenship can confer, the citizen of one state is to be considered as a citizen of each and every other state of the Union. *Butler v. Farnsworth*, 4 Wash., 102.

§ 131. The fourteenth amendment did not add to the privileges and immunities of citizens. It simply furnished additional guaranty to those already possessed. No new voters were necessarily made by it. It may have operated indirectly through the states to produce such an effect, but it did not add the right of suffrage to the immunities and privileges of citizenship. *Minor v. Happersett*, 21 Wall., 162.

§ 132. It is not competent for the legislature of a state to deprive a citizen of any other state of his legal or equitable rights under the constitution and laws of congress, by declaring that they must be enforced in the local court. *Amory v. Amory*,* 18 Int. Rev. Rec., 149.

II. EXPATRIATION.

§ 133. **Right of expatriation.**—In this country expatriation is a fundamental right. *Stoughton v. Taylor*, 2 Paine, 661.

§ 134. The right of expatriation is a natural and inherent right, and extends to Indians as well as to white persons. *United States v. Crook*, 5 Dill., 464.

§ 135. The right of expatriation is not a natural inalienable right in each individual, but it is a reasonable and moral right which every man ought to be allowed to exercise, with no other limitation than such as public safety or interest requires, for in such cases private rights must give way. The right to restrain or permit expatriation resides in the legislature. (Per *IREDELL, J.*) *Talbot v. Janson*, 8 Dal., 102.

§ 136. The right of expatriation exists, and may be freely exercised by the citizens of the United States, subject only to such conditions of good faith, of discharge of subsisting obligations to the society left, and of consummated expatriation in fact, as the principles of international right require to be observed, and subject to such other conditions as the public interest might seem to congress to require to be imposed. *Right of Expatriation*,* 8 Op. Att'y Gen'l, 139.

§ 137. The affirmation by congress in the act of July 27, 1863, that the right of expatriation is "a natural and inherent right of all people," includes citizens of the United States as well as others; and if one of our citizens emigrates to a foreign country, and there, in the mode provided by its laws, or in any other public and solemn manner, renounces his United States citizenship, and makes a voluntary submission to its authorities, with a *bona fide* intent of becoming a citizen or subject there, the government of the United States ought to regard this as an act of expatriation. *Expatriation*,* 14 Op. Att'y Gen'l, 295.

§ 138. The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege

of throwing off his natural allegiance and substituting another allegiance in its stead, is incontestable. Right of Expatriation,* 9 Op. Att'y Gen'l, 356.

§ 139. There is no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with the government, if he sees proper to do so, in time of peace, and for a purpose not directly injurious to the interest of the country. Right of Expatriation,* 9 Op. Att'y Gen'l, 62.

§ 140. Effect.—Although a citizen of the United States has the right to expatriate himself, yet where such expatriation is made solely with a view to his taking hostile proceedings against a nation with whom the United States is at peace, he is liable to proceedings by such friendly power, if found within her jurisdiction, and to the penalties prescribed by her laws. *Jansen v. Brigantine Vrow Christina Magdalena*, Bee, 23.

§ 141. If the federal government gives up a citizen, to become a citizen or subject of a foreign government, his obligations to the particular state in which he resided could hardly come in any practical conflict with his obligations assumed toward his new government. Right of Expatriation,* 9 Op. Att'y Gen'l, 62.

§ 142. A person who divests himself of the obligations of a citizen, if this be within the power of an individual, loses the rights which are connected with those obligations. He becomes an alien. His lands, if he has any, are escheatable. He cannot recover these rights by residence, but must go through that process which the laws prescribe for the naturalization of an alien born. *Case of Santissima Trinidad*, 1 Marsh., 485.

§ 143. Restoration.—The British doctrine is that, if a native of Great Britain absents himself and loses his citizenship, his return to his native country, or entering its military or naval service, restores it; and this rule is recognized by the courts of this country. *Stoughton v. Taylor*, 2 Paine, 662.

§ 144. A native of Bavaria, naturalized as a citizen of the United States, may return to his native country and assume the citizenship of Bavaria, under such conditions as the authorities of that government require to his readmission. They may require of him a renunciation of his American citizenship, or they may demand an oath of abjuration. Right of Expatriation,* 9 Op. Att'y Gen'l, 62.

§ 145. What constitutes.—The fact of expatriation is to be proved like any other fact for which there is no prescribed form of proof—by any evidence that will convince the judgment. *Ibid.*

§ 146. There is no mode of expatriation prescribed. If a citizen emigrates, carries his family and effects along with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligations of a subject to a foreign government, he thereby dissolves his relations with the United States, and our government can claim from him none of the duties of a citizen. *Ibid.*

§ 147. Expatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence. Right of Expatriation,* 9 Op. Att'y Gen'l, 356.

§ 148. The general evidence of expatriation is actual emigration, with other concurrent acts showing a determination and intention to transfer allegiance. Removal for twelve years, taking the oath of allegiance to another government, and entering and remaining in her service eight years, was held sufficient evidence of expatriation. *Stoughton v. Taylor*, 2 Paine, 661.

§ 149. Intent to remain in a foreign country may be evidenced in a variety of ways and by a great variety of circumstances. No general rule can be laid down as to what shall be evidence of such intent. Expatriation,* 14 Op. Att'y Gen'l, 295.

§ 150. The national character which a man acquires by residence in a country other than that of his birth may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. Such character is adventitious, is gained by residence, and ceases by non-residence. It no longer adheres to a party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*. Mere declarations of such intention ought never to be relied on, but when such declarations are accompanied by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest proof is offered which the nature of the case can furnish. *The Venus*, 8 Cr., 280.

§ 151. In order to show complete expatriation, it is necessary to show not only a residence in a foreign country and an intent not to return, but also a naturalization in the country adopted as a future residence, or such acts and expressions as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment or engaging in the military service, etc. Expatriation,* 14 Op. Att'y Gen'l, 295.

§ 152. An American cannot expatriate himself without a *bona fide* change of domicile

under circumstances of good faith. Expatriation can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to have been the intention of the act. *The Santissima Trinidad*, 7 Wheat., 347.

§ 153. Where one, born in the United States, removed to an island in the kingdom of Denmark, resided there and had sworn allegiance to the king of Denmark, but had not expatriated himself according to any form prescribed by law, he was held not to be within the protection of the United States, within the meaning of an act naming "any person or persons resident within the United States or under their protection," as prohibited from engaging in commercial intercourse with France; the court holding it to be settled that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as the one mentioned. *Murray v. The Charming Betsy*, 2 Cr., 64.

§ 154. It seems that an American citizen does not forfeit his national character or privileges attached to it, by residing and marrying in a foreign country; though during part of the time war should intervene between that and his native country, he taking no part therein, unless such character and privileges should be impaired by some law of his own country. *United States v. Gillies*, Pet. C. C., 161.

§ 155. It is true that a man may obtain a foreign domicile, which will impress upon him a national character for commercial purposes, and may expose his property, found upon the ocean, to all the consequences of his new character, in like manner as if he were in fact a subject of the government where he resides. But he does not on this account lose his original character, or cease to be a subject or citizen of the country where he was born, and to which his perpetual allegiance is due. *Ibid.*

III. ALIENS.

SUMMARY — *Property rights*, § 156. — *Holding land*, §§ 157, 158. — *Actions by*, §§ 159-161. — *Escheats*, § 162. — *Secret trusts*, § 163.

§ 156. Aliens presumed to continue as such, until the contrary is proven. Property rights of aliens in Virginia. Distinction between alien friends and citizens obliterated in Virginia by act of 1878. Property rights of Swiss aliens, as established by treaty of 1850. *Hauenstein v. Lynham*, §§ 164-169. See § 242.

§ 157. Under the common law, aliens may take and hold lands until "office found." Their title also becomes perfect upon naturalization. Grants of land to aliens in Virginia and Kentucky, when favored. *Gouverneur's Heirs v. Robinson*, §§ 170-175.

§ 158. Where land is devised to a trustee to be sold, and the proceeds paid to an alien, the alien takes the proceeds as a bequest of personalty, even as against the state. *Craig v. Leslie*, §§ 176-187. See § 242.

§ 159. The general rule of the common law is that alien enemies cannot sue; nor can a suit be maintained for their benefit. *Crawford v. The William Penn*, §§ 188-193.

§ 160. Actions by alien enemies will, however, be sustained, where they arise upon contracts made in a licensed trade, such as a cartel vessel; or when instituted in courts acting under the law of nations. *Ibid.* See § 279.

§ 161. An action instituted by a foreign corporation against citizens of this country is defeated by a declaration of war between the two countries. The disability, however, of alien enemy, to affect the action, must appear of record. An alien corporation is an alien individual, but that either is an alien enemy must be made the subject of proof, and should be pleaded *puis darrein continuance*. *The Society v. Wheeler*, §§ 194-204.

§ 162. The real property of an alien escheats to the state, except where it has previously been conveyed to a citizen under laws empowering aliens to sell, devise, etc. An interest in partnership property will escheat. *Robertson v. Miller*, §§ 205-208.

§ 163. Secret trusts in a conveyance for the benefit of an alien are void. Deeds to an alien, however, are not void, but voidable upon inquest of office. *Hammekin v. Clayton*, §§ 209-211.

[NOTES. — See §§ 212-333.]

HAUENSTEIN v. LYNHAM.

(1 Otto, 488-491. 1879.)

ERROR to the Supreme Court of Appeals of Virginia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—Solomon Hauenstein died in the city of Richmond in the year 1861 or 1862, intestate, unmarried and without children. The precise date of his death is not material. At that time he owned and held considerable real estate in the city of Richmond. An inquisition of escheat was prosecuted by the escheator for that district. A verdict and judgment were rendered in his favor. When he was about to sell the property the plaintiffs in error, pursuant to a law of the state, filed their petition, setting forth that they were the heirs-at-law of the deceased, and praying that the proceeds of the sale of the property should be paid over to them. Testimony was taken to prove their heirship as alleged, but the court was of opinion that, conceding that fact to be established, they could have no valid claim, and dismissed the petition. They removed the case to the court of appeals. That court, entertaining the same views as the court below, affirmed the judgment. They thereupon sued out this writ of error.

§ 164. *In the absence of proof to the contrary an alien is presumed to continue such.*

The plaintiffs in error are all citizens of Switzerland. The deceased was also a citizen of that country, and removed thence to Virginia, where he lived and acquired the property to which this controversy relates, and where he died. The validity of his title is not questioned. There is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland. His original citizenship is, therefore, to be presumed to have continued. Best on Presumptions, 186. According to the record, his domicile, not his citizenship, was changed. The testimony as to the heirship of the plaintiffs in error is entirely satisfactory. There was no controversy on this subject in the argument here. The parties were at one as to all the facts. Their controversy was rested entirely upon legal grounds.

§ 165. *In Virginia aliens may take and hold lands by grant or devise, though not by descent, except where they shall have taken the oath of residence within the state.*

The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. 2 Tucker's Blackst., App., note c. By that law "aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them." 2 Bla. Com., 249. But they may take by grant or devise, though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, but such a title is always liable to be divested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. Fairfax v. Hunter, 7 Cranch, 603. The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sec. 114. In our country this authority is primarily in the states where the property is situated.

The Revised Code of Virginia of 1860, c. 115, sec. 1, provides that an alien,

upon declaring on oath before a court of record that he intends to reside in the state, and having the declaration entered of record, may inherit, or purchase and hold, real estate there as if he were a citizen. Section 2 of the same chapter provides that such alien may convey or devise his real estate, and, if he shall die intestate, that it shall descend to his heirs, and if the alienee, devisee or heir shall be an alien, that he may take and hold, by being in the state and making, under oath, and having recorded within five years, a like declaration **with that prescribed** by the preceding section. The sixth section declares that when, by a treaty ~~between the United States~~ and any foreign country, a citizen of such country is allowed to sell real estate ~~in Virginia~~, he may sell and convey within the time prescribed by the treaty; and when, ~~by such treaty~~, citizens of the United States are allowed to inherit, hold, sell and convey real estate situate in such country, the citizens and subjects of that country may in like manner inherit, hold, sell and convey real estate lying in Virginia, provided that these several provisions shall apply only to real estate acquired thereafter by the citizens or subjects of such foreign country. Section 2 has no application to the present case, because the declaration which it permits has not been made by the plaintiffs in error, and section 6 has none, because all the real estate of the deceased was acquired before the date of the act. The Revised Code of 1873 has obliterated nearly all the distinctions between aliens and citizens with respect to their rights as to both real and personal property. See c. 4, sec. 18, p. 130, and c. 119, secs. 4 and 10, pp. 917, 918. As it is not claimed that any of these provisions affect the present case, we shall pass them by without further remark.

§ 166. *Under and by virtue of the treaty with Switzerland of 1850, Swiss aliens may sell such real estate as has been left to them, or inherited by them, and export its proceeds without any limitation in point of time.*

This brings us to the consideration of the treaty between the United States and the Swiss Confederation of the 25th of November, 1850. 11 Stat., 587. The fifth article has been earnestly pressed upon our attention, and is the hinge of the controversy between the parties. The first part of the article is devoted to personal property and gives to the citizens of each country the fullest power touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows: "The foregoing provisions shall be applicable to real estate situate within the states of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state, or in the canton, in which it may be situated, there shall be accorded to the said heir or other successor such term as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

The plaintiffs in error are exactly within the latter category. This is too clear to require discussion. A corresponding provision for like cases is found in article 2 in the previous treaty of the 18th of May, 1847, between the same parties. 9 Stat., 902. By that article it is declared "that if, by the death of a person owning real property in the territory of one of the high contracting

parties, such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed him to dispose of such property and collect and withdraw the proceeds thereof, without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated." It was clearly the intention of the clause in question in the treaty of 1850 to secure to the beneficiaries absolutely the right "to sell said property," and "to withdraw and export the proceeds thereof without difficulty." Otherwise the language used is a sham and a mockery. The only qualification is as to the time within which the right must be exercised. It has been earnestly contended, in behalf of the defendant in error, that the state having fixed no time within which this must be done, it cannot be done at all, and that the entire provision thus becomes a nullity, and is as if it were not. The terms of the limitation imply clearly that *some time*, and not that *none*, was to be allowed. If it had been proposed to those who negotiated the treaty to express in it the effect of this construction in plain language, can it be doubted that it would have been promptly rejected by both sides as a solecism and contrary to the intent of the parties?

§ 167. *A liberal construction is to be given to a treaty.*

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks v. Dupont*, 3 Pet., 242 (§§ 21-33, *supra*). Such is the settled rule in this court. It was well remarked in the able opinion of the dissenting judge in the court of appeals, that if this case were to be decided under the treaty of 1847, there could not be a doubt as to the result. In this we concur, and we think the case is equally clear under the treaty of 1850, which governs the rights of the parties. The provision as to time in the earlier treaty is, in effect, a statute of limitation. It applied with Procrustean sameness in all the states and in all the cantons. In the latter treaty this limitation was dropped, and the time was to be such "as the laws of the state or canton will permit." In other words, it was left to the laws of the several states and cantons respectively to fix the limitation in this as in other cases. This was consonant to the policy of our judiciary act of 1789, which gave to the state statutes of limitation the same effect in the local courts of the United States which they had in the courts of the states respectively that enacted them. The Procrustean uniformity prescribed by the former treaty was thus abandoned, and it is fair to presume that the harmonious results in this respect which must necessarily follow, everywhere within the territory covered by the treaty, both at home and abroad, were the considerations by which those who made the change were animated. If a state or canton had a law which imposed a limitation in this class of cases, nothing more was necessary. If it had not such a law, it was competent to enact one, and until one exists there can be no bar arising from the lapse of time. A party entitled can sue whenever he chooses to do so, and he is clothed with all the rights of any other litigant asserting a claim where there is no statute of limitation applicable to the case. This we understand to be the position of Virginia, and such are the legal consequences necessarily flowing from it. This construction of the treaty derives support from the fact that the treaty provides (sixth article) that any controversy which may arise among the claimants to the succession "shall be decided accord-

ing to the laws and by the judges of the country where the property is situated."

§ 168. *Treaties are the supreme law of the land.*

It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guarantied by the constitution of the United States. That instrument took effect on the 4th day of March, 1789. In 1796, but a few years later, this court said: "If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the constitution, which provides that 'all treaties made or which shall be made under the authority of the United States shall be *the supreme law of the land*, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions or to make them yield to the general government and to treaties made by their authority. A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state contrary to a treaty is not void, but voidable only, by a repeal or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole." *Ware v. Hylton*, 3 Dal., 199.

It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in *Ware v. Hylton*, was the British treaty of 1783, which terminated the war of the American revolution. It was made while the articles of confederation subsisted. The constitution, when adopted, applied alike to treaties "made and to be made." We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the constitution must have been fresh in the memory of the leading jurists of the country. In *Chirac v. Chirac*, 2 Wheat., 259, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*, 10 id., 181, and with respect to the British treaty of 1794, in *Hughes v. Edwards*, 9 id., 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. *Orr v. Hodgeson*, 4 id., 453. By the British treaty of 1794, "all impediment of alienage was absolutely leveled with the ground despite

the laws of the states. It is the direct constitutional question in its fullest conditions. Yet the supreme court held that the stipulation was within the constitutional powers of the Union. *Fairfax v. Hunter*, 7 Cranch, 627. See *Ware v. Hylton*, 3 Dal., 242." 8 Op. Att'y Gen'l, 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it." *Treat. on the Const. and Gov. of the U. S.*, 204. If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to "enter into any treaty, alliance or confederation." *Const.*, art. 1, sec. 10. It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet., 242 (§§ 21-33, *supra*); *Foster v. Neilson*, 2 id., 253; *The Cherokee Tobacco*, 11 Wall., 616; Mr. Pinkney's Speech, 3 Elliot's Constitutional Debates, 231; *People v. Gerke*, 5 Cal., 381. We have no doubt that this treaty is within the treaty-making power conferred by the constitution. And it is our duty to give it full effect. We forbear to pursue the topic further. In the able argument before us, it was insisted upon one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction. There are doubtless limitations of this power, as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion.

§ 169. *Fees of escheator, attorneys and others.*

During the argument here, our attention was called to the amount that might be taken from the fund for compensation to the escheator and to his counsel in the event of our judgment being in favor of the plaintiffs in error. Under the circumstances, the escheator can have no claim as such, but he may properly receive the percentage allowed by law for making sales of real property in ordinary cases. It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute.

The judgment of the court of appeals of Virginia, so far as it concerns the claim of the plaintiffs in error, will be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is so ordered.

GOVERNEUR'S HEIRS *v.* ROBERTSON.

(11 Wheaton, 332-360. 1826.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This cause comes up from the circuit court of Kentucky, upon a difference of opinion certified from that court.

The case was this: Robertus S. Brantz, through whom the plaintiffs make title, obtained, on the 11th of October, 1784, two grants from the commonwealth of Virginia, comprising, together, ten thousand acres of land lying in Kentucky. One Duncan Rose, through whom the defendants make title, ob-

tained a similar grant, of the date of December 2, 1785, covering a part of the same land. Robertus Brantz, at the date of his patent, was an alien, but became naturalized in Maryland on the 8th of November, 1784, less than one month after the date of his patent, and near a year before that of the defendant was obtained. Some doubts appear to have been raised on the validity of Brantz's patent at an early period, and, in the year 1796, the legislature of Kentucky passed an act, reciting that Brantz was an alien when the patent issued, and affirming his estate as against the rights of the commonwealth, leaving it to operate as to all other persons as if that act had not passed. Brantz died in 1797, leaving a son, J. Brantz, an alien, incapable of inheriting, and owing debts to a considerable amount to the Gouverneurs. The son, unaware of his disability, executed a letter of attorney, under which the land was sold; and the purchasers, the Gouverneurs, subsequently discovering this defect, obtained another act from that state affirming their estate. And this makes out the plaintiff's title.

The defendant's title is regularly deduced through the patent to Duncan Rose. The record presents, first, a general instruction prayed for in behalf of the plaintiffs on their right to recover. And of this there can be no question independently of the points made in the instructions moved for by the defendant, having regard to the effects, 1. Of his alien character; 2. That of his son; and 3. Of the compact between Virginia and Kentucky on the rights of the parties. These will be considered in their own language and in their order. The first is:

"That if the jury find that R. S. Brantz was an alien at the time when the patents given in evidence were procured by him, nothing passed to him by the said patent, but that it was void."

Although this, as well as the subsequent prayers of the defendant, purport to present distinct propositions, it will be unavoidable that they should be considered in connection with each other, and with reference to the general prayer of the plaintiff for a charge in his favor. The defendant's object in propounding them is to repel the prayer of the plaintiff, and to obtain a charge that the jury should find in his favor. They are introduced, in fact, as grounds upon which the prayer of the plaintiff should be rejected.

§ 170. *An alien, who becomes a naturalized citizen, may hold lands acquired by him previous to his naturalization.*

And, in this view of the subject, the proposition stated draws after it the consideration of another, to wit: Whether, although the patent to Brantz should be pronounced void, in consideration of his incapacity to take at the time of its emanation, his subsequent naturalization did not relate back so as to obviate every consequence of this alien disability. On this subject of relation, the authorities are so ancient, so uniform and universal, that nothing can raise a doubt that it has a material bearing on this cause, but the question whether naturalization in Maryland was equivalent to naturalization in Kentucky. To this the articles of confederation furnish an affirmative answer, and the defendant has not made it a question. Nor, indeed, has he made a question on the subject of relation back; yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the rights derived to Brantz through his patent. The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien be not an absolute nullity? The argument is that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on

this subject. We think the doctrine of the defendant is not to be sustained on either ground.

§ 171. *Under the common law an alien could take lands by deed, or by the king's grant, and hold them until office found; it is so with a grant by a state to an alien.*

It is true, Sir William Blackstone has expressed himself on this subject with less than his usual precision and circumspection; but, whether the context be considered, or his authorities examined, we shall find that this doctrine cannot be maintained. The passage relied on is found in his second volume (pp. 347, 348, of Christian), in these words: "If the king grants lands to an alien, it operates nothing." But it would be doing injustice to the writer not to weigh his meaning by the words preceding and following this sentence. His language is this: "But the king's grant shall not inure to any other intent than that which is precisely expressed in the grant. As, if he grants lands to an alien, it operates nothing; for such grant shall not also inure to make him a denizen, that so he may be capable of taking by grant." And the authority referred to is Brooke's Abr., Patent, 62; and Finch's Law, 110. (It ought to be 111.) If we could admit that this learned writer could have committed so egregious a blunder as to suppose that an alien must be made denizen before he could take by grant, as a general proposition, he might stand charged with having greatly transcended his authorities. But when it is considered that the effect of an alien's being made denizen is not to enable him to take lands, but to enable him to hold them against the king, we at once see that his language is to be limited to the proposition laid down in the previous sentence, to wit, that the king's grants shall not inure to the double intent, when made to an alien, of vesting in him the thing granted, and then, by implication, constituting him a denizen, so as to enable him to hold an indefeasible estate. In the case referred to, as abridged by Brooke, the latter proposition alone is laid down; and the case in the year books, which the author cites, affirms nothing more. This was Bagot's Case, 7 Edw. IV., p. 29, which appears to have occasioned a vast deal of discussion for several terms in the British courts, and in which Bagot and another grantee of an office by the crown brought assize, and the defendant pleaded, as to Bagot, *alien nec*. In that cause there was no office found, and the question on this part of the case distinctly was, whether the grant did not both vest the right to the office and create a capacity to maintain assize to recover it. So, in a case in 4 Leon., 82, the same question was raised where there had been an inquest of office; and in both the decision distinctly was that the king's grant did not inure to an intent not expressed distinctly as its object; or, in other words, to a double intent, one direct, the other incidental. In the latter case, the alien's right had been affirmed by a patent from the queen, and the point argued was, that the right of the party was protected, by the act of the queen, against the effect of the office found. But, in both these cases, the decision was no more than this: that the act of the crown did not incidentally make the party a denizen, and, while an alien, he could not be enabled, by any act of the crown, to exercise rights which appertained only to denizens, or to persons naturalized, or natural-born subjects.

The other authority to which Blackstone refers, to wit, Finch, imports no more than that an alien shall not maintain an action, real or mixed, but has no direct bearing upon the doctrine for which it appears to have been cited by the author. The words in the passage in Blackstone more immediately relied on by the defendant, to wit, "If he grants to an alien it operates nothing," are

obviously taken from another passage in Brooke's Abr., Patent, 44, which article gives those words as a *dictum* of Keble, one of the judges. And by referring to the authority in the year book on which the author relies, to wit, 2 Hen. VII, 13, the *dictum* is there found attributed to Keble. But in that case, as in Bagot's Case, there is nothing more argued than that the king's grant shall not inure to the double purpose. And the observation of Keble is only made by way of illustration, accompanied by several others of a similar character, such as that a grant of land to a felon shall not operate as a pardon, or a grant to a company not corporate carry with it a grant of incorporation. It is clear, therefore, that this doctrine has no sufficient sanction in authority, and it will be found equally unsupported by principle or analogy. The general rule is positively against it, for the books, old and new, uniformly represent the king as a competent grantor in all cases in which an individual may grant, and any person *in esse* and not *civiliter mortuus* as a competent grantee. *Femes covert*, infants, aliens, persons attainted of treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. Perkins, Grant, 47, 48, 51, etc.; Comyns' Dig., Grant, B. 1. It behooves those, therefore, who would except aliens, when the immediate object of the king's grant, to maintain the exception.

It is argued that there is an analogy between this case and that of the heir or the widow or the husband alien, no one of whom can take, but the king shall enter upon them without office found; whereas an alien may take by purchase and hold until divested by office found. It is argued that the reason usually assigned for this distinction, to wit, "*Nil frustra agit lex*," may, with the same correctness, be applied to the case of a grant by the king to an alien, as to one taking by descent, dower or curtesy; that the alien only takes from the king to return the subject of the grant back again to the king by escheat. But this reasoning obviously assumes as law the very principle it is introduced to support, since, unless the grant be void, it cannot be predicated of it that it was executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language, since the very reason of the distinction between aliens taking by purchase and by descent is that one takes by deed, the other by act of law, whereas a grantee *ex vi termini* takes by deed and not by act of law. If there is any view of the subject in which an alien taking under grant may be considered as taking by operation of law, it is because the grant issues and takes effect under a law of the state. But this is by no means the sense of the rule, since attaching to it this idea would be to declare the legislative power of the state incompetent to vest in an alien even a defeasible estate. That an alien can take by deed and can hold until office found must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society, and a desire to protect the individual from arbitrary aggression. Hence, it is usually said that it has regard to the solemnity of the livery of seizin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it. "Every person," says he, "is supposed a natural-born subject that is resident in the king-

dom, and that owes a local allegiance to the king, till the contrary be found by office." This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.

§ 172. *The Virginia laws in regard to land grants to aliens intended, as to the interests acquired previous to the grant, to enlarge their rights and secure them from escheat; while as to the patents they were left in statu quo.*

It remains to examine the effect of the Virginia laws upon grants made to aliens. Those laws provide that aliens may purchase warrants for land, and pass them through all the stages necessary to obtain a patent, and may exercise every power over the inchoate interest thus acquired, in the same manner with citizens, and after returning the plat and survey to the register's office, shall be allowed eighteen months to become a citizen or transfer their interests to those who are citizens. These provisions, it is contended, import a prohibition to issue a grant to an alien. But we think the inference by no means unavoidable; and, in addition to the general and strong objections to raising an enactment by inference, consider it as unsupported either by the policy or the provision of the act. It is well known that the purchaser of a warrant, under the laws of Virginia, acquired a beneficial interest in the soil, that the survey located that interest upon a particular portion of soil, by metes and bounds, and the interest thus acquired was devisable, assignable, descendible, and wanted, in fact, nothing but a mere formality to give it all the attributes of a freehold. Hence a doubt arose, not whether an alien could acquire an interest under a warrant and survey, but whether that interest might not be subject to escheat. The object of the law was to encourage aliens to purchase and to settle the country; and all its provisions on this subject were intended to enlarge his rights, not to restrict them. Aliens arriving in the country could not immediately be naturalized, but they might immediately enter upon those arrangements for establishing themselves, when naturalized, which were necessary to precede a grant. Hence, the only true construction of the Virginia law is that, as to all the interest acquired in land previous to grant, it was intended to enlarge their rights and secure them from escheat; while, as to the rights which they might acquire by patent, they were to be left under the ordinary alien disabilities, whatever those were, which the law imposed. The Virginia act, therefore, has no influence upon the rights of the parties in this cause.

§ 173. *Under the Kentucky and Virginia laws patents can issue upon waste and unappropriated lands exclusively, and not upon escheated lands.*

The object of the next four prayers for instruction in behalf of the defendant is to maintain the proposition that the act of Kentucky of 1799, which confirmed the interest of the purchasers under the letter of attorney of the son of Brantz, was in derogation of the rights of Duncan Rose, the subsequent grantees. The argument is, that on the decease of the father, without an heir that could take, the land in controversy reverted to the state, and the junior patent then fastened upon it in the ordinary manner in which it attaches to the soil when a prior grant is removed from before it. That the act of 1799 was nothing more than a junior grant for the same land, and a grant which the state was estopped from making to the prejudice of the prior patentee, as well upon general principles as under the provisions of the compact between the two states. It is obvious that, in considering this argument, the court cannot place the defendant on more favorable ground than by substituting Virginia for Kentucky, and allowing him all the rights that he might have set up against

the former state. And it is equally obvious that, to admit of the right set up in favor of the junior patent's attaching as a patent upon the escheat, it must be affirmed that escheated land was liable to be taken up by patent; whereas, the act authorizes patents to issue upon waste and unappropriated lands exclusively, and not upon escheated property. And so it has been settled by adjudications both in Kentucky and Virginia. *Elmondorff v. Carmichael*, 3 Litt., 484.

§ 174. *Fraud is not imputable to a state government.*

It is further obvious that, as to the claim set up by the defendant on the ground of moral right and estoppel, the court will concede much more than he has a right to assume, if it allows him the benefit of his argument to the whole extent in which it may be applied to the rights and obligations of individuals. Assuming, *argumenti gratia*, that the state could not supersede the right of the defendant derived under his patent, in any case in which an individual would be estopped, or might be decreed to convey. But it is only on the ground of fraud or contract that the law acts upon individuals in either of the supposed cases. Fraud is not imputable to a government; but if it were, where is there scope found for the imputation of it in the relation between a state and the patentee of its vacant lands? In selling the warrant, the state enters into contract no further than that the purchaser shall have that quantity of vacant land if he can find it. And when the patent issues it is to the patentee, if to any one, that the fraud is imputable, if the land be not vacant. The state never intends to grant the lands of another; and where the grantee is ignorant of the previous patent, the maxim, *caveat emptor*, is emphatically applicable to this species of contract.

§ 175. *Only the nullity of a senior patent to lands will allow a junior patent to take precedence.*

But to what result would this doctrine lead us? A junior grant is to be vested with the attribute of hanging over a valid and indefeasible appropriation of soil, waiting to vest upon the occurrence of the casualty of an escheat, or an indefinite failure of heirs. This may not happen in a hundred years; it may not occur upon one life as in this case, but may occur after the lapse of one hundred lives. It is impossible that such a claim can be countenanced. Neither principle nor policy sustains it. And, in fact, the decision upon the first ground is fatal to the cause of the defendant upon the last; for, upon no principle but the assumed nullity of the patent to Brantz could any contract be imputed to the state to make good the junior patent, under which the defendant deduces his title. In that case the land would still have remained vacant land, and, as such, the junior patent would, of course, have taken effect upon it as a patent, and by the immediate operation of the land law, without reference to the supposed incidental rights here set up.

So far this court has considered the cause as one of a new impression; but, on examining the adjudications quoted, they are satisfied that, in every point material to the plaintiffs, the case has been solemnly adjudicated in the courts of Kentucky. They will, therefore, direct an opinion to be certified in favor of the plaintiff.

CRAIG v. LESLIE.

(3 Wheaton, 563-590. 1818.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Virginia.

STATEMENT OF FACTS.—The will in this case devised real and personal estate to trustees, the proceeds to be remitted to Thomas Craig, of Scotland. Craig

brought a suit to compel the trustees to execute the trust. The attorney-general of the state filed a cross-bill, with a view to having the proceeds of the fund paid into the treasury of the state.

Opinion by MR. JUSTICE WASHINGTON.

The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property or as a devise of the land itself.

§ 176. *When by a will land is directed to be converted into money, or money into land, equity will regard that as done which is directed to be done.*

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, 1 Bro. Ch. Cas., 497, the master of the rolls says that "nothing is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given." He adds, "the owner of the fund or the contracting parties may make land money or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See *Doughty v. Bull*, 2 P. Wms., 320; *Yates v. Compton*, id., 308; *Trelawney v. Booth*, 2 Atk., 307. The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

§ 177. — *a court of equity will, however, permit the beneficiary to make his election to take land or money.*

Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal at the will of the party entitled to the beneficial interest.

§ 178. — *if such election is not made, the property takes and keeps the character impressed upon it by the will.*

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed and the conversion actually made in his life-time. In the case of *Kirkman v. Miles*, 13 Ves. Jr., 337, which was a devise of real estate to trustees upon trust to sell, and the moneys arising as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A., B. and C., the estate was, upon the death of A., B. and C., considered and treated as personal property, notwithstanding the *cestui que trusts*, after the death of the testator, had entered upon and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new and not according to the prior cases." The same doctrine is laid down and maintained in the case of *Edwards v. Countess of Warwick*, 2 P. Wms., 171, which was a covenant on marriage to invest 10,000*l.*, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any further investigation of it useless, were it not for the case of *Roper v. Radcliffe*, 9 Mod., 167, which was cited and mainly relied upon by the counsel for the state of Virginia. The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds and of the rents and profits till sale to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise, should appoint, and, for want of such appointment, for the benefit of the said John Roper and his heirs. By his will, reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his *real* and personal estate to William Constable and Thomas Radcliffe and two others, and to their heirs. By a codicil to this will he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R. Upon a bill filed by W. C. and T. R. against

the heir at law of John Roper and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them, the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favor of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir at law sustained; six judges against five being in his favor. Without stating at large the opinion upon which the reversal took place, this court will proceed, 1. To examine the general principles laid down in that opinion; and then, 2. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

§ 179. *The heir has a resulting trust in lands devised to be sold for the purpose of paying debts and legacies for the surplus after such payment.*

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion: They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debts and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle, which is incontrovertible, that where the testator merely directs the real estate to be converted into money for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir at law, as the old use not disposed of. Such was the case of *Cruse v. Barley*, 3 P. Wms., 20, where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, etc., and as to the moneys arising by the sale, after debts paid, gave £200 to A., the eldest son, at the age of twenty-one, and the residue to his four younger children. A. died before the age of twenty-one, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land, to descend to the heir at law of the testator, because it was, in effect, the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of *Ackroyd v. Smithson*, 1 Bro. Ch. Cas., 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. *Hewitt v. Wright*, 1 Bro. Ch. Cas., 86.

§ 180. *There is no resulting trust in favor of the heir if the testator manifestly means to impress the quality of personalty upon the whole estate ordered to be sold.*

But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon

the proceeds of the land described to be sold the quality of personalty, not only to subserve the particular purposes of the will, but to all intents the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yates v. Compton*, 2 P. Wms., 308, in which the chancellor says that the intention of the will was to give away all from the heir and to turn the land into personal estate, and that that was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant and to those of the residuary legatee. In the case of *Fletcher v. Ashburner*, 1 Bro. Ch. Cas., 497, before referred to, the suit was brought by the heir at law of the testator against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes that the case of *Emblin v. Freeman*, and *Cruse v. Barley*, are those where, real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative or devisee, by which something has resulted to the heir at law.

§ 181. *A resulting trust to the heir cannot arise unless something is left undisposed of by the will.*

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise except when something is left undisposed of, either by some defect in the will or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him and partakes of the old use, as if it had not been directed to be sold.

§ 182. *The residuary legatee has the same right to restrain the trustee from selling more of the land than is necessary for the trust.*

The third proposition laid down in the case of *Roper v. Radcliffe* is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies. This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust* of the whole beneficial interest in the money to arise from the sale of the land may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

§ 183. *If the legatee in his life-time elect to take the land as land it will be real estate; otherwise it will be personalty to every intent and purpose.*

But the court cannot accede to the conclusion which, in *Roper v. Radcliffe*, 9 Mod., 167, is deduced from the establishment of the above principles. That conclusion is, that, in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that if the residuary

legatee thinks proper to avail himself of the privilege of taking it as land by making an election in his life-time, the property will then assume the character of land. But if he does not make this election the property retains its character of personalty to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of *Roper v. Radcliffe*. As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason as we think it has been shown to be to principle and authorities. Before anything can be made of the proposition, it should be shown that this right or privilege of election is so indissolubly united with the devise as to constitute a part of it, and that it may be exercised in all cases and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

§ 184. *This privilege of election is not extended to infants. For them the fund must remain as it is directed in the will.*

It certainly is not true that equity will extend this privilege in all cases to the *cestui que trust*. It will be refused if he be an infant. In the case of *Seeley v. Jago*, 1 P. Wms., 389, money was devised to be laid out in land in fee, to be settled on A., B. and C. and their heirs, equally to be divided. On the death, A., his infant heir, together with B. and C., filed their bill, claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

§ 185. *The doctrine of a right of election to take the land as land, or its proceeds as money, when sold under the trusts of a will, does not apply to a person disabled by law from taking land. In such case he takes the property as money.*

In the case of *Foone v. Blount*, 2 Cowp., 467, Lord Mansfield, who is compelled to acknowledge the authority of *Roper v. Radcliffe*, in parallel cases, combats the reasoning of Chief Justice Parker, upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money. This case of *Walker v. Denne*, 2 Ves. Jr., 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts*, though a *feme covert*, was held a sufficient indication of her intention that it should continue personal against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat. Equity would surely proceed contrary to its regular course, and the principles which universally govern

it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason but because, by law, he is incapable to hold the land. In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and, consequently, that the property is to be considered as being of that species into which it is directed to be converted. Having made these observations upon the principles laid down in the case of *Roper v. Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

§ 186. *A papist under English statute William III., ch. 4, could not take land at all, and any trust for him was void.*

The incapacities of a papist, under the English statute of 11 and 12 Wm. III., c. 4, and of an alien, at common law, are extremely dissimilar. The former is incapable to take, by purchase, any lands, or profits out of lands; and all estates, terms and any other interests or profits whatsoever out of lands, to be made, suffered or done, to or for the use of such person, or upon any trust for him, or to or for the benefit or relief of any such person, are declared by the statute to be utterly void. Thus it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit or relief in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In *Roper v. Radcliffe* it was strongly insisted that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so (and it is not material in this case to affirm or deny that position), then the will of John Roper in relation to the bequest to the two papists was void under the statute; and if so, the right of the heir at law, of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

§ 187. *Right of alien to hold land.*

Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received. In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir; and the claim of the state is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could, upon the principles of a court of equity, have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper v. Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield, in the case of *Foone v. Blount*, 2 Cowp., 467, speaks of it with marked disapprobation; and we know that, had

Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided. The case of *The Attorney-General and Lord Weymouth, Ambler, 20*, was also pressed upon the court, as strongly supporting that of *Roper v. Radcliffe*, and as bearing upon the present case. The first of these propositions might be admitted, although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against the papists, and the chancellor so considers it; for he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and incumbrances on land for the benefit of a charity. But if this case were in all respects the same as *Roper v. Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case the chancellor avoids expressing any opinion upon the question whether the money to arise from the sale of the land was to be taken as personalty or land; and, although he mentions the case of *Roper v. Radcliffe*, he adds that he does not depend upon it, as it was immaterial whether the surplus was to be considered as land or money, under the mortmain act.

Upon the whole, we are unanimously of opinion that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

CRAWFORD v. THE WILLIAM PENN.

(Circuit Court for New Jersey: Peters, C. C., 106-112. 1815.)

STATEMENT OF FACTS.—Libel to enforce a contract made during the war of 1812, with an alien enemy, to refit a ship to carry exchanged prisoners from Jamaica to the United States.

§ 188. *Alien enemy cannot maintain an action, as a general rule.*

Opinion by WASHINGTON, J.

The general rule of the common law of England is that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name. The rule is not founded upon any legal objection to the contract or other ground of the action, but upon the disability of the party to sue, arising out of the hostile character which the war has impressed upon him. This rule appears to be inflexible, except where the alien enemy is under the protection of the king; as where he comes into the kingdom after the war, by license of the sovereign; or, being there at the time of the war, is permitted to continue his domicile.

§ 189. *Person beneficially interested being an alien enemy, the suit cannot be sustained.*

Within the reason upon which the general rule was probably founded, it has been also decided that, if the person beneficially interested in the subject in dispute be an alien enemy, the action cannot be supported, even in the name of a British subject, his trustee, any more than it could have been in that of the alien enemy himself. Public policy, which forbids that the property sued for should be carried out of the country to enrich the enemy, would be violated equally in the one case as in the other.

§ 190. *The rule that an alien enemy cannot sue does not apply to a licensed trade.*

But where the reason ceases, upon which this doctrine is founded, which forbids the interest of an alien enemy to be asserted by his trustee, though a sub-

ject, the rule does not prevail; and, therefore, if the contract on which the suit is brought arise directly or collaterally out of a trade licensed by the sovereign authority of the government in whose courts redress is sought, enemy interest in the subject in controversy will not defeat the action depending in the name of the subject as trustee. Thus, it has been held that action upon an insurance, made upon a licensed trade with the enemy for the use of an enemy, may be supported in the common law courts of England, in the name of the agent who effected the insurance, he being a British subject. For all the purposes of this trade, the person for whose benefit the license was granted is to be regarded virtually as an adopted subject of Great Britain, and his trade under such license as British trade; and, the end being licensed, the ordinary legitimate means of attaining that end is considered as being also licensed. *Usparicha v. Noble*, 13 East, 332; *Kensington v. Inglis*, 8 East, 273; 15 East, 419.

§ 191. — *where the trade is licensed, the objection to the plaintiff as alien enemy is merely technical and stricti juris.*

It is clear, therefore, that wherever the trade with an enemy, and consequently a contract founded thereon, are rendered lawful by the license of the sovereign, the objection to the person of the plaintiff, on the ground of his being an alien enemy, is merely technical and *stricti juris*. Although the reason on which the rule was founded does not exist in such a case, the court being bound to support the beneficial interest of such licensed alien enemy, yet it does not appear that any judge of the common law courts of England has thought himself at liberty to entertain such a suit, if brought in the name of the alien enemy. Yet I know of no case in which it has been decided, upon the point coming directly in judgment, that such an action could not be maintained. In the case of *Cornu v. Blackburne*, 2 Doug., 641, the action was supported in the name of the alien enemy upon a ransom bond; but no plea was put in to bar the right of the plaintiff to sue; and the cause was decided upon another point. In *Anthon v. Fisher*, Dougl. (note), 649, it was laid down generally, that an alien enemy cannot, by the municipal laws of England, sue for the recovery of a right acquired by him in actual war; but the particular case in which that decision was given was that of a ransom bond; and of course the decision of the court should be considered as applicable to such a case. But the case of a ransom bond is very different from that of a contract arising out of a licensed trade. In the former, the hostile character of the obligee is in no respect removed; on the contrary, it is an act of hostility which gives rise to it. In the latter case, the hostile character of the party with whom the contract is made does not attach either to him or to the contract. "He is to be regarded (in the words of Lord Ellenborough) virtually as an adopted subject of Great Britain, and his trade as British trade." If he is to be so considered, it would seem to follow that all objection to a suit being maintained in the name of such adopted subject would be at an end; as much so as if the plaintiff were, at the time of bringing the suit, personally within the British dominions. It must, nevertheless, be acknowledged, that in the case of *Kensington v. Inglis*, 8 East, 273, the court seemed to be of opinion that even in the case of a licensed trade the suit cannot be maintained in the name of the alien enemy. But, as the suit was in the name of a subject, the opinion as to this point was not essential to the decision of the cause; and, of course, it ought not to rank higher than an *obiter dictum*. This examination of the subject has been intended to show that in cases where the contract upon which the suit is brought arises out of a licensed

trade, an objection founded upon the disability of the nominal plaintiff to maintain the action, on the ground of alien enemy, is extremely feeble; and can only be supported by a tenacious adherence to a rigid rule of the common law, notwithstanding the reason of the rule should in this particular case have ceased.

§ 192. *The rules of the common law regarding an alien enemy do not apply to courts acting under the law of nations.*

The question, then, is, does this rule apply in all its rigor to courts acting under the general law of nations, and proceeding according to the civil law? I think it does not. Bynkershoek (Bynk., 55) appears to be very strong upon this subject. He says that where commerce is permitted amongst enemies, contracts, and actions founded upon them, are permitted; "for who," he asks, "will sell and carry goods to an enemy, without the right of recovering the price of them? and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser." In cases of this nature, in courts proceeding according to the civil law, the only question is, has the plaintiff a *persona standi in judicio*? Can he be heard as a plaintiff in that court? Bynkershoek, in the above quotations, gives the answer. The right to sue, and to compel payment, is a necessary incident to his right to trade and to contract. This doctrine of Bynkershoek, has received the entire approbation of Sir William Scott, in the case of *The Hoop*, in which he gives the sense of that learned jurist as amounting to this: that the legality of commerce, and the mutual use of courts of justice, are inseparable. 1 Rob., 168. The distinction which I am endeavoring to maintain, founded upon the peculiar rules which prevail in the courts of common law, and those proceeding by the rules of the civil law, may be illustrated by analogous cases of every day's practice. No rule is more rigidly adhered to by the common law courts of England, than that the assignee of a chose in action cannot maintain a suit in those courts in his own name, upon common law principles. Neither can a *cestui que trust* bring an action in his own name; although in both cases the court will, for certain purposes, take notice of those equitable interests. But in a court of equity, where the strict rules of the common law courts do not obtain admission, the person having the beneficial interest is admitted to sue and to assert his right in his own name. In like manner, and within the same principle, it would seem reasonable, that where the party is divested of his hostile character, by which he acquires a *persona standi in judicio*, the technical objection of the common law courts, to his being heard as plaintiff, ought to be disregarded in courts which proceed by different rules.

§ 193. *Privileges of a cartel vessel. Contracts connected with such a ship.*

The only remaining question is, can a contract, made with an alien enemy, by the owner or master of a cartel vessel, in relation to the navigation of that vessel, upon the service in which she is engaged, be enforced in a court proceeding according to the rules of the civil law, and having jurisdiction of the subject-matter? What is the character of a cartel vessel, and of the persons concerned in her navigation? The flag of truce which she carries throws over her and them the mantle of peace. She is, *pro hac vice*, a neutral licensed vessel; and all persons concerned in her navigation, upon the particular service in which both belligerents have employed her, are neutral in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was not the business for which she was employed, and for which the immunities of that flag were granted to her. She is engaged in a special service to carry prisoners from one place to another; and,

whilst so engaged, she is under the protection of both belligerents, in relation to every act necessarily connected with that service. It follows, that all contracts made for equipping and fitting her for this service are to be considered as contracts made between friends, and consequently ought to be enforced in the tribunals of either belligerents, having jurisdiction of the subject. The agreement of the two nations, by their agents, to make her a cartel, amounts to a license by both to perform the service in which she is employed, and sanctifies all the means necessary to that end.

Upon these principles, I am of opinion that the libelants were capable of maintaining this suit; and that the plea of the claimants ought to be overruled. The proceedings have not been regular; but I shall not go further, after reversing the sentence below, than to direct the appellants to answer the libel.

THE SOCIETY v. WHEELER.

(Circuit Court for New Hampshire: 2 Gallison, 105-145. 1814.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This is a writ of entry *sur disseisin*, brought on the demandant's own seisin, and a disseisin by the tenants within thirty years; the writ bears teste on the 22d December, 1807. The tenants, at May term, 1808, having pleaded a plea to the jurisdiction, which was overruled by the court, afterwards pleaded the general issue *nul disseisin*; and at the present October term of this court, a verdict was found for the demandants; and also the value of the improvements made by the tenants on the demanded premises, pursuant to the statute of New Hampshire of the 19th of June, 1805. Acts ed. 1805, p. 395; ed. 1815, p. 170. After the verdict a motion was made by the demandants for a judgment on the verdict, at common law, and writ of seisin thereon, without any regard whatever to the provisions of the statute of 1805, or the value of the improvements found by the verdict, principally upon the ground that this statute was unconstitutional. A cross motion was also made by the tenants in arrest of judgment, upon the ground that the demandants were, by their own showing, alien enemies, and therefore not entitled further to pursue the present action. These motions have been ably argued, and the decision, which after much deliberation I have formed, will now be pronounced.

§ 194. *What must be shown to defeat an action on the plea of alien enemy.*

And first as to the motion in arrest of judgment. The demandants are described in the writ as "The society for the propagation of the gospel in foreign parts, a corporation duly constituted and established in England, in the dominions of the king of the United Kingdoms of Great Britain and Ireland, the members of which society are aliens and subjects of the said king." If from this description, and the other facts apparent upon the record, the court must intend that the demandants have not a capacity further to pursue the present action, then the motion must prevail. If, on the other hand, by possibility, and consistently with the facts on the record, such capacity can remain, then judgment must pass upon the verdict for the demandants. There is no pretense for holding that the mere alienage of the demandants would form a valid bar to the recovery in this case, supposing the two countries to be at peace; for however true it may be, in general, that an alien cannot maintain a real action, it is very clear that either upon the ground of the ninth article of the British treaty of 1794, or upon the more general ground, that the division of an empire works no forfeiture of rights previously acquired (and in point of fact the title of the de-

mandants was acquired before the American revolution), for aught that appears upon the present record, the present action might well be maintained. *Kelly v. Harrison*, 2 Johns. Cas., 29; *Jackson v. Lunn*, 3 Johns. Cas., 109. The whole objection, therefore, must rest on the existing war.

§ 195. *Defense of alien enemy not favored.*

The defense of alien enemy is by no means favored in the law; and some modern cases have gone a great way in discountenancing it; further, indeed, than seems consistent with the general rules of pleading. In *Casseres v. Bell*, 8 Term R., 166, the court held that the plea of alien enemy must not only aver such hostile character, but also set forth every fact that negatives the plaintiff's right to sue; and this decision is expressly put upon the mere ground of authority. On a careful examination, however, of the cases cited, it will not be found that they support the doctrine. In *Derrier v. Arnaud*, 4 Mod., 405, the original record of which, Lord Kenyon says, had been examined, the plea negatived every presumption that could arise in favor of the plaintiff's right to sue. But the case did not turn at all upon that point, but simply on the question whether *oriundus*, in the plea, was equivalent to *natus*, and, upon examining precedents, the court held the plea good; and, as no such objection was made, it seems difficult to admit that a mere averment of the additional facts was adjudged necessary, when upon the judgment of the court it stands purely indifferent. In *Openheimer v. Levy*, 2 Strange, 1082, to an action of *assumpsit* the defendant pleaded, *alien nce*, without saying alien enemy, and the court held that, as an alien friend may maintain a personal action, and, in order to abate the writ, the plaintiff should be shown to be an alien enemy, which is not to be presumed, nor the contrary necessary to be replied, therefore the plea was bad; and so the law had before that time been held. *Dyer*, 2. The case, therefore, steers wide of the doctrine contended for. In *Wells v. Williams*, 1 Ld. Raym., 282; S. C., Lutw., 34; Salk., 46, to debt upon a bond by an executor, the defendant pleaded that the plaintiff was an alien enemy and came into England without a safe conduct. The plaintiff replied that at the time of making the bond he was, and yet is, in England, by the license and under the protection of the king; and upon demurrer the court held, not that the plea was bad, but that the replication was good; and the court resolved that, if the defendant came there before the war, there was no need of a safe conduct; and if he came since the war, and continued without molestation, it should be intended that he came by a license, and his right to sue was consequent upon his protection. In this case, also, the objection did not arise; for the only question seemed to be, whether a residence by the license and under the protection of the king would entitle the party to sue without having a safe conduct; and the court held that it would. And this is but an affirmation of the doctrine of the year books. 32 II. 6, 23 b. These are all the authorities upon which *Casseres v. Bell* professes to have been decided. On the other hand, in *Sylvester's Case*, 7 Mod., 150 (which was not cited), where the plea was *alien enemy* or demurrer, the court held it good; and that, if the party were entitled under a general or special protection of the king, he ought to reply that fact. And so were the pleadings in *George v. Powell*, Fortes., 221. And there are several other precedents in which the plea does not negative the facts, which might enable an alien enemy to sue. 9 Edw. 4, 7; Cro. Eliz., 142.

If, therefore, the present question turned at all upon *Casseres v. Bell*, which was cited at the argument, it would require a good deal of consideration before that decision could be maintained. The case of *Clarke v. Morey*, 10 Johns., 69,

pushes the doctrine further, and asserts that an alien enemy, who comes and resides here without a *safe conduct* or *license* from the government (for so is the averment in the plea), is at all events entitled to sue, until ordered away by the president; and this, too, although the party is not known by the government to have his residence here. The English authorities have always required an express safe conduct or an implied license; and *Boulton v. Dobree*, 2 Camp., 163, decides that a license is not to be implied from mere residence, unless sanctioned by the government after the commencement of hostilities.

§ 196. *In order to arrest a judgment, it is necessary that the disability of alien enemy should appear by the record.*

The present case, however, may well rest upon distinct grounds; for whether the facts should, in pleading, come from one party or the other, to bring the plaintiff within, or to take the plaintiff out of, the disability of alien enemy; it is very clear that every fact must appear on the record which negatives his right to sue; otherwise the judgment cannot be arrested.

§ 197. *There is no difference, as to the plea of alien enemy, between an individual and a corporation.*

The objections to the rendition of judgment for the demandants, in the case at bar, seem to be two; first, that the corporation itself, being established in the enemy's country, acquires the enemy's character from its domicile; second, that the members of the corporation are subjects of the enemy, and, therefore, personally affected with the disability of hostile alienage. It is certainly true that, as to individuals, their right to sue in the courts of a belligerent, or to hold or enforce civil rights, depends not on their birth and native allegiance, but on the character which they hold at the time when these rights are sought to be enforced. A neutral, or a citizen of the United States, who is domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation. This, indeed, has long been settled as the general law of nations, and enforced in the tribunals of prize; and has been latterly recognized and confirmed in the municipal courts of other nations. *O'Mealy v. Wilson*, 1 Camp., 482; *McConnell v. Hector*, 3 Bos. & Pull., 113. And the same principle has been applied to a house of trade established in a hostile country, although the parties might happen to have a neutral domicile; the property of the house being, for such purpose, considered as affected with the hostile character of the country in which it is employed. *The Vigilantia*, 1 C. Rob., 1.

In this respect, a corporation, authorized by its charter to carry on a trade, and established in the hostile country, such as the East India Company, would undoubtedly be held, as to its property, within the same rule, even admitting its members possessed of neutral domicile. In general, an aggregate corporation is not in law deemed to have any commorancy, although the corporators have (*Lincoln County v. Prince*, 2 Mass., 544); yet there are exceptions to this principle; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile, it may, for some purposes at least, be clothed with the same character. Even in respect to mere municipal rights and duties, an aggregate corporation has been deemed to have a local residence. It has been held to be an "inhabitant" under the statute for the reparation of bridges (22 H. 8, ch. 5; 2 Inst., 697, 703); and an "inhabitant and occupier" liable to pay poor rates, under the statute. 43 El., ch. 2; *Rex*

v. Gardner, Cowp., 83. It may, therefore, acquire rights, and be subject to disabilities, arising from the country, if I. may so express myself, of its domicile. And, indeed, upon principle or authority, it seems to me difficult to maintain that an aggregate corporation, as for instance an insurance company, a bank, or a privateering company, established in the enemy's country, could, merely from its being an invisible, intangible thing, a mere incorporeal and legal entirety, be entitled to maintain actions, to enforce rights, acquire property or redress wrongs, when its own property on the ocean would be good prize of war. If the reason of the rule of the disability of an alien enemy be, as is sometimes supposed, that the party may not recover effects which, by being carried hence, may enrich his country, that reason applies as well to the case of a corporation, as of an individual, in the hostile country. If the reason be as Lord Chief Justice Eyre in *Sparenburgh v. Bannatyne*, 1 Bos. & Pull., 163, asserts it to be, that a man professing himself hostile to our country, and in a state of war with it, cannot be heard, if he sue for the benefit and protection of our laws, in the courts of our country, that reason is not less significant in the case of a foreign corporation, than of a foreign individual, taking advantage of the protection, resources and benefits of the enemy's country. In point of law, they stand upon the same footing. It has been argued that the court will look to the purposes for which the corporation was instituted, and to the conduct which it observes; if these be innocent or meritorious, they afford an exception from the general rule. But it is not the private character or conduct of an individual which gives him the hostile or neutral character. It is the character of the nation to which he belongs and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion and humanity, and yet his domicile will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavor by all lawful means to assuage or extinguish it, and yet, while he continues in the country, he is known but as an enemy. The same principle must apply, in the same manner, to a corporation. The objects, indeed, of the present corporation are highly meritorious and worthy of public favor; but, upon the doctrines of law, it must be deemed a British alien corporation, and as such liable to the imputation of being an enemy's corporation, unless it can be protected upon other principles.

§ 198. *The members of a foreign corporation are not necessarily alien enemies.*

Let us now advert to the second objection, which is, that the members of the corporation are all alien enemies. In the writ it is expressly alleged that all the members are *aliens* and *subjects* of the king of the United Kingdom of Great Britain and Ireland. It does not, however, hence necessarily follow that they are *alien enemies*. This averment in the writ was proper, if not indeed indispensable, in order to sustain the jurisdiction of this court; for the corporation, as such, might perhaps have no authority whatsoever to maintain an action here, under the limited jurisdiction confided by the constitution of the United States to their own courts. But in the character of its members, as *aliens*, we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the supreme court, that for this purpose the court will go behind the corporate name, and see who are the parties really interested. *Bank of United States v. Deveaux*, 5 Cranch, 61. And if, for this purpose, the court will ascertain who the corporators are, it seems to follow that the character of the corporators may be averred, not only to sustain, but also to

bar, an action brought in the name of the corporation. It might therefore have been pleaded in this case, even if the corporation had been established in a neutral country, that all its members were alien enemies; and upon such a plea, with proper averments, it would have deserved great consideration, whether it was not, *pendente bello*, an effectual bar. Where the corporation is established in the enemy's country, the plea would *a fortiori* apply.

But, although the corporation itself, and the members also, may be liable to the imputation of being alien enemies, yet that character does not necessarily or unavoidably attach to either. For aught that appears upon the face of the record, every member of the corporation may be now domiciled in the United States, under the safe conduct or license of government. In such a predicament it is clear that, though aliens, they would not be enemies, but might sue and be sued in our courts. Bynk. Q. J. P., cap. 25, s. 8; *Wells v. Williams*, 1 Ld. Raym., 282. And in respect to the corporation itself, although established in Great Britain, it may have the safe conduct or license of the government of the United States for its property, and the maintenance of its corporate rights. It is clearly competent for the government, under the general rights of war, to grant letters of protection, and thereby to suspend the hostile character of any person; and when he has such protection, wherever he may be domiciled, he is to be considered, *quoad hoc*, a neutral. Bynk. Q. J. Pub., cap. 7; *Usparicha v. Noble*, 13 East, 332.

Nor is there, in this respect, any difference between a corporation and an individual. And it would be highly injurious to humanity, as well as public policy, if institutions established in a foreign country for religious, literary or charitable purposes, might not, during war, obtain protection and patronage for their laudable exertions to soften private misery and diffuse private virtue. To support the motion in arrest of judgment, it is necessary for the court to negative every presumption, that could arise, of a safe conduct or license, either to the members or to the corporation itself. This cannot be done in the present case consistently with the principles of law. The suit was commenced in a time of peace, and every presumption which can, ought to be made to support it. It is sufficient, however, that by possibility the demandants, in their corporate capacity, and the capacity of their members, may have a *persona standi in judicio*, to entitle them to judgment.

§ 199. *Where war intervenes after a suit is brought "alien enemy" should be pleaded puis darrein continuance.*

There is another consideration, also, which may properly weigh in this case. The suit was commenced during peace, and, on the declaration of war, it was competent for the tenants to plead the hostile alienage of the demandants, if it existed, in bar to the further prosecution of the suit, in the nature of a plea *puis darrein continuance*, as it was pleaded in *Le Bret v. Papillon*, 4 East, 502. They did not so plead, and thereby have affirmed the ability of the demandants to prosecute the suit to judgment. Upon this ground, where the disability of alien enemy occurred before judgment, and on a *scire facias* on the judgment the disability was pleaded, the plea has been held bad. *West v. Sutton*, 2 Ld. Raym., 853.

§ 200. *Rights of British land owners under the treaty of 1794.*

Another consideration, derived from the express provision of the ninth article of the British treaty of 1794, ought not to be omitted. That article stipulates that British subjects who then held land in the territories of the United States, and American citizens who then held land in the dominions of his majesty,

shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and may grant, sell and devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be regarded as *aliens*. This article has never been annulled, and therefore remains in full force. It deserves, and ought to receive, a liberal and enlarged construction. There can be no doubt that corporations, as well as individuals, are within its purview; and the present claim not only may be, but in fact is, one which it completely embraces. The title of the demandants, as has been already stated, accrued before the revolutionary war. It was obviously the design of the contracting parties to remove the disability of alienage, as to persons within the purview of the article, and to procure to them a perfect enjoyment and disposal of their estates and titles. If, during war, their right to grant, sell or devise such estates and titles were suspended, it would materially impair their value. If the remedies incident to such estates for trespasses, disseisins and other tortious acts were during war suspended, not only would the security of the property be endangered, but, if war should last for many years, the statute of limitations of the various states would, by lapse of time, bar the party of his remedy, and in some cases of his estate. This seems against the spirit and intent of the article, and puts the party upon the footing of an alien enemy, while the language concedes to him all the benefits of a native. Looking to the general moderation with which the rights of war are exercised in modern times, under the policy, if not the law, of nations, perhaps it would not seem (for I mean not to give any absolute opinion) an undue indulgence to hold that, as to all titles and estates within the article, an alien enemy may well maintain all the legal remedies as in a time of peace. At least it cannot be presumed that in this favored class of cases the party has not received the license or safe conduct of the government to pursue his rights and remedies during the war. And unless such presumption can be made, when there are no facts on the record to warrant it, the plaintiffs must be entitled to judgment. Upon the whole, the motion in arrest of judgment must be overruled.

§ 201. *The New Hampshire act of June 19, 1805, so far as it allows to tenants the value of past improvements by them, in case of recovery against them, is unconstitutional and void.*

The other question, which has been argued upon the motion of the demandants, is yet of more delicacy and embarrassment. It is always an unwelcome task to call in question the constitutionality of the acts of a state legislature. It is still more unwelcome, when there has been an apparent acquiescence on the part of state tribunals, for whom this court cannot but entertain the most entire respect and confidence. The parties, however, have chosen to present the question before us, and we are bound to pronounce the law, as upon a careful examination we find it, and if an error be committed, it is a great consolation that the decision here is not final, but a revision may take place before other judges, whose diligence, learning and ability cannot fail to insure a most exact and well considered determination. The demandants contend, first, that the act in question is in contravention of the second, third, twelfth, fourteenth and twentieth articles of the bill of rights in the constitution of New Hampshire; and of the tenth section of the first article, and the ninth article of the amendments of the constitution of the United States; and is also repugnant to natural justice, and is therefore void. Secondly, that the act, if constitutional,

extends only to suits in the state courts, and not to suits in the courts of the United States, and, at all events, not to suits in which a foreigner is a party. There is another objection, as to the shape in which the claims for the improvements are asserted in the pleadings, upon which it is unnecessary to say more than that they have as much certainty as has been deemed necessary in the practice of the state courts, and as seems required by the act, and, therefore, are good in substance.

The objection that the act had in contemplation actions in state courts only, between citizens of the state, cannot prevail. Whatever force such an objection might properly have in cases of personal contracts executed without the territories of a state, where a remedy should be sought in the courts of the United States, under circumstances in which the state laws could afford no remedy, it is a general rule of the law of nations, recognized by all civilized states, that rights and remedies respecting lands are to be regulated and governed by the law of the place where the land is situated. Huber., tom. 2, lib. 1, tit. 3; Vattel, b. 2, ch. 7, s. 85; b. 8, s. 109, 110. Independent, therefore, of the act of congress of the 24th of September, 1789, ch. 20, s. 34, which declares "that the laws of the states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," the laws of the state regulating titles and remedies to real estate must, in the absence of other regulations by the United States, be, upon general principles, the rules of decision equally between foreigners and between citizens. In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject is that which declares that no state shall pass "any *ex post facto* law, or law impairing the obligation of contracts." There is no pretense of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an *ex post facto* law within this clause of the constitution, for it has been solemnly adjudged that it applies only to laws which render an act punishable in a manner in which it was not punishable when it was committed. *Calder v. Bull*, 3 Dal., 386; *Fletcher v. Peck*, 6 Cranch, 87. The clause does not touch civil rights or civil remedies.

The remaining question, then, is, whether the act is contrary to the constitution of New Hampshire. Various clauses of that constitution have been cited; but that which seems most directly pointed to the case, and which must (if any one can) govern it, is the twenty-third article of the bill of rights, which declares that "retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of *civil causes* or the punishment of offenses."

§ 202. *What are retrospective laws.*

What is a retrospective law within the true intent and meaning of this article? Is it confined to statutes which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision to adhere to the former definition. It would enable the legislature to accomplish that indirectly which it could not do directly. Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in

respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities. *Calder v. Bull*, 3 Dall., 386; *Dash v. Van Kleeck*, 7 Johns., 477. The reasoning in these authorities as to the nature, effect and injustice, in general, of retrospective laws is exceedingly able and cogent; and in a fit case, depending upon elementary principles, I should be disposed to go a great way with the learned argument of Chief Justice Kent.

Let us now consider the particular facts of the case at bar, and the provisions of the act of the 19th of June, 1805. Before the passage of that act, the demandants had a clear vested right and title in the demanded premises in fee, absolute and unconditional; and although the seisin was in another, yet the existing laws afforded a complete remedy to perfect that title by an union *juris et seisinæ*, under judicial process. The demandants were also entitled, both at law and equity, not only to the land, but to all the improvements thereon, which were annexed to the freehold by whomsoever made, under that vested right and title. The law imputed no laches to the demandants for not pursuing their legal remedy to recover seisin, for the time of the statute of limitations had not run against them; and it imposed no obligation to pay for any amelioration of the soil, or any erections, which had been made by any person claiming an adverse possession or seisin. Then came the act, which, in the third section, provides "that when any action shall be brought against any person for the recovery of any lands or tenements, which such person holds by virtue of a supposed legal title under a *bona fide* purchase, and which the occupant, or the person under whom he claims, has been in the actual peaceable possession and improvement of for more than six years before the commencement of the action, the jury which tries this action, if they find a verdict for the plaintiff, shall also inquire, and by their verdict ascertain, the increased value of the premises by virtue of the buildings and improvements made by such person or persons, or those under whom he or they claim, and no writ of seisin or possession shall issue upon such judgment until such plaintiff shall have paid into the hands of the clerk of said court, for the use of the defendant or person or persons justly entitled thereto, such sum as said jury shall assess, as aforesaid, which sum shall be paid to the clerk within one year after the verdict rendered by the jury, otherwise no writ of possession shall issue." This section was to take effect from the passage of the act.

The present action was brought in 1807, and if, as the tenants contend, the act applies to it, it must be upon the ground that the six years' possession under a supposed legal title is to be calculated backwards from the time of the commencement of the action, although that time should not have elapsed after the date of the act. And in this view the argument to support its constitutionality must be the same as though the action were commenced immediately after the passage of the act. It may be admitted that if this were a mere statute of limitations, barring the actions in the realty after a reasonable time, under the exercise of legislative discretion, its constitutionality could not be doubted. And if the statute had declared that if a party entitled should for six years after passing the act, or for six years after any ouster or disseisin *in futuro*, neglect to pursue his remedy for the recovery of his right, then the recovery should only be had upon the terms of the act, it might, perhaps, have fallen under the same consideration, for it would in effect be only a rigorous statute of limitations. But if the legislature were to pass an act of limitations, by which all actions upon past disseisins were to be barred, without any allowance

of time for the commencement thereof *in futuro*, it would be difficult to support its constitutionality, for it would be completely retrospective in its operations on vested rights. *Call v. Hagger*, 8 Mass., 423.

But the present cannot be considered as a statute merely regulating a remedy and prescribing the mode and time of proceeding. It confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land. And unless he should comply within a given time, his title, or, what is in effect the same thing, his remedy, is completely extinguished. It is not, therefore, in form or in substance a modification of the remedy, but a direct extinguishment of a vested right in all the improvements and erections on the land which were annexed to the freehold. It also directly impairs the value of the vested right of the party in the land itself, inasmuch as it impairs the remedy, and subjects the party to burthens which may render the right not worth pursuing; and that, too, upon past considerations, respecting which the party had incurred no legal obligation, and had imputed to him no legal laches. If, indeed, it ought, as is alleged, to be the very essence of a new law, that it is to be a rule for future cases, *nova constitutio futuris formam imponere debet, non praeteritis* (Bract., lib. 4, fol. 228), and that it is against natural justice to apply it to past cases, it would seem to follow that an act which works the effects which have been stated ought to be deemed a retrospective law within the prohibition of the constitution of New Hampshire; for it is a law for the *decision* of a *civil cause*, which affects past cases, and has a retroactive operation.

§ 203. *Improvements; right to compensation.*

It is argued by the tenants' counsel that, although there was no legal remedy, yet there was an equitable right in the tenants, before the statute, to compensation for the amelioration of the soil, and the improvements made by erections thereon; that upon the principles of natural justice it is iniquitous that one man should enjoy the fruits of another man's labor; that until a recovery actually obtained by the demandants, they had no vested title to such improvements, but the title remained in the tenants; and, therefore, the statute had no operation to divest previous rights. In this respect the case is likened to that of temporary fixtures and erections, made by a tenant for years during his term, in which the reversioner has never been supposed to have any interest whatever. It is difficult to perceive the foundation of the equitable or moral obligation which should compel a party to pay for improvements that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold that a wrong should prevail against a lawful exercise of the right of property. In the case of a tortious confusion of goods the common law gives the sole property to the other party without any compensation. Yet the equity in such case, where the shares might be distinguished, would seem much stronger than in the present case. There would also have been plausibility in the argument if the statute had confined itself to visible erections made by the tenant, who had been six years in possession under a supposed legal title. But the improvements may be altogether in the soil, and even made by the original wrong-doer, and yet the compensation must be allowed. And they may be

just such improvements as, in the case of a rightful tenancy, would at common law be deemed waste. It is sufficient, however, that no such equitable right as is now contended for is recognized in the law; and indeed it has been deemed so far destitute of moral obligation, that even an express promise to pay for improvements, made by a person coming in under a defective title, has been held a *nude pact*. *Frear v. Hardenburgh*, 5 Johns., 272.

As to the argument that the demandants had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labor (which is embraced both by the statute and the verdict), it would be absurd to contend that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear that everything permanently annexed to the freehold passes with the title of the land, and vests with it. And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so, indeed, would the law be as to like fixtures by a mere trespasser. *Taylor v. Townsend*, 8 Mass., 411. The right, then, to permanent erections follows as a necessary and inseparable incident to the right of the soil, and is not acquired but is merely reduced into possession by a subsequent suit. On the whole, if the statute must have a construction which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, inasmuch as it divests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone.

§ 204. *Rule as to construing statutes.*

But there is a construction which, although not favored by the exact letter, may yet well stand with the general scope of the statute and give it a constitutional character, and that is to give it a prospective operation, so as to apply to improvements made after the statute, and where the possession has been for six years after its date. In deference to the legislature this construction ought to be adopted, if by law it may. And upon the authority of *Gilmore v. Shuter*, 2 Show., 17; S. C., 2 Mod., 310; 1 Freem., 466; 2 Lev., 227; 2 Jones, 108; 1 Vent., 330, and *Couch v. Jefferies*, 4 Burr., 2460, and *Dash v. Van Kleeck*, 7 John., 477, where the wording of the statutes was equally strong, I do not at present perceive any difficulty in adopting it. In either view the tenants can take nothing by their claims for improvements, and judgment must pass for the demandants and a writ of seisin issue immediately *non obstante veredicto quoad hæc*. See *Fox v. Southack*, 12 Mass., 143; *Hutchinson v. Brock*, 11 Mass., 119.

ROBERTSON v. MILLER.

(Circuit Court for Virginia: 1 Marshall, 466-477. 1820.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—William Brown, a citizen of Virginia, and Boyd Miller, a British subject, entered into partnership, and carried on trade and commerce by the name of "William Brown & Co." During the partnership, William Brown purchased a house and lot in Lynchburg, with the funds, and for the benefit of, the company, but took the conveyance to himself. Some time in the year 1811 William Brown departed this life, having first made his last will in writing, which was properly recorded in February, 1812; by which, after certain legacies, his estate was devised to his relations in Scotland, who are British subjects. By this devise, the interest of William Brown, in the

house and lot in Lynchburg, passes to the devisees, subject to any claim Boyd Miller may have upon it, as surviving partner. Boyd Miller became a resident of Virginia, and in November, 1815, while a resident, sold the house and lot in Lynchburg to Archibald Robertson, the complainant, for \$8,000. A suit was, at that time, depending in this court, brought by the executors of William Brown against Boyd Miller and others, to which the devisees and legatees of William Brown were afterwards made parties, for a settlement of partnership transactions and a distribution of the partnership fund. In this suit, it is understood that the sum for which the house and lot in Lynchburg sold was considered as one item in the total amount of the fund. Boyd Miller was decreed, as surviving partner, to pay to the representatives of William Brown the sum of \$225,204.04, with interest, and, of course, became entitled to the partnership effects.

Archibald Robertson, the purchaser of the house and lot in Lynchburg, after paying the whole purchase money, except \$1,717.78, became apprehensive that the property had become escheatable to the commonwealth and that the title conveyed to him by Boyd Miller was not a good one. Under this apprehension he has filed his bill, praying that the title may be considered; that if it is a good one, the escheator may be enjoined from instituting proceedings of escheat; and that, if it is not a good one, Boyd Miller may be decreed to refund the purchase money, and may be enjoined from all proceedings to collect the residue. The answer of Boyd Miller admits the several allegations of the bill, and contends that the proceeds of the said house and lot have been rightly applied, under orders of this court, to the payment of partnership debts. There has been no explicit direction of the court on this subject, nor has any question on it ever before been made. The only points decided by the court are that the debts of the company should be paid, and that the residue of its property should be divided according to the articles of copartnery which had expired, but under which the parties had continued to act. This question, therefore, is still open, and ought to be determined on the principles which would have applied to it had it been made in November, 1815.

§ 205. *Under the Virginia statute the real property of an alien escheated to the state. If it belonged to a firm of which he was a member his proportion escheated.*

William Brown having held the legal title to the property in question in trust for the firm, it will be considered in a court of equity as if the conveyance had been made to the firm; and the inquiry will be, what is the operation of the law of escheat, upon such property, where one of the partners is an alien? If an alien merchant, who is alone, purchases a house and lot for the purposes of trade, either in fee or for life, that house and lot are escheatable; and I can see no reason, if he be a member of a firm, why his interest should not be escheatable. The commercial law does not extend its protection to real estate acquired by alien merchants. The debts of the firm may attach on his interest, as his own private debts would attach on his own private estate, but no farther; that is, I presume, that what remained, after exhausting his personal, might charge his real estate. This would, I presume, be the rule in the case of an estate at law; and a court of equity, in the absence of peculiar circumstances, would follow the rule of law.

In the life-time of William Brown a court of equity would have subjected the interest of Boyd Miller to the claim of the commonwealth, chargeable only with such debts as the personal fund of the company was insufficient to pay.

On the death of William Brown the whole legal estate passed to aliens, and became escheatable. Would the property, if then escheated, have been chargeable with the debts of the company? However this may be, had there been no other effects for the payment of debts, I know of no law or principle which would subject this real property to the payment of debts, in exoneration of the personal fund. In this view of the subject, the fact that the escheat has not taken place can make no difference. If a court of equity would not interfere to subject the proceeds of escheated land to the payment of debts in exoneration of the personal fund, neither, I presume, would it interfere to order the sale of escheatable land, and the application of the proceeds to the discharge of that fund. If, then, there was nothing peculiar in the articles of copartnership, the real estate, composing a part of the capital stock of the firm, would, on the death of some of the partners, pass by the will of the decedents, or go in moieties to the two partners, subject to the title of the commonwealth, which, charged with the payment of debts, would act on each moiety according to the law as applicable to that party. Both being aliens, both moieties would be escheatable.

§ 206. *Articles of copartnership, providing for a right of survivorship upon making certain payments to the heirs, etc., change the rule of law, and, if the terms are complied with, will pass the firm property, real and personal, to the surviving copartners.*

But it is contended by the defendants that the articles of copartnery, in this case, transfer the whole property to the survivor. The articles of copartnery were entered into on the 14th day of April, 1803, between Boyd Miller, William Brown and John M'Credie, and were to continue in force for four years from the 1st day of September, 1803, and might "be renewed by the joint consent of the whole, in writing, given one year before the expiration." The books were to be balanced in the month of September, in each year, and an inventory of all their effects, with a true state of all their affairs, was then to be made out. In the fourth article it is agreed that "in case of the death or bankruptcy of any of the said parties, in order to prevent any altercation with the heirs, executors, administrators or assignees of the deceased or bankrupt, it is agreed that the shares of the profits, as well as capital of the deceased or bankrupt, shall be paid by the survivors or solvents, agreeable to the yearly statement of the company's affairs, prior to his death or bankruptcy," etc. It is very material to settle the extent of this article. If it be an agreement to transfer the real and personal estate of the company to the surviving or solvent partner or partners, entitling the representatives of the deceased or the insolvent to "his share of the profits, as well as capital," "agreeable to the yearly statement of the company's affairs, prior to the death or bankruptcy," then it is equivalent to an agreement that the right of survivorship shall take place between the parties, as to the subject itself, giving the assignees of the bankrupt, or the representatives of the deceased partner, his share of the capital, and profits according to the last yearly statement, instead of that interest to which, independent of special compact, he would be entitled by law. It is the substitution of a rule, by the act of the parties, for that rule which the law makes, where the parties are silent. After the best consideration I can give the subject, I am in favor of this construction for several reasons. The article is professedly entered into in order to prevent any altercation with the heirs, executors, administrators or assignees of the deceased or bankrupt. This object cannot be effected unless the property be transferred to the survivors or

solvent partners on the terms specified. The rule for ascertaining annually the rights of the parties would be useless if the application of that rule were to be defeated.

The article contains, also, other provisions, which demonstrate, I think, the intent with which it was made, and show a determination to leave nothing for discussion in the event provided for. Five per centum is, in this annual statement, to be deducted from the cost and charges of the goods on hand; and no allowance is to be made for bad or doubtful debts. These goods, then, and these debts, become the property of the surviving or solvent partner, and the representatives of the deceased, or assignees of the bankrupt, are entitled, in lieu of all claims on the subject, to the share allowed in the annual statement. Is there any reason for withdrawing real estate, considered by the company as a part of its stock in trade, from the operation of this article? I can perceive no reason for the exception. The parties certainly have not made it, and the court could not be justified in doing what they have not chosen to do. Their language shows an intent to comprehend lands. The word "heirs" could be of no other use. To introduce the exception would defeat the object of the article. It would not only make the word "heirs" useless, but would reinstate those subjects of altercation which the article intended to remove. The real property must be withdrawn from the fund, its value ascertained by some rule to be agreed on by the parties, or given by a court, and the residue be subjected to the rule stated in the article.

This construction is strengthened by the understanding of the parties, as illustrated by an event which has taken place. John M'Credie, one of the partners, departed this life in the year 1807, and his account was adjusted by the rule which has been stated, without an idea on either side that any other principle ought to prevail; and the court of chancery of the state has, I perceive, by its decree directing a conveyance of the real estate standing in his name, given this construction to the article. I think, then, had the event which has happened taken place during the four years for which the copartnership was originally prepared, it could not be doubted that the whole fund of the company, real and personal, would pass to the surviving partner; leaving the representatives of the deceased entitled to their testator's share of the capital and profits of the company, according to the annual statement on the books. Putting alienage out of the question, I think it cannot be doubted that a court of equity would, in such a state of things, decree a conveyance to Boyd Miller, on his paying that share of capital and profits.

§ 207. *Expiration of the time for which articles of copartnership were formed will not operate to dissolve the connection or change its terms if the business continues to be conducted as before without any express arrangement.*

It remains to inquire whether the expiration of the time for which the articles were formed produces any alteration in the law of the case? I can perceive no reason for this opinion. Where two or more persons enter into a particular business for a stipulated time, under a special contract, and continue that business after the expiration of the time, without any change whatever in the circumstances, or any expression of the terms, on which the business is conducted, the natural conclusion seems to be, that the business is still to be conducted on its original principles. The law, I think, would imply a contract that it should be so conducted. Many examples might be adduced in illustration of this position. A tenant having a tenement for a year, at a stipulated rent, and holding over with the consent of the landlord, would be understood

to hold under the original contract. If, for some years, he paid the same rent, and it was received by the landlord, the law would certainly raise a tacit agreement, binding on both parties, so long as the occupation of the land continued, without any dissent expressed by either party. So, with respect to the employment of an agent, or to an engagement of any other description. The testimony in the cause shows that this general rule of reason is understood to apply to commercial companies. It also shows that the parties understood it to be applicable to them. Their declarations were to this effect, and their clerk proves that the annual statement required by the articles was regularly made, and that the business continued to be conducted in the same manner, and on the same principles, as before the expiration of the articles. This court, in its decree in the original cause, without any reference to the question of escheat, considered the articles as regulating all the subsequent transactions of the parties, and directed the settlement to be made in conformity with them. That opinion is still retained. Its application to the case before the court will now be considered. The property in question, though conveyed to William Brown, singly, having been purchased with the money, and held in trust for the company, must be considered, in a court of equity, as if the trusts had been expressed, or as if the legal estate had in terms conformed to the trust. As the property was acquired under the articles of copartnership, the trust must accord with those articles. The title then is to be considered as if the deed had been made to the firm, and, if either of the partners should die, or become bankrupt during the continuance of the partnership, to the surviving partner, he paying to the representatives of the deceased, or the assignees of the bankrupt partner, his share of the capital and profits, including this property, as stated on the books at the last annual statement. Under such a limitation, it cannot be doubted that the lot would pass to the surviving partner.

§ 208. *The right of the commonwealth to the escheat of the property of an alien is released by its conveyance to a citizen.*

But the surviving partner is an alien, and this property was, therefore, while held by him, escheatable. Has the right of the commonwealth been released? In 1813 the legislature passed an act, which was re-enacted in 1819, which contains the following clause: "*And be it further enacted, That, where any alien, residing within the United States, holding, or claiming title to, any land, not heretofore escheated to the commonwealth by an office found, shall have bona fide sold or demised the same, or shall have died testate, or intestate, seized or possessed thereof, or claiming title thereto, and where any alien, residing within the United States, shall hereafter hold, or claim title to, any such land, and before any proceedings be instituted by the escheator, for the purpose of escheating the same to the commonwealth, shall bona fide sell or demise the same, or die testate, or intestate, seized, or possessed thereof, or claiming title thereto; in every such case, the purchaser from such alien, or his lessee, heir or devisee, being a citizen of the United States, shall hold and enjoy such land.*" Boyd Miller, in 1815, when this property was sold to the plaintiff, was an alien, residing within this commonwealth, in possession of and claiming title to the land in question, which had not then been escheated to the commonwealth, and the sale is admitted to be *bona fide*. The case is within the letter of the law, unless a distinction be taken between an equitable and a legal estate. I can perceive no ground for such a distinction. A court of equity will sustain a claim of the commonwealth to an equitable estate, held by an alien. Why, then, should not the commonwealth release its right to an equitable as well as to a

legal estate? And what good reason, founded in the principles of law or of policy, can be assigned for not releasing to a citizen the right of forfeiture in lands of which he holds the equitable title, the mere legal title being in a foreigner under circumstances in which that right would be released had the legal title been conveyed? I am entirely satisfied that the legislature intended to release the right of the commonwealth to all lands held by an alien, whatever his title might be, in every case in which that alien, being a resident, sells to a citizen, before the right of the commonwealth has been asserted, and that the release is co-extensive with the title of the alien. I am, therefore, of opinion that the commonwealth has released its title to the land in the bill mentioned, and that the title is valid in equity.

Although, upon a fair construction of the will of William Brown, I doubt whether the legal estate would pass by it to his devisees, and am satisfied that he did not intend it should pass, it is proper that they should release their right to the complainant, and I shall direct them to do so.

This court has been under the necessity of considering, incidentally, the title of the commonwealth, but cannot bind that title, since the commonwealth cannot be made a defendant, either by serving process on its escheator, or otherwise. Of that part of the case the court has no jurisdiction, and therefore the bill, so far as it prays relief against the escheator, is dismissed without prejudice.

HAMMEKIN v. CLAYTON.

(Circuit Court for Texas: 2 Woods, 336-341. 1874.)

Opinion by WOODS, J.

STATEMENT OF FACTS.—The case was an action of trespass to try titles, and the facts were substantially as follows: The plaintiff claimed title under an eleven league grant made by the state of Coahuila and Texas to Emanuel Crescentia Rejon, dated November 8, 1833. On the 11th of April, 1836, by a deed of that date, executed in the city of Mexico, Rejon conveyed the land in question to one Mrs. Laguerenne. On the 27th of September, 1836, Mrs. Laguerenne executed at the City of Mexico an instrument of that date by which she declared that she held the lands in trust for the plaintiff Hammekin, and conveyed the same to him. On the 28th of July, 1840, Mrs. Laguerenne united with her husband in a deed of that date, whereby they again conveyed the land to the plaintiff Hammekin.

The plaintiff was a native of the state of New York, and immigrated to the republic of Mexico in 1831 and became domiciled in the City of Mexico, where he remained until 1836. In April of that year he purchased the land in question and paid for it three thousand silver dollars. The deed, therefor, was made to Mrs. Laguerenne, who was a native of Mexico and had never resided out of that county. The deed was made to her in trust for the plaintiff, and the reason why it was not made directly to the plaintiff was that the law of the republic of Mexico, as the parties supposed, prohibited a foreigner from holding real estate situate in the republic. On March 2, 1836, the independence of the republic of Texas was declared, and on the 17th of the same month the constitution of the Texan republic was adopted. These facts were, at the time of the execution of the deed to Mrs. Laguerenne, unknown to her and to Hammekin. In April, 1836, after the conveyance to Mrs. Laguerenne, the plaintiff took from her a power of attorney to sell the land and started for Texas.

He was shipwrecked and did not reach his destination until June, 1836, at which date he became a citizen of the republic of Texas, and continued to reside in Texas as a citizen until 1845. In 1838 he paid the land dues on the lands. In 1845 he left Texas and again became a citizen of the United States, and so continued until the commencement of this suit, being at the latter date a citizen of New York. In 1838 Mr. and Mrs. Laguerenne removed to and resided in New Orleans, and while there executed the deed to plaintiff, dated July 28, 1840. In 1840 or 1841 they returned to the City of Mexico, where Mr. Laguerenne died, and where Mrs. Laguerenne, who is still living, resides.

The defendant was in possession of the land in controversy at the commencement of the suit, but showed no title whatever. The constitution of the republic of Texas, section 10, General Provisions (Paschal's Dig., vol. 1, p. 37), declares: "No alien shall hold land in Texas except by titles emanating directly from the government of this republic." Upon this state of facts the court instructed the jury that the deed from Rejon to Mrs. Laguerenne of April 11, 1836, was absolutely void, and conveyed no title to the grantee. In pursuance of this instruction the jury returned a verdict for defendant. The motion for new trial is based on the alleged error of the court in giving such instruction to the jury.

The defendant insists that the instruction was correct, and that the deed was void upon two grounds: 1. Because it was made with the purpose to evade the laws of the state of which Mrs. Laguerenne was a citizen, and where the plaintiff was domiciled; and 2. Because, at the date of the deed the republic of Texas, within which the land was situated, had declared its independence and adopted a constitution, and both the constitution and laws of Texas forbid that an alien should hold lands except by titles emanating directly from the government of the republic.

We will notice these two points in their order. It is claimed by the plaintiff that the law of Mexico at the date of the deed in question did not absolutely prohibit all foreigners from acquiring and holding real estate in Mexico, and to sustain this view he cites the sixth, ninth and tenth sections of the decree of March 12, 1828, found on page 349 of Schmidt's Civil Law of Spain and Mexico.

§ 209. *Where a secret trust is made in a conveyance of land for the benefit of an alien not entitled to hold lands, the trust is void but the conveyance is not.*

In the view we take of the case, it is unnecessary to decide this question. Conceding that the law of Mexico was as claimed by defendant, we think it does not follow that the deed to Mrs. Laguerenne was void. There is no evidence in the case that Rejon, the grantor, knew that the deed was in trust for Hammekin. We think that the deed operated to convey the title out of Rejon, and that the most that could be claimed was that the trust was void. *Hubbard v. Goodwin*, 3 Leigh, 492. The main question in the case is the second, namely, Was the deed in question, by the constitution and laws of the republic of Texas, absolutely void, so as to convey no title to Hammekin? Between the 17th of March, 1836, and the 20th of January, 1840, the laws of Mexico, unless where modified by the constitution and statutes of the republic of Texas, were in force in Texas. *Barrett v. Kelly*, 31 Tex., 481; *Hanrick v. Barton*, 16 Wall., 166.

§ 210. *The common law rule that deeds to aliens are not void, but that they may hold the lands conveyed thereby until "office found," is in force in Texas and Mexico.*

It becomes important, therefore, to determine whether by the Mexican law the deed of Rejon was void and conveyed no title. Upon this point the de-

cided weight of authority is, in our opinion, with the negative of this proposition. The rule of the common law is well settled that an alien may hold real estate against every one, and even against the government, until office found. 1 Com. Dig., tit. Alien, C., 2; *Craig v. Leslie*, 3 Wheat., 589; *Braistreet v. Supervisors of Oneida County*, 13 Wend., 546. That this is the rule of the civil law of Mexico is shown by the following authorities: *Escreche Partidos Hispano Mexicanos*, vol. 2, 696; *Sala Mexicano*, vol. 2, 240; *Ramires v. Kent*, 2 Cal., 558; *The People v. Folsom*, 5 id., 378; *Merle v. Mathews*, 26 id., 478. In the last cited case the court says: "At common law, a conveyance of land to an alien was a cause of forfeiture to the crown of such lands, not only on account of the alien's incapacity to hold them, but likewise on account of his presumption in attempting, by an act of his own, to acquire real property (2 Black. Com., 274), but notwithstanding, until office found, the title remained in him. So far as we are advised, the consequences that might follow this species of infraction of the law were substantially the same under the Mexican law as at common law, and until denouncement the alien grantee of land could hold and possess it as his own property." So in *Racouillat v. Sansevain*, 32 Cal., 386, the court declares that "the question as to the right of a non-resident alien to hold property at common law, and, as we understand it, under the civil law, was a matter between the alien and the government, and could not be called in question in a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased is by an inquest of office, and until office found an alien may hold real estate. Under the civil law, there was some analogous proceeding." In *Osterman v. Baldwin*, 6 Wall., 121, the facts run almost on all fours with the case at bar. In 1839, prior to the admission of Texas into the Union, Baldwin, a citizen of New York and an alien to Texas, bought and paid for some lots in the city of Galveston. It was objected to Baldwin's title, that, when his purchase was made, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. The supreme court held that "the defendants could not object on that ground; that until office found, Baldwin was competent to hold land against third persons; no one has any right to complain in a collateral proceeding if the sovereign does not enforce his prerogative."

§ 211. *Authority of state decisions.*

But it is insisted that the supreme court of Texas has settled the law otherwise, and that this court should follow the courts of Texas, which have established the contrary doctrine as a rule of property in the state. We are cited to the cases of *Holliman v. Peebles*, 1 Tex., 673; *Yates v. Iams*, 10 id., 168; *Clay v. Clay*, 26 id., 24; *La Coste v. Odam*, 26 id., 458, and other cases, to show that the ruling of the supreme court of the state has been that a deed of lands to an alien, under the laws of the republic of Mexico, was absolutely void, and conveyed no title. We should feel bound to follow these decisions of the supreme court of Texas had they not been unsettled by later adjudications. The case of *Barrett v. Kelly*, 31 Tex., 477, is subsequent in date to all the cases cited to show the invalidity of the deed of Rejon, and is entirely inconsistent with those cases; and, though not in words, yet in effect it overrules them. The facts in that case were that Wharton, a citizen of Mexico, on the 13th of April, 1833, executed a conveyance for lands in Texas to J. and W. D. Barrett, who were aliens, and the point was distinctly made in the case that the alienage of the Barretts gave Kelly, who claimed under a junior grant, the better title. But the court sustained the Barrett title, and took the same view of the

Mexican law as was taken by the supreme court of California in the cases above cited. The learned judge who delivered the opinion says: "From 1833 to 1840, the defendants (the Barretts) were liable to have their land divested from them by due process of law, according to the laws of Mexico. There is no allegation that any court or political authority ever adjudicated upon the alienage of defendants while they were such, and there can be as little question that without some process of this kind the rights of the parties to the land were never divested." pp. 481, 482. These remarks of the court and its action in the case are entirely inconsistent with the doctrine in *Clay v. Clay*, *supra*, that the deed to the Barretts was absolutely void, and conveyed no title. In the case of *Settegast v. Schrimpf*, 35 Tex., 341, the supreme court of the state appear to cite with approbation the case of *Osterman v. Baldwin*, 6 Wall., *supra*.

We are of opinion, therefore, that the later and better view of the supreme court of this state is, that under the Mexican law a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by the government for that purpose. Our conclusion is, therefore, that a new trial should be granted on account of the error of the court in instructing the jury that the deed from Rejon to Mrs. Laguerenne was void and conveyed no title.

DUVAL, D. J., concurred.

§ 212. In general.—A person who was born in New York in 1760, and who went to Ireland in 1771, returning to America in 1793, was held not a citizen of the United States. *Hollingsworth v. Duane*,* Wall. C. C., 51.

§ 213. A man cannot throw off his natural allegiance except in assuming some new citizenship. And hence a native of Ireland, who came to the United States and declared his intention to become a citizen, as required by the act of April 14, 1802, but who had not resided in this country for the term required by this act as precedent to the final act of naturalization, was held to be a foreign subject. *Baird v. Byrne*, 3 Wall. Jr., 1.

§ 214. Neither residence in this country without intention to return, nor a declaration of intention, will transform an alien into a citizen of the United States. *Lanz v. Randall*, 4 Dill., 429.

§ 215. Persons born in the United States who have, according to the laws of a foreign country, become subjects of such country, must be regarded as aliens. Such a person cannot become a citizen of the United States again, except in the manner provided for the naturalization of aliens. *Expatriation*,* 14 Op. Att'y Gen'l, 295.

§ 216. An affidavit of alienage, filed by a person for the purpose of removing a case from a state to a federal court, is admissible in another action to prove the alienage of the person making it. *Urtetiqui v. D'Arbel*, 9 Pet., 700.

§ 217. A person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides. In questions on this subject the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, a right of domicile is acquired by a residence even of a few days. *The Venus*, 8 Cr., 379.

§ 218. Where an American removed to England and became a British subject, taking with him his minor son, who never returned here, it must be held that the son ratified the father's choice and act and became an alien. *Inglis v. Sailors' Snug Harbor*, 3 Pet., 123.

§ 219. Rights of aliens.—Comity and courtesy are due to all friendly strangers by the courts and government of the United States. *Taylor v. Carpenter*, 2 Woodb. & M., 18.

§ 220. A right conferred upon foreigners, by treaty, to reside in this country, implies the right to work here for a living. *Baker v. City of Portland*, 5 Saw., 670.

§ 221. An alien cannot be the master of an American vessel under the registry laws; and, though he may in fact hold such authority that but for the registry laws he would be master,

and consequently could have no lien on the vessel for his services, yet, being an alien, he cannot be master, even *de facto*, in such a manner that his claim for a lien on the vessel will be defeated. *The Dubuque*, 2 Abb., 28.

§ 222. The rights of alien friends are entitled to the same protection in our courts as those of our citizens. *Taylor v. Carpenter*, 3 Story, 463; *Taylor v. Carpenter*, 2 Woodb. & M., 10.

§ 223. Alien subjects of a nation with whom the United States are at peace, coming within our territory, and placing themselves, with the consent of the general and state governments, under the safeguard of our laws, are entitled to be protected in their personal rights in like manner as citizens. It is the duty of the executive to see that such laws as may have been passed by congress on the subject be faithfully executed. *Duty of the Executive respecting Alien Residents*,* 3 Op. Att'y Gen'l, 253.

§ 224. Resident aliens suffering violence in their persons or in their houses may prosecute the offenders in a criminal action in the proper state court, and may bring their action for the recovery of damages in the circuit court of the United States in the state in which the injury was committed and the offenders reside. *Remedy of Aliens for Personal Injuries*,* 3 Op. Att'y Gen'l, 253.

§ 225. A foreigner trading in this country is bound to know and obey our revenue laws. *Cambisio v. Maffet*, 2 Wash., 104.

§ 226. "The Burlingame Treaty," approved February 5, 1870, which declares that "Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may be there enjoyed by the citizens or subjects of the most favored nation," does not grant to the Chinese in America any greater privileges than are extended to other aliens. *Territory v. Lee*,* 2 Mont. Ty., 124.

§ 227. A state may prohibit the landing of foreigners upon its shores who are lunatics, idiots, maimed, aged or infirm, or who are incompetent to maintain themselves, or who have been paupers in any other country, unless security shall be given that they shall not become a city, town or state charge. *Passenger Cases (Smith v. Turner)*, 7 How., 410.

§ 228. The right of a state to exclude foreigners from its territory is limited by the right of self-defense. It may exclude convicts, lepers and persons afflicted with incurable disease, paupers, idiots, lunatics and others who from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge. But whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government. *In re Ah Fong*, 3 Saw., 144.

§ 229. It is held that the statute of California which imposes onerous conditions upon persons of particular classes, on their arrival in the ports of the state by vessel, but leaves all other foreigners of the same classes entering the state in any other way, by land from the British possessions or Mexico, or over the plains by railway, exempt from such conditions, is in violation of that provision in the fourteenth amendment that the states shall not deny to any person the equal protection of the laws. *Ibid.*

§ 230. The treaty with China of July 28, 1868, which secures to the subjects of China the right to enjoy the same privileges, immunities and exemptions, in respect to residence or travel within the United States, as may be enjoyed by the citizens or subjects of the most favored nation, implies the right to follow any lawful calling and pursuit which is open to the citizens of any foreign country. State laws forbidding Chinamen from working in a mining claim, either for themselves or others, are therefore void. *Chapman v. Toy Long*, 4 Saw., 28.

§ 231. Under the fifth article of the treaty between the United States and China, adopted July 28, 1868, which recognizes the inalienable right of every man to change his home and allegiance, and under the sixth, which declares that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may be enjoyed by citizens or subjects of the most favored nation, a Chinese subject cannot be prohibited from landing in California, under a statute of that state prohibiting the landing from any foreign country of any passengers who are lunatic, idiotic, deaf, dumb, blind, and certain other classes enumerated, until the owner, master or consignee of the vessel shall execute a bond that they shall not constitute a charge upon the public. *In re Ah Fong*, 3 Saw., 144.

§ 232. The treaty with China of July 28, 1868, gave the Chinese the same rights in this country as the citizens of the most favored foreign countries, and clauses of the state constitution and mining regulations which abridge the privileges thus conferred are null and void. *Chapman v. Toy Long*, 4 Saw., 28. So, also, state statutes. *Baker v. City of Portland*, 5 Saw., 569.

§ 233. Alien patentees.—The fifteenth section of the patent act of July 4, 1806, which provides that a defendant, in an action on the case for the infringement of a patent, may, under a previous notice to that effect, show that the patentee, if an alien at the time the

patent was granted, had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent was issued, and in that case judgment shall be rendered for the defendants with costs, applies only to alien patentees, and not to American patentees who became such as assignees of alien inventors. It is not necessary for an alien patentee to prove that he hawked the patented improvement in order to obtain a market for it, or that he endeavored to sell it to any person. *Tatham v. Lowber*, 2 Blatch., 49.

§ 234. Protection of trade-marks.—Where one of our citizens fraudulently uses the mark of a foreigner to recommend an article of domestic manufacture, he is liable to an action. In this respect there is no difference between a citizen and an alien. *Coffeen v. Brunton*, 4 McL., 516.

§ 235. An alien friend may sue in the federal courts to recover for violations of his trade-mark. *Taylor v. Carpenter*, 2 Woodb. & M., 10.

§ 236. Passports.—It seems that a passport issued by the secretary of state describing a person as a citizen of the United States is not, *per se*, legal and competent evidence of the fact of citizenship. *Urtetiqui v. D'Arbel*, 9 Pet., 699.

§ 237. Enlistment.—The voluntary enlistment of aliens into the military service is valid on common law principles. But under an act of congress, passed in 1815, the enlistment of an alien is considered invalid. Enlistment of Aliens,* 3 Op. Att'y Gen'l, 670.

§ 238. There is nothing in the laws relating to the enlistment of sailors and marines prohibiting the employment of aliens, and an alien enlisted in the naval or marine corps service of the United States is bound to serve to the end of his enlistment. Enlistment of Aliens in the Naval Service,* 4 Op. Att'y Gen'l, 850.

§ 239. The president is not enjoined by law either from enlisting alien enemies in the armies which have been raised or ordered to be raised during a war, or from accepting the voluntary services of such persons. Alien enemies, volunteering their services, which have been accepted by the president, are not entitled to be discharged. *Wilson v. Izard*, 1 Paine, 68.

§ 240. Spanish treaty of 1795.—It is held that, under the Spanish treaty of 1795, intended to give reciprocal and co-extensive privileges to both countries, the word "subjects," as used in the fifteenth article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or inhabitants, when applied to persons owing allegiance to the United States, and includes a foreigner resident in Spain. *The Pizarro*, 2 Wheat., 227.

§ 241. Must obey laws.—Aliens resident within the United States are bound to obey all the laws not immediately relating to citizenship. And they are amenable, equally with citizens, for the infraction of those laws. They are under the protection of the United States while they remain within its limits, and they owe a temporary allegiance in return for that protection. *Carlisle v. United States*, 16 Wall., 147.

§ 242. Holding real estate.—As to the right of an alien to hold real estate, alienage is a disability that cannot be taken advantage of by a private individual, and, as between citizen and alien, only the sovereign power of the state can demand a forfeiture of the alien's property. *Territory v. Lee*,* 2 Mont. Ty., 124. See §§ 156-159.

§ 243. As concerns the rights of aliens to take lands by purchase there exists no difference between alien friends and alien enemies. *Fairfax v. Hunter*, 7 Cr., 620.

§ 244. One person may convey to another lands owned by him in a foreign country, even during the existence of war between the country in which they are residents and citizens and that in which the land is situated. *Airhart v. Massieu*, 8 Otto, 497.

§ 245. The fact that the vendee of lands is an alien does not entitle the vendor to rescind the contract. *Hepburn v. Dunlop*, 1 Wheat., 198.

§ 246. Previous to the 18th of December, 1800, aliens could not hold or transmit real estate in Kentucky, and the statute of that date providing "that any alien, etc., who shall have actually resided within this commonwealth two years," etc., applies to future as well as to past residence. *Beard v. Rowan*, 1 McL., 141; S. C., 9 Pet., 317.

§ 247. Under the laws and decisions of Texas, forfeiture of property for alienage can only take place on proceedings had by the government for that purpose. *Jones v. McMasters*, 20 How., 21.

§ 248. In Texas, while it continued part of the republic of Mexico, a non-resident alien could not acquire, under a sale by a citizen, such an interest in land as to be able to hold it against the government, or to prevent it from being denounced and adjudged to be vacant land, subject to be regranted, but the title would pass out of the vendor, so as to denude him of all estate in the land and consequent dominion over it, and the purchaser would take the title and hold it until, in some official way, the fact of non-residence and alienage was authoritatively established, when the general law would come into operation and restore the property to the public domain. By the sale to the alien the right of the vendor is divested,

but it is to be held by the vendee until the government, upon its own motion, or the denouncement of a private citizen, shall determine to claim the property. *Phillips v. Moore*, 10 Otto, 210.

§ 249. By an act of the legislature of Maryland, passed December 19, 1791, aliens were permitted to take and hold lands by deed or will, and enabled to convey and to transmit the inheritance to their heirs. This act was adopted by congress with reference to the District of Columbia ceded by Maryland, so that an alien may hold, convey and devise lands in that District. Right of Aliens to hold lands in D. C., * 5 Op. Att'y Gen'l, 621.

§ 250. Though an alien is forbidden by the laws of a state to hold lands within it, yet until office found an alien may hold lands as against third persons. No one has a right to complain in a collateral proceeding if the sovereign does not enforce his prerogative. And on the naturalization of such an alien his title becomes absolute and not liable to forfeiture. Such naturalization is retroactive and confirms the previously voidable title. *Osterman v. Baldwin*, 6 Wall., 121.

§ 251. The rule that aliens may hold and convey lands till office found applies to foreign corporations as well as to natural persons. *Farmers' Loan & Trust Co. v. McKinney*, 6 McL., 5.

§ 252. The capacity of British corporations to hold lands in this country did not cease by and in consequence of the revolution. *Society, etc., v. New Haven*, 8 Wheat., 464. See § 59.

§ 253. The property of British corporations in this country was protected from forfeiture for cause of alienage, by the treaty of peace of 1783, in the same manner as the property of British subjects. And the titles of such corporations were confirmed by the treaty of 1794. *Ibid.*

§ 254. The ninth article of the treaty between the United States and Great Britain, made in the year 1794, provides that British subjects holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, shall not be considered as aliens. To avail themselves of this treaty, parties must show that either they or their ancestors held title to the lands which they seek to recover, at the time the treaty was made. *Harden v. Fisher*, 1 Wheat., 300.

§ 255. The act of January 12, 1872, of Montana territory, entitled "An act to provide for the forfeiture to the territory of placer mines held by aliens," is void as in conflict with the organic act of the territory, which forbids it from passing any law interfering with the primary disposal of the soil, and in conflict with the act of congress of May 10, 1872, "to promote the development of the mining resources of the United States," which provides "that nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever." *Territory v. Lee*, * 2 Mont. Ty., 124.

§ 256. It is held that the territory of Montana possesses no inherent sovereign power to forfeit to itself the property of aliens situate within its territorial limits. *Ibid.*

§ 257. The act of congress of 1863, which provides that only citizens and those who have declared their intention to become citizens shall have the right to enter upon and possess the mineral lands in Montana territory, does not give that territory power to confiscate the mineral lands of aliens. *Ibid.*

§ 258. — by devise or descent. — At common law an alien could take lands by purchase, though not by descent. *Fairfax v. Hunter*, 7 Cr., 619. See §§ 158, 163.

§ 259. Though aliens may take land by purchase they cannot take by descent, and on descent cast lands pass to the next of kin, if any, who are not aliens, the same as if no alien issue was in existence. *Orr v. Hodgson*, 4 Wheat., 460.

§ 260. An alien may take land by deed or devise and hold against anyone but the sovereign until office found. *Cross v. De Valle*, 1 Wall., 13. Lands devised to an alien do not escheat until office found. *Taylor v. Benham*, 5 How., 270.

§ 261. An alien enemy may take title in fee to lands by devise, and his title cannot be defeated except by inquest of office or other equivalent proceeding. *Craig v. Bradford*, 3 Wheat., 559.

§ 262. Where the rules of the common law prevail, an alien may take land by devise, and he has the right of possession of such lands until office found. *Fairfax v. Hunter*, 7 Cr., 619; *Conrad v. Waples*, 6 Otto, 289.

§ 263. An alien will hold lands devised to him until the state shall see fit to interpose its prerogative claim, and this rule holds good in equity as well as in law. *Cross v. De Valle*, 1 Cliff., 286.

§ 264. The rule that an alien can take lands by purchase, but not by descent, prevails in equity. *Ibid.*

§ 265. An alien can, in the United States, inherit, with the faculty of carrying away and aliening, every species of personal property, without being liable to any *jus detractus*. But he cannot inherit real or fast property at all. The right of aliens to inherit real property

depends on the laws of the states, and the United States has no power to change these laws. Right of Aliens to Inherit,* 1 Op. Att'y Gen'l, 275.

§ 266. An alien cannot inherit lands in New York. *Inglis v. Sailors' Snug Harbor*, 3 Pet., 126.

§ 267. Under the laws of Mexico subsequent to March 12, 1828, aliens could acquire no rights by descent to lands situated in Mexico. *Middleton v. McGrew*, 23 How., 47.

§ 268. In 1793 a British subject could not inherit lands in the United States from a citizen of the United States. And where one of four parceners was such an alien, the whole was held to descend to the remaining three. *Contee v. Godfrey*, 1 Cr. C., 479.

§ 269. A person born in this country, who left it before the declaration of independence, and never returned here, became thereby an alien and incapable of taking lands by descent in this country. The right to inherit depends upon the existing state of things at the time of descent cast. *Prima facie*, the character in which native Americans, born before the declaration of independence, are to be considered, will depend upon the situation of the party and the election made at the date of the declaration of independence, according to our rule, or at the time of the treaty of peace in 1783, according to the rule as adopted by Great Britain. The presumption arising from continued residence in this country, after such declaration, is removed by showing that the person in question adhered to British authority, and removed from and never returned to this country, before the evacuation of this country by British troops. *Inglis v. Sailors' Snug Harbor*, 3 Pet., 121.

§ 270. A., in 1796, conveyed a lot of ground to B. in fee, rendering an annual rent, to be paid to the heirs and assigns of C., a citizen of the United States. In the year 1785 C. died, leaving as his only heir at law and next of kin a sister who was an alien, born in Scotland, and had always resided there. *Held*, that the executor of A. might recover the rents for the use of the heir, notwithstanding her alienage. *Wise v. Resler*, 2 Cr. C. C., 182.

§ 271. A subject of Great Britain, born before the declaration of independence, cannot inherit lands in this country. The doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance at the time of descent cast. *Antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown; but the same reason does not extend to the *antenati* of Great Britain, because they never owed allegiance to our government. *Dawson v. Godfrey*, 4 Cr., 321.

§ 272. Where a statute provides that a "foreigner may, by deed or will, . . . take and hold lands," etc., it is held that a foreigner who becomes a citizen is no longer a foreigner within the view of the act. *Spratt v. Spratt*, 1 Pet., 348.

§ 273. So it is held that lands acquired by a person before being naturalized were acquired by him as an alien, and such lands descended to his heirs under the statute. *Ibid*.

§ 274. The treaty of peace with Great Britain of 1783, and the treaty of 1794, providing that British subjects holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, shall not be considered as aliens, each provided only for titles existing at the time. And hence the title of a British subject who acquired it after the treaty of 1783, and died before the signature of 1794, is not protected by either of those treaties. *Blight v. Rochester*, 7 Wheat., 535.

§ 275. Alienage being fully proved, citizenship will not be presumed from lapse of time since the arrival of the person to this country, and since his first acquisition of real estate, where the law of the state requires, as indispensable to his citizenship, that he should take the oath of fidelity to the commonwealth in a court of record. *Ibid*.

§ 276. British subjects, born before the revolution, are equally incapable with those born after that event, of inheriting or transmitting the inheritance of lands in this country, except there be some treaty providing the contrary. *Ibid*.

§ 277. The title of plaintiff's lessor to recover depended upon the question whether she could claim as one of the co-heirs of her deceased uncle, her father being an alien and still alive at the commencement of the present suit. The facts were that Wm. McCreery died possessed of lands in Maryland, leaving a will, by which the lands in controversy were devised to those under whom defendant now claims. Deceased left no children, but only a brother, who was an alien, whose daughters were native-born Americans, and in whose behalf this suit was brought to recover their portion of the land as the heirs of their deceased uncle. The court, however, decided that, though under the statute 11 and 12 William III., chapter 6, in force in Maryland, the disability of claiming title by descent through an alien ancestor was removed, still such statute could not be made to apply to the case of a living ancestor, so as to create a title by heirship, where none would exist by the common law, though the ancestor were a natural-born subject. *McCreery v. Somerville*, 9 Wheat., 354.

§ 278. The statute 11 and 12 William III. is not in force in New York, and, therefore, a citizen cannot inherit collaterally from another citizen when he must trace his pedigree through *mediate* alien ancestors; the court, however, holding that where the descent was

immediate, as between brothers, one could inherit from the other, without regard to alien disabilities; and the fact that their father was an alien could not be set up as a bar to the recovery. *Levy v. McCartee*, 6 Pet., 102. The plaintiff, in a suit to recover back a "succession tax," imposed by congress by the act of June 30, 1864, and the act of July 18, 1866, on every "devolution of title to any real estate," is estopped, by receiving the value of the devise in partition proceedings, from setting up as a ground of recovery that he is an alien, and that, by the law of the state where the property is situated, a devise to an alien is void. *Scholey v. Rew*, 23 Wall., 831.

§ 279. Suits by.—Alienage is no bar to a suit for lands in Texas if the title to the lands is good; and the title is good in an alien in such a case as against third persons till office found and a judgment of forfeiture. *Airhart v. Massieu*, 8 Otto, 499. See §§ 159-161.

§ 280. Foreigners, even transiently here, may sue each other and our own citizens in courts of common law, and courts of admiralty will entertain such suits, when, in their discretion, circumstances make it necessary or highly convenient that they should do so. *Lorway v. Lousada*, 1 Low., 78.

§ 281. An alien, and subject of a country having treaty relations with the United States, has a right to invoke the aid of the federal tribunals for his protection, when his rights, guaranteed by the treaty, or the constitution, or any law of congress, are in any respect invaded. *In re Ah Fong*, 8 Saw., 144.

§ 282. The fact that wrongs done by Englishmen to foreigners are not redressed in English courts affords no reason why wrongs done by our citizens to aliens should not be redressed in the federal courts, especially as the right to maintain suits in the federal courts is conferred upon aliens by the constitution and laws of the United States. *Taylor v. Carpenter*, 2 Woodb. & M., 9.

§ 283. An alien enemy has no *persona standi in judicio*; that is, he cannot be heard as plaintiff in a court of justice. *Johnson v. 18 Bales*,* *Van Ness*, 45; *Mumford v. Mumford*,* 1 Gall., 366.

§ 284. An alien may sue in the circuit court of the United States, in the state in which the defendant resides. *Gassies v. Ballou*, 6 Pet., 761.

§ 285. A circuit court of the United States has jurisdiction of a suit by a citizen against a foreigner, though he is a duly admitted foreign consul, his consular office only protecting him from suit in a state court. *St. Luke's Hospital v. Barclay*, 8 Blatch., 265.

§ 286. Resident aliens, as well as non-resident, may sue in the federal courts. *Breedlove v. Nicolet*, 7 Pet., 431.

§ 287. The courts of the United States have no jurisdiction of cases between aliens. *Montalet v. Murray*, 4 Cr., 46.

§ 288. A corporation aggregate is not a citizen in a sense that will enable it to maintain suits in the federal courts. *Bank of United States v. Deveaux*, 5 Cr., 86.

§ 289. An alien mortgagee may foreclose his mortgage in the federal courts, because the proceeding is a personal remedy to secure a debt and not an action to obtain the possession of land. *Hughes v. Edwards*, 9 Wheat., 496.

§ 290. An alien holding lands in a state by virtue of a law of the state has a right to maintain a suit in the federal court for a violation of his rights of property, whether the law under which he holds is general or special. *Bonaparte v. Camden & Amboy R. Co.*, Bald., 216.

§ 291. During the war of the rebellion a British subject made sundry contracts with the Confederate government relative to cotton and other property, and furnished certain supplies and munitions of war. *Held*, that as this was not an act of treason against the United States, having been committed by an alien, the amnesty of the president extending pardon to all traitors, and conferring on them the right to sue for captured and abandoned property, did not embrace such British subject. *Young v. United States*, 7 Otto, 68.

§ 292. Any person, whether citizen or not, whose property has been seized and sold, may avail himself of the remedy given by the "Abandoned or Captured Property Act." A citizen of Great Britain residing in Charleston during the rebellion, who did not give aid or comfort to the rebellion, but remained entirely neutral, was held entitled to avail himself of that act. *Byrnes v. United States*,* 8 Ct. Cl., 195.

§ 293. Under the act of July 27, 1868, providing that *aliens* cannot maintain suits against the United States, unless they are subjects or citizens of a foreign government which accords to citizens of the United States the right to prosecute claims against such government in its courts, a subject of Prussia may maintain his suit in the court of claims against the United States, although, by the law of Prussia, foreigners are required to give security for costs in suits against the state. *Brown v. United States*,* 5 Ct. Cl., 571.

§ 294. Aliens may prosecute claims against the British government by the proceeding known as the "petition of right." British subjects may, therefore, maintain suits in the

court of claims against the United States to recover the proceeds of captured property, under the act of July 27, 1868, confining the right of aliens to maintain suits for captured property to citizens or subjects of such foreign governments as extend to our citizens a reciprocal right. *United States v. O'Keefe*, 11 Wall., 178; *Carlisle v. United States*, 16 Wall., 147.

§ 295. A resident and subject of Great Britain, engaged during the rebellion in running the blockade of the ports in the insurrectionary districts, and in importing and exporting merchandise, not munitions of war, and who purchased large quantities of cotton in the south, by his agent there, was held entitled to maintain his claim against the United States for the capture of the cotton, under the right secured to him by our statute of July 27, 1868, in exchange for the right his sovereign gives to our citizens to sue him in his courts. *Collie v. United States*,* 9 Ct. Cl., 481.

§ 296. Subjects of France possessing the right to sue the French government for real and personal property detained by that government, and the right of American citizens to sue the French government for real and personal property detained by it, being the same as those enjoyed by French citizens, subject only to giving security, subjects of France are within the proviso of the act of July 27, 1868, saving to aliens the right to prosecute their claims against the United States, if they are subjects or citizens of a government which accords to the citizens of the United States a reciprocal right. And hence citizens and residents of France, who maintained strict neutrality during the rebellion, may recover their property captured by the United States at Richmond *jure belli*. *Rothschild v. United States*,* 6 Ct. Cl., 204. A French subject, resident in this country, may likewise recover the proceeds of his cotton seized by the United States during the rebellion, if he has maintained his neutrality and not given aid or comfort to the rebellion. *Dauphin v. United States*,* 6 Ct. Cl., 221.

§ 297. The Civil Code of the Kingdom of Italy provides that "In suits pending before the judicial authority, between private persons and public administration, the proceedings shall always take place formally and at regular session." Another section of the same code declares that "The alien is admitted to enjoy all the civil rights granted to the citizen." These provisions establish the right of an Italian citizen to maintain a suit in the court of claims within the meaning of the act of July 27, 1868, which prohibits subjects of a foreign government from maintaining a suit for captured property unless the right to prosecute suits against such government in its courts is reciprocal and extends to citizens of the United States. *Fichera v. United States*,* 9 Ct. Cl., 257.

§ 298. By the unwritten law of Belgium the government sues and is sued in the ordinary courts of justice in the same manner as a private individual. There is no written law regulating suits against the government either by citizens or aliens, but by the unwritten law and custom aliens may sue the government in the same manner as citizens of Belgium. The citizens of that country are therefore within the proviso to the act of July 27, 1868, allowing aliens to prosecute their claims against the United States in the court of claims, provided they are subjects or citizens of a government which extends to the citizens of the United States a reciprocal right. *De Give v. United States*,* 7 Ct. Cl., 517.

§ 299. Alien enemies.—A contract made with an alien enemy during war is utterly void. *The Cargo of the Ship Emulous*, 1 Gall., 563.

§ 300. Though, as a general rule, all contracts made with an alien enemy are void, yet the master of a vessel may hypothecate it and its cargo to obtain means to return home, though his voyage has been broken up by capture by the enemy. *Crawford v. The William Penn*, 3 Wash., 491.

§ 301. It seems that contracts with an alien enemy are lawful if made in a trade carried on under license of the government, and that, too, whether arising directly or collaterally out of such licensed trade; or if the enemy with whom the contract is made be in the hostile country by license of that government; or if the contract is a ransom bond, or is made by prisoners of war for subsistence. *Ibid*.

§ 302. The national character of a person is to be determined by that of his domicile; if that be neutral, he acquires a neutral character; if otherwise, he is affected with the enemy's character. But the property of a person may acquire a hostile character, independent of his own peculiar character derived from residence. *The San Jose Indiano*, 3 Gall., 267.

§ 303. A state may, during war, confiscate debts due from its citizens to an alien enemy. *Ware v. Hylton*, 3 Dal., 226, 262.

§ 304. Where a debt of an alien enemy has been confiscated by a state during the continuance of a war, such confiscation is valid and obligatory, within the limits of the state, to bar any suit for the recovery of the debt, so long as the confiscation remains unimpeached by subsequent sufficient authority. *Ibid*.

§ 305. The right to confiscate debts due from citizens of the various states to British subjects was not, during the revolutionary war, delegated by the states to congress. *Ibid*.

§ 306. It is held that the act of July 6, 1793, respecting alien enemies, authorized the pres-

dent, after war had been declared by the United States against Great Britain, to direct the confinement and restraint of alien enemies within the United States, not only for the purpose of removing them from the United States, but for the purpose of regulating and controlling their residence here. He was authorized to establish any such rules and regulations respecting such enemies as he should think necessary for the public safety. *Lockington v. Smith*, Pet. C. C., 466.

§ 307. Shipments made by citizens of the United States, actually domiciled in the enemy's country at the breaking out of a war, partake of the nature of enemy trade, and as such are subject to belligerent capture. It is not material that the commander of the private armed vessel making the capture is an alien enemy. *The Mary and Susan*, 1 Wheat., 46.

§ 308. Residence in an enemy's country long enough to acquire a domicile is conclusive of a person's national character, so far as to invest him with the disabilities of an enemy. *United States v. Schooner El Telegrafo*, 1 Newb., 388.

§ 309. Suits against an alien enemy being permitted in our courts, such alien enemy is entitled to defend suits therein against him. *McVeigh v. United States*, 11 Wall., 237.

§ 310. An alien enemy residing here by permission of the government of the United States may maintain a personal action. Such permission may be presumed from residence, although the person has not reported himself according to a proclamation of the president. *Otteridge v. Thompson*, 2 Cr. C. C., 108.

§ 311. An alien enemy residing in this country without safe conduct or without being under the protection of the government cannot sue in our courts, either by himself or by an agent, for he cannot do indirectly what he could not do directly. *Johnson v. Thirteen Bales, etc.*, of Goods, 2 Paine, 643.

§ 312. Alien enemies cannot sue, nor can they be heard as claimants, in the courts of the belligerent captors. All the inhabitants of the insurgent states were, during the rebellion, *quasi* enemies, but not alien enemies to the United States. The act of congress of 1831, and the president's proclamation of the same year, having recognized this as an organized insurrection, and the Confederate government having ordered all who did not adhere thereto to leave those states under the penalty of being treated as alien enemies, the rule forbidding alien enemies to sue was applicable to the citizens of the insurrectionary states. *United States v. 100 Barrels of Cement*,* 12 Am. L. Reg., 735.

§ 313. An alien enemy is entitled to appear as claimant and contest the allegations in a libel against his property praying its condemnation as having been forfeited to the United States under the acts of August 6, 1861, and July 17, 1862. These acts provided that the proceedings for the condemnation of property employed in aiding insurrection or rebellion should conform to the proceedings in admiralty cases, and the principle that an alien enemy has no standing in court has no application in admiralty cases. *United States v. 1,756 Shares of Capital Stock*, 5 Blatch., 281.

§ 314. Alien enemies, commorant in the enemy country, cannot be heard in a prize court. *Johnston v. 13 Bales and 13 Cases of Goods*,* Van Ness, 45.

§ 315. If claimants in a prize court be shown or admitted to be alien enemies, they must be presumed and taken to be in the ordinary and usual situation of alien enemies, to wit, in their own country, or, at any rate, out of this. They cannot be here without a letter of safe conduct, or by the permission of the government. Once acknowledged to be alien enemies, they cannot be presumed to be here and to have that permission. That presumption would be unnatural and violent. If they have either, they ought to show it if they mean to make it the foundation on which they assert a right, or claim a privilege. On general principles, as enemies, they have no rights, no privileges, and if they mean to be exempted from the general rule, from the general operation and effect of a state of war, they must show themselves to be within the stipulated or customary exceptions. *Johnson v. Thirteen Bales, etc.*, of Goods, 2 Paine, 640.

§ 316. Where a native of one country becomes domiciled in another, and war breaks out between the countries, although such person may not be an enemy in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the trade of the enemy as is connected with his residence. It is found adhering to the enemy. *The Venus*, 8 Cr., 280.

§ 317. The presumption from lapse of time that a bond has been paid can arise during a state of war in which the plaintiff is an alien enemy, but it seems that in case of an old bond, so long a time after the removal of the disability is not necessary to raise the presumption as would be required if the bond had borne date at the time of such removal. *Dunlop v. Ball*, 2 Cr., 184.

§ 318. The rule that interest is not recoverable on debts between alien enemies, during war of their respective countries, applies only when the money is paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the

debtor, the latter cannot justify his refusal to pay the demand and the interest which it bears. *Ward v. Smith*, 7 Wall., 447.

§ 819. It is held that a person who was a citizen of Texas at the breaking out of the war, and who owed no allegiance to any foreign country, is to be considered as a resident of the enemy's country, and therefore has no *persona standi* in court as a claimant of property seized as a prize. *The Peterhoff*, Bl. Pr. Cas., 463.

§ 820. A citizen of a state in rebellion cannot appear as claimant in a court of the United States to contest the seizure of his property as a prize. *The D. Sargeant*, Bl. Pr. Cas., 576.

§ 821. The rebellious states of the Union are treated as public enemies, and no claim of any citizen or subject of an enemy's country can be received on the seizure of property, and every resident of a hostile country is regarded in such a court as a citizen or subject. His property, when libeled at the suit of the captors or their government, is condemned, without his being heard. *United States v. Steamboat Isaac Hammett*, * 2 Pittsb. R., 338.

§ 822. Under the provisions of the act of congress of July 13, 1861, the property of the resident of an insurrectionary state was subject to seizure and condemnation, independent of the fact of his loyalty. Having the misfortune to be an integral part of an insurrectionary state, he took his *status* from it, and was treated as a public enemy. *United States v. Steamboat Allegheny*, * 2 Pittsb. R., 437.

§ 823. Under the act of July 17, 1862, called the Confiscation Act, an alien enemy cannot maintain an action for property seized under that act by the government. *Elgee v. Lovell*, 1 Woolw., 102.

§ 824. An alien who has traded within the lines of the Confederate government during the war cannot sue the United States for the recovery of property seized by the government. *Young v. United States*, 7 Otto. 67.

§ 825. It is held that aliens resident in this country during the rebellion and engaged in the manufacture of saltpetre, which they sold to the Confederates, knowing that it was to be used in the manufacture of gunpowder for the prosecution of the war of the rebellion, became participants in the treason of the Confederates, and thus gave aid and comfort to the rebellion. *Carlisle v. United States*, 16 Wall., 147.

§ 826. The proclamation of the president, issued December 25, 1838, granting "unconditionally and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States or of adhering to their enemies during the civil war," etc., embraced within its provisions aliens resident in this country. *Ibid.*

§ 827. *Neutrals*.—A neutral or subject found residing in a foreign country is presumed to be there *animo manendi*, and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. *The Venus*, 8 Cr., 279.

§ 828. A Spanish subject who came to New York for the purpose of carrying on trade between the United States and Spanish provinces was held, after the war broke out between Spain and Great Britain, to be an American merchant, although his trade with the Spanish provinces could only be carried on by a subject of Spain. His neutrality was determined by his residence and trade, whether general or limited, and not on the kind of trade. *Livingston v. Maryland Ins. Co.*, 7 Cr., 536.

§ 829. The "non-intercourse acts" of congress, interdicting trade between the loyal and disloyal states, did not prohibit a non-resident alien, belonging to a neutral power, from appointing an agent in the insurrectionary districts for the purchase of cotton. The title to the cotton so purchased passed to the alien, and he is entitled to the relief afforded by the "abandoned or captured property act" for the recovery of the proceeds of the cotton seized and sold by the United States. *La Plante v. United States*, * 6 Ct. Cl., 311.

§ 830. A citizen of Switzerland, resident in the United States, who, during the war, gave no aid or comfort to the rebellion, and did no act inconsistent with his character as a resident neutral, may maintain his claim against the United States for his cotton seized and sold by the government. The laws of Switzerland providing that a private citizen may maintain an action against the government, and our treaty with that republic providing that citizens of the United States "shall be at liberty to prosecute and defend their rights before the courts of justice in the same manner as native citizens," a citizen of the Swiss Confederation is a citizen "of a foreign government which accords to the citizens of the United States the right to prosecute their claims against such government in its courts," within the act of July 27, 1868. *Lobsinger v. United States*, * 5 Ct. Cl., 687.

§ 831. An alien, resident in the United States, who was neutral during the rebellion, and gave no aid or comfort to the rebellion, may recover his property captured by the United States, if he is otherwise within the protection of the statute provided for that purpose. *Waltjen v. United States*, * 3 Ct. Cl., 283.

§ 832. A foreigner, resident in Charleston, under the protection of his consul, who is shown

to have been neutral, and to have given no aid to the rebellion, may recover the proceeds of his cotton seized by the United States. *Bruning v. United States*, * 3 Ct. Cl., 242.

§ 833. A non-resident alien need not expose himself or his property to the dangers of foreign war. He may trade with both belligerents or either. By doing so he commits no crime. His acts are lawful in the sense that they are not prohibited. So long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure in his person and property. If he is neutral in fact as well as in name, he runs no risk. But as soon as he steps outside of actual neutrality, and adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other. To the extent of his acts of hostility and their legitimate consequences, he submits himself to the risk of the war into whose presence he voluntarily comes. If he breaks a blockade or engages in contraband trade, he subjects himself to the chances of the capture and confiscation of his offending property. If he thrusts himself inside the enemies' lines, and for the sake of gain acquires title to hostile property, he must take care that it is not lost to him by the fortune of war. While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as enemy's property. He has the legal right to carry, to sell and to buy; but the conquering belligerent has a corresponding right to capture and condemn. He enters a race of diligence with his adversary, and takes the chances of success. The right of the two are in law equal. The one may hold if he can, and the other seize. *Young v. United States*, 7 Otto, 63.

IV. NATURALIZATION.

SUMMARY — *Who may become citizens*, § 334. — *Good moral character*, § 335. — *Refusal working a hardship*, § 336. — *Married women*, § 337. — *Record of proceedings; effect of judgment*, §§ 338-341.

§ 334. White persons, within the meaning of § 2167, Revised Statutes, entitled to naturalization. Half breeds may not be naturalized. *In re Camille*, §§ 342-344. Neither may an alien enemy. *Ex parte Newman*, § 345. Nor are Mongolians entitled to become citizens of the United States. *In re Ah Yup*, §§ 346-349. See § 391.

§ 335. An alien, before being naturalized, must prove that, during his residence in this country, he has been a man of "good moral character;" what constitutes the latter considered; also the prospective and retrospective effect of a pardon upon a man's moral character. *In re Spenser*, §§ 350-354.

§ 336. On an application to be admitted to citizenship, the fact that a refusal would operate as a hardship will not be considered. *Ibid*.

§ 337. An alien woman possessing the qualifications entitling her to naturalization, and who marries a citizen, thereby becomes a citizen of the United States. Requisite qualifications of race, residence, etc., enumerated and considered. *Leonard v. Grant*, §§ 355-358.

§ 338. The time of the arrival of the alien in this country need not be mentioned in the certificate of his report to a court of record; other evidence thereof is admissible. By the act of 1816, such recital, however, was made necessary; but the decree of a court of record naturalizing an alien is conclusive of the same. *Spratt v. Spratt*, §§ 359-363.

§ 339. The validity of a judgment of a court of record, admitting an alien to the rights of citizenship, cannot be impaired by proof of inaccurate recitals. *In re McCoppin*, § 364. And the administration of the oath of allegiance to an alien, by a court of record, amounts to a judgment that such alien is a citizen of this country, and is conclusive. *Campbell v. Gordon*, §§ 365, 366. See § 380.

§ 340. Applicants for citizenship are not required to see that the proceedings in regard to their naturalization are recorded; neither are they responsible for want of form in the record. What will constitute a sufficient record of naturalization considered. Docket entries, if regarded by the court as recorded, are admissible as record evidence. *In re Coleman*, §§ 367-373.

§ 341. Even if there is such a defect in the record of the court issuing a certificate of naturalization as to make the certificate one that was unlawfully issued or made, the person using such certificate would not be guilty of an offense, under § 5426, Rev. Stat., unless when he used it he knew that it was unlawfully issued or made. *Ibid*.

[NOTES. — See §§ 374-408.]

IN RE CAMILLE.

(Circuit Court for Oregon: 6 Sawyer, 541-544. 1880.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—Frank Camille petitions to be admitted to become a citizen of the United States under section 2167 of the R. S., as an alien who has resided in the United States the three years next preceding his arriving at the age of twenty-one years, and without having made the declaration of his intentions in that respect required in the first condition of section 2165 of the R. S. From the evidence it appears that the applicant was born at Kamloops, in British Columbia, in 1847, and at the age of seventeen came to Oregon, where he has ever since resided, and that he is otherwise entitled to admission, if he is a “white person” within the meaning of that phrase, as used in section 2167 of the R. S., as amended by the act of February 18, 1875 (18 Stat., 318). His father was a white Canadian and his mother an Indian woman of British Columbia, and he is therefore of half-Indian blood.

§ 342. A “white person,” within the meaning of section 2167 (Rev. Stat.), is one of the Caucasian race, and does not include one who is half Caucasian and half Indian.

In *In re Ah Yup*, 5 Saw., 155 (§§ 346-349, *infra*), it was held by Mr. Justice Sawyer that the words “white person,” as used in the naturalization laws, mean a person of the Caucasian race, and do not include one who belongs to the Mongolian race. In the course of the opinion he says: “Words in a statute, other than technical terms, should be taken in their ordinary sense. The words ‘white person,’ as well argued by petitioner’s counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words, in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly so used in the literature of the country as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words ‘white person’ would intend a person of the Caucasian race.”

§ 343. Indians are not “white persons.”

For the same reasons it appears that the words “white person” do not and were not intended to include the red race of America. Chancellor Kent, in considering this subject (2 Com., 72), says that “it may well be doubted” whether “the copper-colored natives of America or the yellow or tawny races of the Asiatic” “are ‘white persons’ within the purview of the law.” In all classifications of mankind hitherto, color has been a controlling circumstance, and for that reason Indians have never, ethnologically, been considered white persons or included in any such designation. From the first, our naturalization laws only applied to the people who had settled the country—the Europeans or white race,—and so they remained until in 1870 (16 Stat., 256; R. S., sec. 2169), when, under the pro-negro feeling generated and inflamed by the war with the southern states and its political consequences, congress was driven at once to the other extreme, and opened the door not only to persons of African descent, but to all those “of African nativity”—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the “dark continent,” while withholding it from the intermediate and much better qualified red and yellow races.

However, there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to immigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst and at our doors, and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them. The conclusion being that an Indian is not a "white person" within the purview of the naturalization laws, the question arises, What is the *status* in this respect of the petitioner, who is a person of one-half Indian blood? In Louisiana, if the proportion of African blood did not exceed one-eighth, the person was deemed white; and this was the rule in the colonial code *noir* of France, and approved in Carolina. 2 Kent, 72, note b. In Ohio it has been held that a person nearer white than black or red was a white person, within the provision in the state constitution of 1802 limiting the privilege of voting to the "white male inhabitants," etc., but that where the colored blood was equal to or preponderated over the white blood, the person was not white. In *Jeffries v. Ankeny*, 11 Ohio, 372, it was held that the offspring of a white man and a half-breed Indian woman was a voter; "that all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of the white citizen." See *Gray v. State*, 4 id., 353; *Thacker v. Hawk*, 11 id., 377; *Lane v. Baker*, 12 id., 237.

§ 344. *Half-breeds are not entitled to citizenship.*

Upon these authorities, and none other have come under my observation, the petitioner is not entitled to be considered a white man. As a matter of fact he is as much an Indian as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither. The power to say when and under what circumstances aliens may become American citizens belongs to congress. Citizenship is a privilege which no one has a right to demand; and in construing the acts of congress upon the subject of naturalization, the courts ought not to go beyond what is plainly written. The petitioner is not a "white person" in fact, nor can he be so considered upon any reasonable construction of the statute or within any rule that has ever been promulgated on the subject. The application is denied.

EX PARTE NEWMAN.

(Circuit Court for Massachusetts: 2 Gallison, 11, 12. 1813.)

§ 345. *An alien enemy cannot be naturalized.*

Opinion by STORY, J.

The petitioner is an alien enemy, and therefore has no legal standing in court to acquire even inchoate rights. We have so held on a former application. The act of congress of 30th of July, 1813, chapter 135, on which this motion is founded, does not apply. That act enables persons, who before the war had made the preparatory declaration, to become citizens in the same manner as if war had not intervened. But it confers no privileges on other persons. The petitioner, therefore, cannot exempt himself from the general disability. Motion denied.

DAVIS, D. J., concurred.

IN RE AH YUP.

(Circuit Court for California: 5 Sawyer, 155-160. 1878.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—Ah Yup, a native and citizen of the empire of China, of the Mongolian race, presented a petition in writing, praying that he be permitted to make proof of the facts alleged, and upon satisfactory proof being made, and his taking the oath required in such cases, he be admitted as a citizen of the United States. The petition stated all the qualifications required by the statute to entitle the petitioner to be naturalized, provided the statute authorizes the naturalization of a native of China of the Mongolian race. The petitioner was represented by B. S. Brooks, a counselor of this court. This being the first application made by a native Chinaman for naturalization, the members of the bar were requested by the court to make such suggestions as *amici curiæ* as occurred to them upon either side of the question; whereupon S. Heydenfeldt, Jr., argued the case very fully in opposition to the application. Suggestions were also made by other members of the bar present. The only question is, whether the statute authorizes the naturalization of a native of China of the Mongolian race.

In all the acts of congress relating to the naturalization of aliens, from that of April 14, 1802, down to the Revised Statutes, the language has been "that any alien, being a free white person, may be admitted to become a citizen," etc. After the adoption of the thirteenth and fourteenth amendments to the national constitution, the former prohibiting slavery, and the latter declaring who shall be citizens, congress, in the act of July 14, 1870, amending the naturalization laws, added the following provision: "That the naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent." 16 Stat., 256, sec. 7. Upon the revision of the statutes, the revisors, probably inadvertently, as congress did not contemplate a change in the laws in force, omitted the words "white persons;" section 2165 of the Revised Statutes, being the section conferring the right, reading: "An alien may be admitted to become a citizen," etc., etc. The provision relating to Africans, of the act of 1870, is carried into the Revised Statutes in a separate section, which reads as follows: "The provisions of this title shall apply to aliens of African nativity, and to persons of African descent." Section 2169. This section was amended by the "Act to correct errors and to supply omissions in the Revised Statutes of the United States," of February 18, 1875, so as to read: "The provisions of this title shall apply to aliens, *being free white persons, and to aliens* of African nativity, and to persons of African descent." R. S., p. 1435, first ed.; 18 Stat., 318. And so the statute now stands. The questions are: 1. Is a person of the Mongolian race a "white person" within the meaning of the statute? 2. Do those provisions exclude all but white persons and persons of African nativity or African descent?

§ 346. *Rule of construction of statutes.*

Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words, in this country at least, have undoubtedly

acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race.

§ 847. *Classification of races.*

In speaking of the various classifications of races, Webster in his dictionary says: "The common classification is that of Blumenbach, who makes five. 1. The *Caucasian*, or white race, to which belong the greater part of the European nations and those of western Asia; 2. The *Mongolian*, or yellow race, occupying Tartary, China, Japan, etc.; 3. The *Ethiopian* or negro [black] race, occupying all Africa, except the north; 4. The *American*, or red race, containing the Indians of North and South America; and 5. The *Malay*, or brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnæus makes four divisions, founded on the color of the skin: "1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and 4. African, black." Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race." See *New American Cyclopedia*, title "Ethnology."

Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term "white person," as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that congress intended to include in the term "white person" any other than an individual of the Caucasian race, I do find much in the proceedings of congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word "white" from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every senator who spoke upon the subject assumed that they were then excluded by the term "white person," and that the amendment would admit them, and the amendment was advocated on the one hand, and opposed on the other, upon that single idea. Senator Morton, in the course of the discussion, said: "This amendment involves the whole Chinese problem. . . . The country has just awakened to the question and to the enormous magnitude of the question, involving a possible immigration of many millions, involving another civilization; involving labor problems that no intellect can solve without study and time. Are you now prepared to settle the Chinese problem, thus in advance inviting that immigration?" *Congressional Globe*, part 6,

1869-70, p. 5122. Senator Sumner replied: "Senators undertake to disturb us in our judgment by reminding us of the possibility of large numbers swarming from China; but the answer to all this is very obvious and very simple. If the Chinese come here they will come for citizenship, or merely for labor. If they come for citizenship then in this desire do they give a pledge of loyalty to our institutions, and where is the peril in such vows? They are peaceful and industrious; how can their citizenship be the occasion of solicitude?" *Id.*, 5155. Many other senators spoke *pro* and *con.* on the question, this being the point of the contest, and these extracts being fair examples of the opposing opinions. *Id.*, 5121-5177.

§ 348. *A native of China of the Mongolian race is not entitled to become a citizen of the United States under the operation of the Revised Statutes as amended in 1875.*

It was finally defeated, and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear, from these proceedings, that congress retained the word "white" in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. Again, when it was found that the term "white person" had been omitted in the Revised Statutes it was restored by the act passed "to correct errors and to supply omissions" in the Revised Statutes before cited. Upon reporting this bill, Mr. Poland, chairman of the committee, explained the various amendments correcting errors, and upon the amendment to insert the words "being free white persons," said: "The original naturalization laws only extended to free white persons." . . . A very few years since [in 1870] Mr. Sumner, of Massachusetts, then in the senate, moved to strike out the word "white" from the naturalization laws, and it was objected to on the ground that that would authorize the naturalization of that class of Asiatic immigrants that are so plentiful on the Pacific coast. After considerable debate, instead of striking out the word "white," it was provided that the naturalization laws should extend to Africans and persons of African descent. After explaining the omission in the Revised Statutes, he adds: "The member of our committee who had this chapter on the naturalization laws to examine as a sub-committee, failed to notice this change in the law, or it would have been brought before the house when the revision was adopted." *Congressional Record*, vol. 4, part 2, Session 1875, p. 1081.

§ 349. *A Mongolian is not a white person within the meaning of the acts of congress on naturalization.*

Upon this report the amendment was made as it now stands in the statute. Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of congress.

The second question is answered in the discussion of the first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in section 2165 than where it is found in section 2169. But the purpose is clear. It was certainly intended to have some operation or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and as all white aliens and those of the Afri-

can race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude unless it be the Chinese. It follows that the petition must be denied, and it is so ordered.

IN RE SPENSER.

(Circuit Court for Oregon: 5 Sawyer, 195-201. 1878.)

Opinion by DEADY, J.

STATEMENT OF FACTS.— William Spenser, an alien, applies to “be admitted to become a citizen of the United States,” under section 2165 of the Revised Statutes. From the evidence it satisfactorily appears that he duly declared his intentions, and has continuously resided in the United States — the state of Oregon — at least since 1870. He is therefore entitled to be admitted to citizenship if it appears that, during such residence, “he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed towards the good order and happiness of the same.” Sec. 2165, *supra*, sub. 3. The proof shows that the applicant has resided in Oregon, near The Dalles, for more than eight years; that in 1876, and after he had declared his intentions, he was duly convicted in the circuit court of the state for Wasco county of the crime of perjury, committed by swearing falsely as a witness in a case in said court, in which he was a party, and sentenced to five years’ imprisonment in the penitentiary; that, after being in prison fifteen months and eight days, he was unqualifiedly pardoned by the governor upon, as the pardon recites, the petition of sundry citizens of Wasco county, and because it appeared that there were doubts as to his guilt, and unless he was released from prison there was danger that he would lose his homestead.

§ 350. *What is “behavior as a man of good moral character” considered with reference to naturalization laws.*

Upon this state of facts two questions arise: 1. Has the applicant “behaved as a man of good moral character” within the meaning of the statute; and 2. What is the effect of the pardon in this respect? In the first place, during what time is the behavior of the applicant open to consideration? The statute — *supra* — declares that “it shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, . . . and that during that time he has behaved as a man of good moral character,” etc. Is an alien who has behaved as a man of good moral character during the five years immediately preceding his application, but who had not so behaved during his residence in the United States prior thereto, entitled to admission? I think not. The behavior of the applicant during all the time of his residence within the United States is material. The good of the country does not require, and it does not appear to be the policy of the law to promote, the naturalization of aliens who have at any time during their residence in the United States behaved otherwise than as persons of good moral character. The citizenship of the country is sufficiently alloyed and debased by the presence of immoral natives without the addition of those born in foreign countries. The applicant must not simply have sustained a good reputation, but his conduct must have been such as comports with a good character. In other words, he must have behaved — conducted himself — as a man of good moral character ordinarily would, should or does. Character consists of the qualities which constitute the individual; reputation the sum of

opinions entertained concerning him. The former is interior, the latter external. The one is the substance, the other the shadow. N. Y. P. Code, 120; 8 Barb., 603.

§ 351. *No fixed standard of "good moral character."*

What is "a good moral character" within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. In one age and country dueling, drinking and gaming are considered immoral, and in another they are regarded as very venial sins at most. The only authorities I have been able to find upon this subject are the cases of *Ex parte Douglas* and *Ex parte Sandberg*, cited in 2 Bright. Fed. Dig., 25, from 5 West. Jur., 171. These cases hold that an alien who lives in a state of polygamy, or believes that polygamy may be rightfully practiced in defiance of the laws to the contrary, is not entitled to citizenship. Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered, for the time being, immoral, within the purview of this statute. And it may be said with good reason that a person who violates the law thereby manifests in a greater or less degree that he is not "well disposed to the good order and happiness" of the country. Good behavior—that behavior for which a person reasonably suspected of an intention to misbehave may be required to give surety—is defined to be conduct authorized by law, and bad behavior such as the law punishes. Bouv. Dic., *verb.* Behavior; 2 Black., 251, 256.

§ 352. *A man who commits perjury is not a man of good moral character.*

But perjury is not only *malum prohibitum*, but *malum in se*. At both the civil and common law it was classed among the *crimina falsi*, and wherever, as in this case, it affected the administration of justice by introducing falsehood and fraud therein, it was, at common law, deemed infamous, and the person committing it held incompetent as a witness and unworthy of credit. *United States v. Block*, 4 Saw., 213. There can be no question, then, but that a person who commits perjury has so far behaved as a man of bad moral character. But it may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years ought not to be denied admission to citizenship on account of the commission in that time of a single illegal or immoral act. This suggestion is based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some sense this may be correct. For instance, the law of the state prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby become immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—*mala in se*. Now, if an applicant for naturalization, whose behavior, during a period of five or more years, was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship. But in the case of murder, robbery, theft, bribery or perjury, it seems to me that a single instance of the commission of either of them is enough to prevent the admission. The burden of proof is upon the applicant to prove, "to the satisfaction of the court," that during the period of his probation he has conducted

himself as a moral man. But when the proof shows that he has committed an infamous crime, it is not possible, in my judgment, to find that his behavior has been such as to entitle him under the statute to receive the privilege and power of American citizenship.

§ 353. *A pardon for a crime has no effect on the moral character of the person pardoned.*

What effect, if any, does the pardon have upon the application? By the constitution of this state, article V, section 14, the governor has power to grant pardons, after conviction, for all offenses, except treason, "subject to such regulations as may be prescribed by law." The criminal code makes no restrictions upon the power of the governor, except that he must first require the judge or district attorney who tried the case to give him a statement of the facts. Or. C. C., c. 32. This pardon does not show that this statement was asked for or obtained, nor does it appear therefrom what gave rise to the alleged doubts as to the defendant's guilt. But this suggestion cannot affect the truth or operation of the judgment which established his guilt. So far, then, as this application is concerned, the matter stands thus: the applicant was duly convicted of perjury, and the governor, in the exercise of that mercy which belongs to him in his official character, has pardoned him for reasons of his own that are immaterial to this inquiry.

The pardon is now produced by the applicant to show not only that his crime has been forgiven him, but that it never was, and therefore it cannot now, be relied upon to prove that he has not behaved as a man of good moral character during his residence in the United States. In *Ex parte Garland*, 4 Wall., 380, Mr. Justice Field, speaking for a majority of the court, says: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that, in the eyes of the law, the offender is as innocent as if he had never committed the offense." This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offense. And such, I think, is the doctrine of the authorities cited in support of this opinion, namely: 4 Black., 402; 6 Bac., tit. Pardon, H. Blackstone's language is: "The effect of such a pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtained his pardon; and not so much to restore him to his former, as to give him a new credit and capacity." And the author goes on to state that a pardon does not purify the blood during the period it was corrupted by conviction, and gives the following illustration: "Yet if a person attainted receives the king's pardon and afterwards hath a son, that son may be heir to his father, because the father being made a new man might transmit new inheritable blood; though had he been born before the pardon he could never have inherited at all." Bacon says a pardon makes the party, "as it were, a new man." It removes the punishment and "legal disabilities consequent on the crime." It restores his competency to be a wit-

ness, "but yet his credit must be left to the jury." From these authorities it is plain that a pardon **does not operate** retrospectively. The offender is purged of his guilt, and thenceforth he is **an** innocent man; but the past is not obliterated, nor the fact that he had committed **the crime** wiped out.

Apply these principles to this case. By the commission of the crime the applicant was guilty of misbehavior, within the meaning of the statute, during his residence in the United States. The pardon has absolved him from the guilt of the act, and relieved him from the legal disabilities consequent thereupon. But it has not done away with the fact of his conviction. It does not operate retrospectively. The answer to the question: Has he behaved as a man of good moral character? must still be in the negative; for the fact remains, notwithstanding the pardon, that the applicant was guilty of the crime of perjury — did behave otherwise than as a man of good moral character.

§ 354. *On an application for citizenship the fact that a refusal would operate as a hardship will not be considered.*

The fact that the applicant cannot obtain title to his homestead, unless he is admitted to citizenship, cannot affect the consideration of the question. Doubtless, in this respect, the matter operates as a hardship upon him. But this only illustrates the truth of the proverb — "the way of the transgressor is hard," and, in the long run, it is better for the world that it should be so. The proof is not satisfactory that the applicant has behaved as a man of good moral character, during his residence in the United States, but the contrary, and therefore the application is denied. But the applicant having no counsel, and the matter having been submitted without argument, and being now *res judicata*, if he shall be hereafter advised that there is probable error in this ruling, he may apply within a reasonable time to set aside the judgment denying his application, and for a rehearing thereof.

LEONARD v. GRANT.

(Circuit Court for Oregon: 6 Sawyer, 603-611. 1880.)

STATEMENT OF FACTS.—Plaintiff, widow of D. G. Leonard, sues the administrator to recover rents and profits, etc. Plaintiff avers that she is an alien, native of Switzerland. Defendant denies that she is an alien, and alleges that she is a citizen of the United States and of Oregon.

Opinion by DEADY, J.

By the stipulation of the parties the cause was submitted to the court for trial upon the issue made by this plea, and the admissions in such stipulation, which are: 1. That the plaintiff is a native and citizen of the republic of Switzerland. 2. That D. G. Leonard was a citizen by birth of the United States, and at his death, and for twenty years prior thereto, was a citizen of Oregon. 3. That the plaintiff was married to said Leonard in Oregon on July 19, 1875, and lived with him therein as his wife until his death, and still resides here.

§ 355. *Beginning and end of a plea to the jurisdiction.*

The matter contained in the answer is doubtless intended as a plea to the jurisdiction, but no such or other application is therein made of it. It does not commence with the usual allegation that the court ought not, on account of the fact stated in the plea, to take cognizance of the action, nor conclude with the proper prayer, *si curia cognoscere velit*, whether the court will take cognizance of the action (3 Chit., 894), but with a prayer for a judgment for costs

and disbursements, which is superfluous and improper in any action, as they are given or withheld as an incident of the action and according to the final judgment in the case. One of the admissions in the stipulation is that the plaintiff is a native and citizen of Switzerland. If this be taken as literally true, then there is no doubt that this court has jurisdiction of the action. But taken in connection with the rest of the stipulation and the argument of counsel, I suppose it may be regarded as an inadvertence and as intended only as an admission that she was such citizen by birth and until the time of her marriage.

§ 356. *Under the act of 1855, an alien woman, who is entitled to become a citizen and be naturalized, and who marries a citizen of the United States, becomes at once a naturalized citizen thereof.*

These preliminary matters being disposed of, the case turns upon the decision of the question, is the plaintiff a citizen of the United States? And this depends upon the construction to be given to section 2 of the act of February 10, 1855 (19 Stat., 604; R. S., sec. 1994), which reads, in the latter, as follows: "Any woman who is now, or may hereafter be, married to a citizen of the United States, and might herself be lawfully naturalized, shall be deemed a citizen." The plaintiff being an alien entitled to be naturalized, and having married a citizen of the United States, the defendant contends that she is within the purview of this statute, and, therefore, a citizen of the United States, to which the plaintiff replies that she was never absolutely a citizen of the United States, but was only "deemed" to be such citizen by force of the statute; that is, was only taken, considered or supposed to be one because she became the wife of a citizen, which assumption or supposition ceased with the fact upon which it was based — the termination of the relation or state of marriage between her and her late husband. The American statute is substantially a copy of the British one of 7 and 8 Vict., c. 66, sec. 16, 1844, which provides "that any woman married, or who shall be married, to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject."

§ 357. *Authorities reviewed.*

In *Reg. v. Manning*, 2 Carr. & Kir., 886 (61 Eng. C. L.), it was held under this statute, that a Swiss woman married to an English subject was not entitled to be tried by a jury *de medietate lingue*, as provided in the case of aliens, in the 28 Edward III., c. 13, and George IV., c. 50, sec. 47, upon a charge of murder. In considering the British statute, Pollock, C. B., after citing it, said: "The obvious, plain and natural inference from that appears to me to be that she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject." And Wilde, C. J., in delivering the opinion of the court in the exchequer chamber, whither the cause had been reserved for "the consideration of the judges upon the question 'Was the female prisoner entitled to a jury *de medietate lingue*?' " said: "It appears to me that the general intention of the legislature in this act of Victoria is to make the woman a British subject. . . . With respect, therefore, to the prisoner we can discover no intention whatever in this act of parliament to do more or less than to make her a British subject."

The only decisions which have been found under the American act are *Burton v. Burton*, 1 Keyes, 350, and *Kelly v. Owen*, 7 Wall., 496. In the first case it was held, in the language of the syllabus, that "the alien widow of a naturalized citizen of the United States, although she never resided in the United

States during the life-time of her husband, is entitled to dower in his real estate;" and this, not upon the ground that a state law gave an alien woman situate as the plaintiff was dower in the lands of her husband, but because, under and by force of the act of 1855, *supra*, she became, upon the naturalization of her husband, an American citizen, and was entitled as such citizen to dower in her husband's lands after his death, although she was married in 1823, and her husband was not naturalized until 1840, and she was never in the United States until after his death. In the second case it is only expressly decided that an alien woman that marries an alien, who subsequently becomes an American citizen, is within the purview of the act, as well as if her husband had been a natural-born citizen or naturalized before the marriage, and therefore she is an American citizen from and after the naturalization of her husband. In delivering the opinion of the court Mr. Justice Field says: "The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the marriage is celebrated, but to a state of marriage. They mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. . . . Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part." In 2 Bish. Law M. W., sec. 505, it is said of this statute, "that, by the very act of marriage, citizenship is conferred on a woman who, by previous laws, was capable of becoming naturalized. His citizenship conferred citizenship on her." And in *Kane v. McCarthy*, 63 N. C., 299, it was held, according to 3 U. S. Dig., 308, "that a white woman, a native of Ireland, and not an alien enemy, who marries a citizen of the United States, is a citizen of the United States, although she always resided in Ireland."

While it may be admitted that none of these authorities expressly decide the point now made by the plaintiff, to wit, that the citizenship imputed to the wife by that of the husband is a qualified one and continues no longer than the reason of it — the marriage with a citizen, — still, it is also true that there is not even a hint or doubt in any of them that the citizenship of the wife thus acquired is a qualified or contingent one, while the language used in all of them is only consistent with a citizenship as enduring and unqualified as if the wife had been actually naturalized upon her own formal application by the judgment of a competent court. In *Reg. v. Manning* it is said, "she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject;" and in *Kelly v. Owen*, "his citizenship, whenever it exists, confers under the act citizenship upon her." Besides, in this case, one of the parties that was considered, apparently without question, to be a citizen, was the widow of Miles Kelly, who was herself an alien born, and married to her deceased husband before he was naturalized. So in *Burton v. Burton*, the widow of the deceased naturalized citizen, although never in the United States until after her husband's death, was held to be a citizen without an intimation from court or counsel that such citizenship terminated with the existence of the marriage; and this decision is cited with approbation by the supreme court in *Kelly v. Owen*, *supra*.

It is also argued by counsel for the plaintiff that it is not to be presumed that congress would naturalize an alien woman absolutely, without her consent, and therefore the act should be construed as only intended, as a matter of con-

venience, to give her the *status* of a citizen during her marriage to a citizen. But the answer to this argument is found in the fact that an alien woman who marries a citizen of the United States must be presumed to assent to the obligations, duties and *status* which the law provides shall be consequent upon the act of entering into such relation. No law expressly providing for a temporary or contingent citizenship is known to the legislation of the United States, and so unusual and singular a purpose ought not to be attributed to congress without an explicit provision to that effect. The language of the statute in question, taken in its most natural and apparent sense, conferred citizenship upon the plaintiff on her marriage with Leonard, and there is nothing in it or the nature or circumstances of the case to warrant the conclusion that congress thereby only intended to confer upon her a qualified citizenship, a citizenship during marriage. The phrase "shall be deemed a citizen," in section 1994 of the Revised Statutes, or as it was in the act of 1855, *supra*, "shall be deemed and taken to be a citizen," while it may imply that the person to whom it relates has not actually become a citizen by the ordinary means or in the usual way, as by the judgment of a competent court upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word "deemed" is the equivalent of "considered" or "judged;" and, therefore, whatever an act of congress requires to be "deemed" or "taken" as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, congress declares that an alien woman shall, under certain circumstances, be "deemed" an American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of congress or in the usual mode thereby prescribed.

§ 358. *To entitle an alien woman to naturalization, she need only have the qualifications of race, residence and good character, and that she have renounced all titles or orders of nobility.*

There is another question in this case that is not so easy of solution. An alien woman who marries a citizen of the United States does not thereby become an American citizen unless, at the time, "she might herself be lawfully naturalized" also. To entitle the plaintiff to become naturalized at the time she was married to Leonard, on June 19, 1875, she should have been: 1. A free white person or a person of African descent or nativity; 2. She must have resided within the United States five years; 3. She must have been of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and 4. She must have renounced all titles or orders of nobility, if any she had. If, whenever, during the life of the woman or afterwards, the question of her citizenship arises in a legal proceeding, the party asserting her citizenship by reason of her marriage with a citizen must not only prove such marriage, but also that the woman then possessed all the further qualifications necessary to her becoming naturalized under existing laws, the statute will be practically nugatory, if not a delusion and a snare. The proof of the facts may have existed at the time of the marriage, but years after, when a controversy arises upon the subject, it may be lost or difficult to find. The marriage is a public act of which the law takes cognizance and preserves the evidence, and the race of the woman is generally a fact susceptible of proof; but beyond this, it would be very difficult, if not impossible, to establish, after the lapse of any

considerable time, the facts showing her right to become naturalized under the then existing laws.

In *Kelly v. Owen*, *supra*, the question does not appear to have been discussed or considered, but it was assumed that race was the only one of these qualifications that it was necessary for the woman to possess at the time of her marriage; in other words, that as the law then stood, she "should be a 'free white person' and not an alien enemy;" and it appeared affirmatively that one of the parties who was held to be a citizen, Margaret Kahoe, had not the qualification of residence, because she was only two years in the United States when she was married, and only four years therein when her husband became naturalized. In *Burton v. Burton*, *supra*, the woman was never in the United States until after the death of her husband, and in neither case does it appear that there was any evidence that the women held to be citizens by reason of their marriage with citizens possessed the qualifications of good moral character, attachment to the principles of the constitution and disposition to the good order and happiness of the United States. The reasonable inference is, that notwithstanding the letter of the statute, "might herself be lawfully naturalized," the supreme court considered that it was only necessary that the woman should be a person of the class or race permitted to be naturalized by existing laws, and that in respect to the qualifications arising out of her conduct or opinions, being the wife of a citizen she is to be regarded as qualified for citizenship, and therefore considered a citizen; and tried by this test, it is quite likely that she will be found as well qualified, personally, as her husband or the thousands of poor, ignorant and unknown aliens who are yearly admitted to citizenship in the larger centers of foreign population by the local courts of practically their own creation.

The stipulation in this case is silent as to the qualifications of the plaintiff, except that she is a native of Switzerland, and was married to an American citizen in 1875, and has since resided in Oregon; and if it must appear affirmatively that she possessed the qualifications at the time of her marriage to entitle her to naturalization, then it does not appear that she is or ever was a citizen of the United States. Indeed, it does not appear certainly that she belongs to the class or race of persons who "might be lawfully naturalized;" for although she is a native of Switzerland, it does not follow from that fact that she is either a free white person or one of African descent or nativity. But on the argument it was practically admitted that she was a free white person, and the stipulation may be amended in this respect accordingly. As to the other qualifications, my conclusion is upon the authorities and the reason, if not the necessity of the case, that the statute must be construed as in effect declaring that an alien woman who is of the class or race that may be lawfully naturalized under the existing laws, and who marries a citizen of the United States, is such citizen also. Upon this construction of the act, and the assumption that the plaintiff is "a free white person," she is a citizen of the United States, and has been ever since her marriage to Leonard, and there must be a finding of fact and law for the defendant accordingly.

SPRATT v. SPRATT.

(4 Peters, 393-409. 1830.)

ERROR to the Circuit Court for the District of Columbia, County of Washington.

Replevin on a distress for rent. Plaintiff in replevin claims that no rent is due because he is seized as heir at law.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This case depends entirely on the title of the defendant in error to the premises in the avowry mentioned, who is one of the brothers and heirs of James Spratt, deceased. James Spratt was a native of Ireland, who arrived in the United States previous to the 18th of June, 1812, and resided therein until his death. On the 14th of April in the year 1817, he made report of himself to the clerk of the circuit court of the United States for the District of Columbia, in the county of Washington, which report was recorded; and, on the 17th of May thereafter, he appeared in the same court, and made the declaration on oath required by the first condition of the first section of the act "to establish an uniform rule of naturalization," etc., passed the 14th of April, 1802; which proceeding was recorded, and a certificate thereof granted in the following words: "District of Columbia, to wit: James Spratt, a native of Ireland, aged about twenty-six years, bearing allegiance to the king of Great Britain and Ireland, who emigrated from Ireland and arrived in the United States on the 1st of June, 1812, and intends to reside within the jurisdiction and under the government of the United States, makes report of himself for naturalization according to the acts of congress in that case made and provided, the 14th of April, Anno Domini, 1817, in the clerk's office of the circuit court of the District of Columbia, for the county of Washington; and on the 14th of May, 1817, the said James Spratt personally appeared in open court, and declared, on oath, that it is his intention to become a citizen of the United States, and to renounce all allegiance and fidelity to every foreign prince," etc.

This certificate was given under the hand and seal of the clerk. On the 11th of October, 1821, James Spratt again appeared in open court, and took the oath required by law, and was admitted as a citizen. The certificate of his admission states that the first three conditions required by the act of the 14th of April, 1802, had been complied with.

The said James Spratt intermarried with the plaintiff in error, Sarah Spratt, and departed this life in March, 1824, without issue and intestate. The plaintiff in replevin is a native-born subject of the king of Great Britain and Ireland, and was not naturalized at the time of the institution of this suit.

In the year 1791, the state of Maryland passed an act entitled "An act concerning the territory of Columbia and the city of Washington;" the sixth section of which provides "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state." This act continues in force.

A decree was made by the circuit court for the sale of the estate of Simon Meade, deceased, to satisfy his creditors, on certain conditions therein specified. In pursuance of this decree, Joseph Forrest, who was appointed to carry the

same into execution, did, on the 21st of May, 1821, offer the real estate of the said Simon Meade for sale on the terms and conditions following, to wit: that the purchase money should be paid in four equal instalments, at six, twelve, eighteen and twenty-four months, respectively, from the day of sale, with interest; and that a conveyance of the property in fee-simple should be made to the purchaser upon the ratification of the sale by the court, and the payment of all the said instalments of the purchase money, with interest. At this sale the said James Spratt became the purchaser of the lot in the avowry mentioned. On the 15th of October, 1821, the said Joseph Forrest made his report to the court; and on the 24th of December, 1822, an interlocutory decree was made for confirming the sale; and on the 26th of January, 1824, the final decree of confirmation was passed. No deed was executed during the life-time of the said James Spratt. The bidding at the sale was made while the said James Spratt was an alien; but before any other step was taken he became a citizen. Upon this state of facts, the circuit court gave judgment for the plaintiff in replevin; which judgment has been brought before this court by writ of error.

This cause has been argued very elaborately by counsel. It appears to the court to depend essentially on two questions. 1. Was James Spratt a citizen of the United States? 2. If he became a citizen, did the premises in the avowry mentioned pass to his alien relations who are his next of kin?

§ 359. *Under the naturalization act of 1802, the certificate of the report of an alien to a court of record for admission to the rights of a citizen was not required to mention the time of arrival in the United States.*

1. The first question depends on the act of 1802 for establishing an uniform rule of naturalization. The act declares that an alien may be admitted to become a citizen of the United States "on the following conditions, and not otherwise." The act then prescribes four conditions, the first three of which were applicable to James Spratt, and were literally observed. The second section enacts (2 Stats. at Large, 154) "that in addition to the directions aforesaid, all free white persons, being aliens, who may arrive in the United States after the passing of this act, shall, in order to become citizens of the United States, make registry and obtain certificates in the following manner, to wit: every person desirous of being naturalized shall, if of the age of twenty-one years, make report of himself," etc. The law then directs what the contents of the report shall be; orders it to be recorded, and that a certificate thereof shall be granted to the person making the report; "which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States."

As James Spratt arrived within the United States after the passage of the act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires. Must this report be made five years before he can be admitted as a citizen? The law does not in terms require it. The third condition of the first section provides "that the court admitting such alien shall be satisfied that he has resided within the United States five years at least;" but does not prescribe the testimony which shall be satisfactory. This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself in the manner prescribed by that section; and requires that such report shall be ex-

hibited, "on his application to be naturalized, as evidence of the time of his arrival within the United States." The law does not say that this report shall be the sole evidence, nor does it require that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid. The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed. Yet the inference is very strong from the language of the act, that the time of arrival must be proved by this report; and that a court, about to admit an alien to the rights of citizenship, ought to require its production.

But is it anything more than evidence which ought indeed to be required to satisfy the judgment of the court, but the want of which cannot annul that judgment? The judgment has been rendered in a form which is unexceptionable. Can we look behind it, and inquire on what testimony it was pronounced? The act does not require that the report shall be mentioned in the judgment of the court, or shall form a part of the certificate of citizenship. The judgment and certificate are valid, though they do not allude to it. This furnishes reason for the opinion that the act directed this report as evidence for the court, but did not mean that the act of admitting the alien to become a citizen should be subject to revision at all times afterwards, and to be declared a nullity, if the report of arrival should not have been made five years previous to such admission.

§ 360. *The act of 1816 annuls all certificates of citizenship granted to aliens, without the requisite recitals, after the 18th of June, 1812.*

The act of 1816, s. 1 (3 Stats. at Large, 258), has, we think, considerable influence on this question. That act requires that the certificates of report and registry, required as evidence of the time of arrival in the United States, and of the declaration of intention to become a citizen, "shall be exhibited by every alien, on his application to be admitted a citizen of the United States, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th day of June, 1812; and shall each be recited at full length in the record of the court admitting such alien; and any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States since the said 18th day of June, 1812, to be a citizen, after the promulgation of this act, without such recital of each certificate at full length, shall be of no validity." James Spratt arrived within the United States previous to the 18th day of June, 1812, and is consequently not within the provisions of the act of 1816. This act is not intended to explain the act of 1802, but to add to its provisions. It prescribes that which the previous law did not require, and prescribes it for those aliens only who arrive within the United States after the 18th day of June, 1812. It annuls the certificates of citizenship which may be granted to such aliens, without the requisite recitals; consequently, without this act, such certificates would have been valid. The law did not require the insertion of these recitals in the certificate of James Spratt.

§ 361. *The judgment of a court of record, naturalizing an alien, if in due form, is conclusive evidence thereof.*

The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment

is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity. The inconvenience which might arise from this principle has been pressed upon the court. But the inconvenience might be still greater if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court not apparent on the record of his admission. We are all of opinion that James Spratt became a citizen of the United States on the 11th of October, 1821.

§ 362. *Right of aliens to inherit under the Maryland act of 1791.*

2. Did the property mentioned in the avowry descend to his alien relations? Since aliens are incapable of taking by descent, the answer to this question depends on the enabling act of the state of Maryland in the year 1791. That act does not enable aliens who may come into the District of Columbia to transmit all real estate, however acquired, to their alien relations by descent; but such lands only as shall be thereafter acquired by deed or will. This is a qualification of the power which cannot be disregarded. The words are not senseless, and would not, we must suppose, have been inserted had they not been intended to operate. They limit the capacity of an alien to inherit from his alien ancestor, residing within this District, to lands which he had taken by deed or will. It is not for us to weigh the reasons which induced the legislature to impose this limitation. It is enough for a court of justice to know that the legislature has imposed it, and that it forms part of the law of the case.

§ 363. *An alien cannot inherit from an alien ancestor land bid off by him at a judicial sale at a time when he was an alien, but deeded to him only after he had become a citizen.*

If any equivalent act might be substituted for a deed, no such equivalent act can be found in this case. The auction at which this property was sold certainly took place while James Spratt was an alien; but that the sale was entirely conditional, and the purchase depended on the payment of the instalments on the confirmation of the court and the final decree of the court. Before the first instalment became due, before even the report was returned to the court, James Spratt became a citizen. He did not, therefore, while an alien, hold this land by a deed or by any title equivalent to a deed. In a controversy between the alien heirs of James Spratt and Sarah Spratt (1 Pet., 343), this court determined that land which James Spratt took and held under the enabling act of Maryland descended to his alien heirs, but that land which he took and held as a citizen did not pass to those heirs. The lot mentioned in the avowry comes, we think, within the last description, and did not descend to the plaintiff in replevin. The judgment of the circuit court is reversed, and the cause remanded, with directions to enter judgment for the avowant.

IN RE MCCOPPIN.

(Circuit Court for California: 5 Sawyer, 630-632. 1869.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is an application on the part of Mr. McCoppin to this court “to re-naturalize him if, in its judgment, his former naturalization is defective or open to question.” It appears that on the 12th of December, 1864, the applicant was admitted as a citizen by the district court of the United

States for this district. The record of the proceeding recites that the applicant at the time made a declaration of his intention to become a citizen, and proved by the oaths of P. H. Canavan and Lafayette Maynard, citizens of the United States, his residence within the United States for the previous five years, and for the three years next preceding his arrival at the age of twenty-one years, and his residence in California for one year, and that during that time he had behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and that he took the customary oath to support the constitution and renounced all allegiance and fidelity to every foreign power.

The applicant states that he was born in Ireland on the 4th of July, 1834, and at the time he made his application to be admitted as a citizen he was under the impression that he had arrived in the United States in 1852; but in this respect he is now satisfied he was mistaken, and that he arrived in 1853; that his father arrived at the same time, and afterwards became a citizen; that he himself declared his intention to become a citizen in the court of common pleas for the city and county of New York on the 18th of June, 1857, and produces a certified copy of the declaration; that subsequently he was advised, and for some years believed, that he was entitled to citizenship by reason of his nonage at the time of his arrival in the United States, and the subsequent naturalization of his father; and that when informed of his error in this particular, he made formal application for admission to the district court. The application in this case is an unusual one, but, under the circumstances, a very proper one, though, we think, if the district court were in session, that it might with more propriety have been made to that court.

§ 364. *The validity of a judgment admitting a person to citizenship is not impaired by inaccurate statements in the recitals.*

The applicant is the mayor of the city of San Francisco, and his citizenship is, therefore, a matter of public interest. The law implies that the officers of the municipality are citizens of the United States, and it was certainly under the belief that the applicant was a citizen that he received the suffrages of the people of the city and was installed into office. If, therefore, the proceeding by which he claims his citizenship is invalid or open to question, it is quite natural that he should desire that a new proceeding may be taken to establish his citizenship beyond a doubt. No such proceeding, however, is necessary. The record of naturalization in his case is perfect, and the judgment valid. Its validity and efficacy are in no respect impaired by the inaccurate statement in the recitals respecting the three years residence in the United States of the applicant previous to his attaining the age of twenty-one. The recitals constitute no part of the judgment, and whether correct or otherwise is immaterial. The court was satisfied at the time of the sufficiency of the evidence presented to justify the admission of the applicant, and pronounced its judgment accordingly. Undoubtedly the court might, in a proper case, set aside its judgment admitting a party to citizenship, if the party was not at the time entitled to admission, and the court had reason to believe that it had been intentionally deceived. But in this case there is no ground to suppose any deception was intended, or for any imputation upon the motives of the applicant. He was at the time entitled to be admitted as a citizen on other grounds. He had declared his intention to become a citizen in one of the courts of record in the city of New York, seven years before, and had resided in the United States for five years. This latter fact was established at the time before the district court,

and is stated in the record. Upon these facts and the other matters as to character, and attachment to the principles of the constitution, proved by the witnesses present, he could have been as readily admitted as upon the grounds stated. There is no occasion for any further proceedings in the matter. The application for re-naturalization is, therefore, denied.

CAMPBELL v. GORDON.

(6 Cranch, 176-188. 1810.)

APPEAL from U. S. Circuit Court, District of Virginia.

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—The object of the bill was to rescind a contract made between the appellant and Robert Gordon, the appellee, for the sale of a tract of land by the latter to the former upon the ground of a defect of title. The facts in the case which are not disputed appear to be as follows: The land which forms the subject of dispute belonged to James Currie, a citizen of Virginia, who died seized thereof in fee on the 23d of April, 1807, intestate and without issue. James Currie had one brother of the whole blood named William, who, prior to the 14th day of October, in the year 1795, was a subject of the king of Great Britain, but who emigrated to the United States, and on the day last mentioned, at a district court held at Suffolk, in Virginia, took the oath prescribed by the act of congress for entitling himself to the rights and privileges of a citizen. At the time when this oath was taken William Currie had one daughter, Janetta, the wife of the appellee, who was born in Scotland. She came to the United States in October, 1797, whilst an infant, during the life of her father, and hath ever since continued to reside in the state of Virginia. William Currie died prior to the 23d of April, 1807. The title of the appellees to the land in question being disputed only upon the ground of the alienage of the female appellee, the court take it for granted that there is no other objection to its validity. It is contended by the counsel for the appellant that Janetta, who claims as heir to James Currie, is an alien, inasmuch as she has, by no act of her own, entitled herself to the rights and privileges of a citizen, and cannot claim those rights in virtue of her migration to the United States and of any acts performed by her father. First, because her father was not duly naturalized; and secondly, because, if he were, she was not, at the time of her father's naturalization, dwelling within the United States.

§ 365. *The admission of a person to citizenship raises a presumption that the court was satisfied as to the character of the applicant.*

In support of the first objection it is contended that, although the oath prescribed by the second section of the act of congress entitled "An act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject," passed the 29th of January, 1795, was administered to the said William Currie by a court of competent jurisdiction, still it does not appear, by the certificate granted to him by the court and appearing in the record, that he was, by the judgment of the court, admitted a citizen, or that the court was satisfied that, during the term of two years mentioned in the same section, he had behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same. It is true that this requisite to his admission is not stated in the certificate, but it is the opinion of this court that the court of Suffolk must have been satisfied as to the character of the applicant, or otherwise a certificate

that the oath prescribed by law had been taken would not have been granted. It is unnecessary to decide whether, in the order of time, this satisfaction as to the character of the applicant must be first given, or whether it may not be required after the oath is administered, and, if not then given, whether a certificate of naturalization may not be withheld. But, if the oath be administered, and nothing appears to the contrary, it must be presumed that the court before whom the oath was taken was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is, therefore, the unanimous opinion of the court that William Currie was duly naturalized.

§ 366. *By the act of April 14, 1802, the minor children of all persons duly naturalized before that time are declared to be citizens of the United States.*

The next question to be decided is whether the naturalization of William Currie conferred upon his daughter the rights of a citizen after her coming to, and residing within, the United States, she having been a resident in a foreign country at the time when her father was naturalized. Whatever difficulty might exist as to the construction of the third section of the act of the 29th of January, 1795, in relation to this point, it is conceived that the rights of citizenship were clearly conferred upon the female appellee by the fourth section of the act of the 14th of April, 1802. This act declares that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time she was an infant; but she came to the United States before the year 1802, and was, at the time when this law passed, dwelling within the United States. It is, therefore, the unanimous opinion of the court that, at the time of the death of James Currie, Mrs. Gordon was entitled to all the right and privilege of a citizen, and, therefore, that there is no error in the decree of the circuit court for the district of Virginia, which is to be affirmed, with costs.

IN RE COLEMAN.

(Circuit Court for New York: 15 Blatchford, 406-432. 1879.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—On the 3d of November, 1878, Stephen Mosher made oath before John I. Davenport, a United States commissioner, to an affidavit "that there is to be an election held in the city of New York, on the 5th day of November, 1878, at which representatives in congress are to be chosen; that there has, in accordance with the laws of the state of New York, been a registration of voters for said election; that such registration was held on the 8th, 16th, 25th and 26th days of October, 1878; that, as deponent is informed and believes, one Peter Coleman did, on one of the said days of registration, for the purpose of registering himself as a voter, or otherwise, unlawfully use a certain certificate of citizenship of the superior court in the city of New York, showing him to be admitted to be a citizen, knowing that such certificate had been unlawfully issued or made; this, in the eleventh election district of the second assembly district of the said city, and in violation of the laws of the United States; and deponent further says, that a portion of his information is

derived from, and one of the grounds for his belief is founded upon, the statements of said Peter Coleman, made to the board of inspectors of election in said election district, at the time he so used said certificate, as the same are set forth and contained in the copy of the registry of said district, made and kept by one of the supervisors of election of the United States at said time and place, and the report made thereof by said supervisor, which statement, records and report deponent believes to be true." This affidavit was made for the purpose of obtaining a warrant of arrest against Coleman, for having committed an offense against section 5426 of the Revised Statutes of the United States, which provides that "every person who in any manner uses for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship or certificate, judgment or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment or exemplification has been unlawfully issued or made; and every person who unlawfully uses, or attempts to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or in the name of a deceased person, shall be punished by imprisonment at hard labor not less than one year nor more than five years, or by a fine of not less than \$300 nor more than \$1,000, or by both such fine and imprisonment."

On this affidavit, the commissioner, on the 4th of November, 1878, issued a warrant under his hand and seal, to the marshal as follows: "Whereas, complaint on oath has been made to me, charging that Peter Coleman did, in the eleventh election district of the second assembly district of the city of New York, on or about the 16th day of October, in the year 1878, unlawfully use a certain certificate of citizenship, purporting to be issued or granted by the superior court in the city of New York, showing him to be admitted to be a citizen, then and there knowing that such certificate had been unlawfully issued or made—this in violation of the laws of the United States,—now, therefore, you are hereby commanded, in the name of the president of the United States of America, to apprehend the said Peter Coleman, and bring his body forthwith before me, or some judge or justice of the United States, wherever he may be found, that he may then and there be dealt with according to law, for the said offense." Coleman was arrested and brought before said commissioner on said warrant, and, the charge set forth in said warrant being explained to him, and an examination respecting the same being had, the commissioner, on the 5th of November, 1878, committed him to the custody of the marshal, to await the action of the grand jury in the premises, in default of \$2,000 bail. The commitment was indorsed on the warrant.

Coleman was brought before this court on a writ of *habeas corpus*, and the proceedings before the commissioner were brought before it by a writ of *certiorari*. Formal returns were made to both writs. The relator put in one traverse to both returns, and the commissioner put in a reply to such traverse. Thereupon proofs were taken on the issues of fact raised by said papers. The principles on which this court acts in issuing and adjudicating on writs of *habeas corpus* and *certiorari*, in cases like the present, are those laid down in *In re Martin*, 5 Blatch., 303. The rulings established by this court in *In re Stupp*, 12 id., 501, apply solely to extradition cases. The proofs taken herein were taken before a referee, and have not been submitted to the court, but the respective parties have stipulated in writing that the facts involved in these proceedings are as follows: Peter Coleman was born in Prussia. He is now thirty-four

years of age, having been born in 1844. From 1846 to 1860 he sailed to and from Liverpool in English bottoms. He arrived in this country in 1860 in the capacity of an ordinary seaman. From 1860 to 1863 he sailed to and from New York in American bottoms, living in the city of New York when in port. In February, 1863, he gave up going to sea and has since resided continuously in said city. The certificate, of which the following is a copy, was given to Coleman October 15, 1868: "United States of America. State of New York. City and County of New York, ss.: Be it remembered, that on the 15th day of October, in the year of our Lord one thousand eight hundred and sixty-eight, Peter Coleman appeared in the superior court of the city of New York (the said court being a court of record, having common law jurisdiction and a clerk and seal), and applied to the said court to be admitted to become a citizen of the United States of America, pursuant to the provisions of the several acts of the congress of the United States of America, for that purpose made and provided; and the said applicant having thereupon produced to the court such evidence, made such declaration and renunciation, and taken such oaths as are by the said acts required, thereupon it was ordered by the said court that the said applicant be admitted, and he was accordingly admitted by the said court, to be a citizen of the United States. In testimony whereof the seal of the said court is hereunto affixed, this fifteenth day of October, one thousand eight hundred and sixty-eight, and in the ninety-third year of our independence. (L. S.) By the court. James M. Sweeney, clerk." Coleman testifies that his witness "was a man named Sandy Holland, who went by the nickname of Swain."

Coleman offered himself for registry at the place of registry in the eleventh election district of the second assembly district of the city of New York, on the 25th of October, 1878. At that time he produced, for the purpose of enabling him to be so registered, what purported to be a certificate of naturalization issued by the superior court of the city of New York, on the 15th of October, 1868, of which a copy is above set forth. Thereupon his right to register was challenged, on the ground that he had never been legally naturalized. At the time of being so challenged he was also presented with, as the supervisor of election in the said district swears, a printed notice, of which the following is a copy, but Coleman denies the receipt of such notice: "United States Court House, room 1, fourth floor. New York, October 15, 1878. Sir: As complaint has been filed with me charging you with being possessed of a false, fraudulent and void certificate of naturalization, issued in 1868, your attention is called to the following notice from the U. S. district attorney. Respectfully yours, John I. Davenport. Office of the United States attorney for the Southern district of New York. New York, October 12, 1878. To holders of certificates of naturalization purporting to have been issued from the supreme and superior courts in the city of New York in 1868: On August 24th and September 21st, ultimo, I gave notice that complaints had been lodged with John I. Davenport, Esq., United States commissioner, charging many persons residing in this district with being fraudulently possessed of fraudulent certificates of citizenship (commonly known as naturalization papers); that these certificates purported to have been issued by the supreme and superior courts in the city of New York, in the year 1868; and that such complaints further charged the holders of such certificates with having fraudulently registered thereon at the last congressional election in 1876. I gave further notice that these are offenses against the laws of the United States. As some of the persons holding

such certificates may be lawfully entitled to be naturalized, as many of them were possibly ignorant and misled, and in order that no injustice might be done to any person now willing to obey the law, I gave further notice that each person against whom such complaint had been made could avoid arrest and prosecution by appearing before Commissioner Davenport, at his office in the United States court building, room 1, fourth floor, on or before the 12th day of October, 1878, and surrendering such certificate, if, upon examination, it should prove to be fraudulent. Commissioner Davenport has this day officially informed me that more than two thousand persons holding such certificates have presented themselves to him, since my said notice was given, and have voluntarily surrendered such certificates. At his request, and in order that full opportunity may be given to those who may still be disposed to obey the law, I hereby extend the time within which persons against whom such complaints have been made may appear before Commissioner Davenport, at his said office, and surrender such certificates, if, upon examination, they shall prove to be fraudulent, until Friday, the 1st day of November, 1878. For the convenience of such of the accused as are laboring men, the United States commissioner's office will be kept open for the transaction of this business until half-past eight o'clock in the evening. Stewart L. Woodford, United States Attorney." Coleman, upon being so challenged, was examined under oath respecting his claim to naturalization, and his right to said certificate, and took the statutory oaths for a challenged person, whereupon, such oaths being taken, said Coleman was, in compliance with the laws of the state of New York, duly registered by the inspectors of election. The only book in the office of the clerk of said superior court containing any entry in regard to the alleged naturalization of Coleman is a book having pasted on its back labels of leather and paper, with the following words printed or inscribed upon them: "Naturalization Index, October 12, 1868, to October 16, 1868, superior court." The entry in said book relating to the case of Coleman was as follows:

"1868. SUPERIOR COURT. 1868.			1868. SUPERIOR COURT. 1868.	
DATE.	NAME.	NATION.	WITNESS.	REMARKS.
Oct. 15...	Coleman (min.) Peter	Queen of England.	Dwain, Edward ...	339 Water, N. Y."

There is, in said book, no other entry relating to the case of Coleman, and no other matter except similar entries relating to other persons. Said book contains about three hundred and fifty pages, and purports to cover four days from October 12, 1868, to October 16, 1868, there being thirty-five names on a page, and five thousand six hundred and seventy-two names in the book. With reference to the 15th of October, 1868, said book contains entries relative to nine hundred and fifty-one other persons besides Coleman. In the month of October, 1868, and prior thereto, there were, and since that date have been, several record books belonging to said superior court, entitled "Special term and general term minutes," which were minutes kept in the manner that court minutes are usually kept, and there is no reference to Coleman therein, nor any mention of any matters relative to the naturalization of any alien, except as hereinafter mentioned, that is, before 1859 and since 1873. Among the papers on file in the office of the clerk of said superior court is an original paper of which the follow-

ing is a copy: "Superior court of the city of New York. In the matter of Peter Coleman, on his application to become a citizen of the United States. Minor. State of New York, city and county of New York, ss.: Edward Swain, of 339 Water St., being duly sworn, doth depose and say, that he is well acquainted with the above-named applicant; that the said applicant has resided in the United States for three years next preceding his arrival at the age of twenty-one years; that he has continued to reside therein to the present time; that he has resided five years within the United States, including three years of his minority, and that he has resided in the state of New York one year, at least, immediately preceding this application; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and deponent verily believes that, for three years next preceding this application, it has been the real and honest intention of the said applicant to become a citizen of the United States. Edward his × mark Swain. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, clerk. State of New York, city and county of New York, ss.: Peter Coleman, of No. 330 Water St., New York, the above-named applicant, being duly sworn, says that he has arrived at the age of twenty-one years; that he has resided in the United States three years next preceding his arrival at that age, and has continued to reside therein to the present time; that he has resided five years within the United States, including the three years of his minority, and that he has resided one year at least, immediately preceding this application, within the state of New York, and that, for three years next preceding this application, it has been his real and honest intention to become a citizen of the United States. Peter his × mark Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, clerk. I do declare, on oath, that it is my *bona fide* intention, and has been for the three years next preceding this application, to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the queen of Great Britain and Ireland, of whom I was before a subject. Peter his × mark Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, clerk. I, ———, do solemnly swear that I will support the constitution of the United States, and that I do absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the queen of Great Britain and Ireland, of whom I was before a subject. Peter his × mark Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, clerk."

The four several documents composing said paper are all on one page of a half sheet of paper, and are printed blanks filled in. In writing, across the face of said paper, and partly on the margin and partly on the affidavit of Swain, on said paper, are the initials "J. H. McC.," in the handwriting of the Honorable John H. McCunn, who was a judge of the said superior court in October, 1868, and is now dead. On the back of said half sheet of paper are the following words: "New York Superior Court. In the matter of Peter Coleman, on his naturalization — minor. Affidavits, etc. Filed October 15, 1868." These words are a printed blank filled in. The only books now in the office of the clerk of said superior court which purport to relate to the naturalization of any person at any time between January 1, 1859, and January 1, 1874, are books which resemble in all respects that in which the said entry in regard to

Coleman appears, except that the label on each of the books which cover the years preceding 1868 is "Naturalizations," and the label on each of the books which cover the years succeeding 1868 is "Naturalization Record." The only papers on file in said clerk's office purporting to relate to the naturalization of any persons between January 1, 1859, and January 1, 1874, are papers which resemble those in the case of Coleman in all respects, one of which is filed in the case of each person whose name is entered in said books. Said books, labeled "Naturalizations," "Naturalization Index" and "Naturalization Record," covering the time between 1858 and 1874, contain entries relative to between fifty thousand and sixty thousand persons, of which more than one thousand are as to females, and twenty thousand are as to persons who, it is claimed, were naturalized in the year 1868, eighteen thousand four hundred and thirty-two of whom were in the month of October alone. The establishment and keeping of the volumes in use between 1858 and 1874, which contain such entries as appear in relation to Coleman in the said book labeled "Naturalization Index," was not in pursuance of any order of any term, general, special or circuit, of the said superior court, so far as appears by any record in said court. Prior to January 1, 1859, when an alien was naturalized in said superior court, an entry was made in the court minutes book, in the following form: "Thursday, October 7, 1858. Daniel McCarthy and Francis Popper personally appeared in open court this day and made application to be admitted as citizens of the United States, and, producing the evidence as required by law, and upon reading and filing such evidence, it is ordered that they severally be admitted as citizens of the United States of America." Since January 1, 1874, whenever an alien has been naturalized by said superior court, an entry has been made in the court minutes book in the following form: "Monday, March 2, 1874. The following named persons personally appeared in court, produced the evidence required by the several acts of congress, and, having made the declarations and renunciations as by said acts required, it is ordered that said applicants be admitted to be citizens of the United States of America: Michael Brasby — Patrick Hunt. Thomas Boese, clerk." When Coleman was brought before the commissioner he demanded an examination, which was granted. Upon such examination the commissioner had before him all the facts above stated, and the said notice, of which a copy is above set forth, alleged to have been given to Coleman when his right to register was challenged, together with the opinion of Judge Freedman, hereinafter referred to, and proof that both had been previously published in most, if not all, the newspapers of said city, both German and English. Coleman was then committed by the commissioner, as having, for the purpose of registering himself as a voter, unlawfully used a certificate of naturalization, of which a copy is above set forth, knowing the same to have been unlawfully issued or made. All the issues arising on the pleadings and testimony in this case, except such as arise on the foregoing facts so stipulated in writing, and on the sufficiency of the original complaint, were waived by the counsel for the respective parties, by a stipulation in writing.

§ 367. *An affidavit which fails to show probable cause of arrest for unlawful registration of a voter. A warrant of arrest should not issue on it under the fourth amendment of the constitution.*

The sixth amendment to the constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation." This provision applies as well to

the preliminary proceedings for arrest, before indictment, as to the indictment itself. The fourth amendment provides that the right of the people to be secure in their persons against unreasonable seizures shall not be violated, and that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the person to be seized. Assuming that the words "or otherwise," in the affidavit of Mosher, may be regarded as surplusage, and that such affidavit, taking all its language together, sufficiently alleges that Coleman used the certificate of citizenship for the purpose of registering himself as a voter, in the election district named, and on one of the four days named, yet it does not state how such use was unlawful, or how the certificate had been unlawfully issued or made. There is no statement as to wherein the illegality of the use, or as to wherein the illegality of the issuing or making, of the certificate consisted. The use by a person, for the purpose of registering himself as a voter, of a "certificate of citizenship of the superior court in the city of New York, showing him to be admitted to be a citizen," is not a forbidden act or an offense. The only specification of an offense in the affidavit is that Coleman "unlawfully" used for such purpose such certificate, knowing that such certificate had been "unlawfully" issued or made. Characterizing the use as unlawful does not give any information as to the nature of the offense. Whether the use was unlawful or not is itself a conclusion of law, and to allege that the use was unlawful is not to allege a fact. So, also, to allege that Coleman knew that the certificate had been unlawfully issued or made is not to give any information as to what fact or facts he knew. The allegation that Coleman knew that the certificate had been unlawfully issued or made is, in substance, an allegation of two things: first, that the certificate had been unlawfully issued or made; and second, that Coleman knew that when he so used it. The allegation that the certificate was unlawfully issued or made gives no information as to any fact, or as to the nature of any guilty knowledge by Coleman; and, to say that Coleman knew that the certificate was unlawfully issued, gives no information, unless it is set forth wherein the unlawfulness of the issuing consisted, and that Coleman knew the facts so alleged to constitute such unlawfulness. No "probable cause" was set forth in the affidavit.

The warrant is open to the same objections as the affidavit, in the use of the same words, "unlawfully use," and "unlawfully issued or made;" and to the further objection, that it does not set forth that the certificate was used for the purpose of registering as a voter, or for what purpose, but simply that it was unlawfully used by Coleman in the election district named, on or about the day named, he knowing that it had been unlawfully issued or made.

In *United States v. Henry*, 3 Ben., 29, I held that, in an indictment under a statute which made it an offense to execute a fraudulent bond by which the payment of any internal revenue tax shall be evaded, it was sufficient to aver, in the indictment, that the defendant executed a specified bond, and that it was fraudulent, and that, by means of it, the payment of a specified internal revenue tax was evaded, and that the defendant knew the bond to be fraudulent; and that it was not necessary to set forth in what particulars the bond was fraudulent. This decision was made in view of the rulings in *United States v. Gooding*, 12 Wheat., 460, 474; *United States v. Mills*, 7 Pet., 138, 142; *United States v. Staats*, 8 How., 41, 44; and *United States v. Pond*, 2 Curt., 265, 268, establishing the principle, that, "in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the

statute, and that, if the defendant insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to the general rule." The allegation that a bond was fraudulent is an allegation of a fact, even though it is not stated wherein it was fraudulent, and even though to so state would be to state a further fact. But the allegation that a certificate was unlawfully used or unlawfully issued is not an allegation of a fact, but is the allegation of a conclusion of law. In this connection, the case of *United States v. Hirschfield*, 13 Blatch., 330, in this court, before Judge Benedict, may be referred to. There, an indictment, under section 5512 of the Revised Statutes, which makes it an offense to fraudulently register, not having a lawful right so to do, alleged that the defendant fraudulently registered, having no lawful right to register. It was objected that the indictment was insufficient, because it simply averred that the accused fraudulently registered, without stating any facts to show that a fraud was committed, or to enable the accused to know what he was charged with having done. The indictment was held insufficient on the ground that it did not point out the fraud which it was supposed the accused had committed so that he could know what it was that he was called on to explain. The subject has recently been considered by the supreme court, in *United States v. Cruikshank*, 2 Otto, 542, 557, and, within the principles there laid down, it must be held that the affidavit of Mosher failed to disclose "probable cause" for the issuing of the warrant.

§ 368. *It is not incumbent on an applicant for citizenship that he should see to it that the proceedings are recorded.*

It is not intended to be held that, if the evidence before the commissioner on the examination showed the defendant to have been guilty of an offense against section 5426, or, if the evidence taken in the proceedings on this *habeas corpus* showed such guilt, it would necessarily follow that the defendant must be now discharged because of the insufficiency of the original affidavit and warrant. The main question discussed, on the hearing on the writ, was, whether the certificate of citizenship which Coleman used was unlawfully issued. It was contended by the attorney for the United States that the certificate was unlawfully issued because there was no matter of record in the superior court on which to found it; and that what has been found in and produced from the books and files of that court does not constitute a record of the naturalization of Coleman. The proceedings in the superior court, in the case of Coleman, took place under the act of April 14, 1802 (2 U. S. Stat. at Large, 153), and the act of May 26, 1824. 4 id., 69. The first section of the act of 1802 contained the following provisions: "Any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise: *First*. That he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least before his admission, that it was, *bona fide*, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may at the time be a citizen or subject. *Secondly*. That he shall, at the time of his application to be admitted, declare, on oath and affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he

doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court. *Thirdly.* That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that, during that time, he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; *provided*, that the oath of the applicant shall in no case be allowed to prove his residence. *Fourthly.* That, in case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title, or order of nobility, in the court to which his application shall be made, which renunciation shall be recorded in the said court."

Section 3 of the act of 1802 provides that "every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court, within the meaning of this act." The first section of the act of 1824 provides as follows: "Any alien, being a free white person and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is an addition, three years previous to his admission; provided such alien shall make the declaration required therein at the time of his or her admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization."

Propositions are announced in this case, by the attorney for the United States, the accuracy of which cannot be questioned — such as, that the admission of an alien to citizenship is a judicial act; that it is essential that a court should act; and that the evidence submitted to the court for the purpose of admission to citizenship must be legal evidence. It is further contended, by the attorney for the United States, that the proceedings and judgment of admission must be recorded. The act of 1802 provides that the alien may be admitted to become a citizen "on the following conditions, and not otherwise:" (1) He must have declared his intention. (2) He must take an oath to support the constitution, and renouncing his former allegiance. The statute then says: "which proceedings shall be recorded by the clerk of the court." Then follow the third and fourth conditions: (3) The court must be satisfied, by proof, as to the prescribed residence and character of the applicant, some other oath than his own being required to prove his residence. (4) The applicant must expressly renounce all titles and orders of nobility, "which renunciation shall be recorded in the said court."

It is hardly to be supposed that congress intended to make the applicant for citizenship responsible for a non-compliance with any other conditions than such as he had the power to comply with. The applicant can declare his intention, and can take the prescribed oath and make the renunciation. But he cannot see to it that the proceedings and renunciation are recorded. He can produce a witness as to his residence and character, and can appear in person in the proper court, and be sworn there in open court, with his witness, as to the matters prescribed in the statute. When this is done, he can do nothing more except to receive such a certificate from the court as that which Coleman received from the court—a certificate which sets forth that it is given “by the court” under its seal; that Coleman appeared in the court on a day named, and applied to it to become a citizen, and produced to it such evidence, and made such declaration and renunciation, and took such oaths, as are required by the acts of congress on the subject; and that, thereupon, the court ordered that he be admitted; and he was accordingly admitted, by the court, to be a citizen of the United States. When he has done what the certificate says he has done, and when he leaves with the clerk of the court such papers as he has signed, and when the court tells him, as it does by the certificate, that, he having done all that, the court had thereupon ordered that he be admitted to be a citizen, and had admitted him to be a citizen, and when the court gives the certificate into his keeping, he has done all he can to comply with the statute. It cannot be held that the word “conditions” applies to anything further. There must, undoubtedly, be an act of admission; but what shall be the evidence, directed by the court, of such act of admission, is another question. The provision for recording “proceedings,” at the close of the second condition, and the provision for recording the renunciation mentioned in the fourth condition, are introduced in such form that they may very well be regarded as merely directory, and as no part of the “conditions.” The conditions are well satisfied by limiting them to what the applicant is required to do, in the first, second and fourth paragraphs, and to what the court is required to do, in the third paragraph. The admission to citizenship is to follow the observance of those conditions. The recording is to follow the admission and not precede it. The admission separates the conditions from the recording. The court admitting to citizenship must have evidence of the prior declaration of intention, or, in the case provided for by the first section of the act of 1824, evidence of what is required by that section, and satisfactory evidence as to residence and character, and the applicant must take the prescribed oaths and make the prescribed renunciations, and then the court is authorized to admit him to become a citizen. Even if the evidence as to residence and character is required to be recorded, yet it, and all evidence as to a prior declaration of intention, and the oaths and renunciations of the applicant, and the evidence as to residence and character, may very well be recorded by placing the written papers on the files of the court, in the shape in which the court receives them as complete. Such papers, when filed, are just as much recorded, and just as much records of the court, as if they were bound in book form, and the book were filed, or as if they were copied at length in a book, and the book were filed.

§ 369. *What is a record of naturalization.*

As said before, there must be an act of admission by the court. But the court has a right to say what it will regard as its act of admission, and it has a right to say what it will regard as its order that the applicant be admitted,

and what it will regard as his admission. Whatever the court says is its act of admission, and whatever the court says is its order of admission, is such act and such order, whenever the question is brought up in a collateral proceeding such as is the present proceeding, provided there is sufficient to reasonably amount to such act and such order. Here, the superior court has said to Coleman, by the certificate, that he has complied with all the requirements of the statute, and that it has made an order thereupon that he be admitted to be a citizen, and that it has admitted him to be a citizen. The evidence produced on the subject, from the files and records of that court, shows that the certificate stated the truth in stating that Coleman appeared in the court and applied to it to become a citizen, and produced to it such evidence, and made such declaration and renunciation, and took such oaths, as the statute required. The three oaths of Coleman, embracing also the necessary declaration and renunciation by him, and the oath of the witness as to his residence and character, are all sworn to in open court, and are on one and the same page of paper, at the head of which is a title, showing that all the proceedings are in the matter of the application of Coleman to the superior court to become a citizen of the United States. The original page of paper is on file in that court, and bears the mark of having been filed on the same day on which the certificate was issued. This filing was a recording, within the meaning of the statute.

§ 370. *Where docket entries are regarded as records by the court that makes them they will receive from other courts the same consideration as records.*

It is contended by the attorney for the United States that it has been shown that there was no matter of record in the superior court on which to found the certificate that was given to Coleman; that what was put on record was not an act of admission or an order of admission; that there should have been a record of a judgment of the court, in the same form as the ordinary record of a judgment between parties; that there is nothing in this case that can be regarded as such record, even including what is found in the "Naturalization Index" and the affidavits, and what is in them and on them; and that, therefore, the certificate was unlawfully issued. The evidence in this case shows very clearly that the superior court regarded what is found in the "Naturalization Index," in regard to Coleman, in connection with the paper of oaths, etc., and the initials of the judge on such paper, as amounting to an order for the admission of Coleman to be a citizen. The evidence shows that there was no other record or entry of any order for the admission of Coleman; but, it equally shows, not only that the court understood that there was an order for his admission, but, also, what it was that was understood by the court to be an order for his admission. The certificate given by the court under its seal states that there was an order made by the court for his admission. It follows that what is now found is what the court referred to as the order. It is not claimed that between the end of 1858 and the beginning of 1874 any other form of order admitting to citizenship was made, by the superior court in any case, different from what now appears to have been made in the case of Coleman, while it does appear, that, during all the time from 1858 to 1874, the form of the order of admission was the same as in the case of Coleman (except that nothing appears as to any initials of a judge), and that such form covers the cases of between fifty thousand and sixty thousand persons, who appear by the books of that court, before mentioned, to have been admitted by that court, during that period, to be citizens, if Coleman was so admitted. It may be that some, and, perhaps, many of the entries in such books may have been intended as state-

ments that persons were naturalized who were not in fact naturalized, who never appeared in the court, and who never took any oaths, and on whose cases the court never acted, or acted only to reject them, and it may be that certificates were issued like that issued to Coleman, not only in cases thus fraudulently entered in such books, but in cases where no entry appears in such books. But no such case is now presented to this court. It is to be presumed that, if it shall be judicially shown to the superior court that any entries of naturalization in its books are fraudulent, or that any fraudulent certificates have been issued under its seal, it will annul such entries and certificates.

But the only question in this court, on this branch of the case, is whether what is found in the records of the superior court amounts to an order for the admission of Coleman to be a citizen. That court, for a period of fifteen years, observed the same forms of procedure, and kept the same records, and made the same orders of admission, in all cases of naturalization, as in the case of Coleman, and none others. During that period, nineteen judges occupied seats on the bench of that court. They were: Joseph S. Bosworth, Murray Hoffman, John Slosson, Lewis B. Woodruff, Edwards Pierrepont, James Moncrief, Anthony L. Robertson, James W. White, John M. Barbour, Claudius L. Monell, Samuel B. Garvin, John H. McCunn, Samuel Jones, Freeman J. Fithian, John J. Freedman, James C. Spencer, William E. Curtis, John Sedgwick and Hooper C. Van Vorst. It is to be presumed that, in each case of naturalization, during that time, a certificate was given, like in form to that received by Coleman, and averring that the court had ordered the admission of the party. That series of judges must have regarded what was found on the files, or in the records or books of the court, in each case, as an order of admission, or as a record showing that such an order had been made by the court. The stipulation of facts states that, in the case of each person whose name is entered in the book as naturalized, there are on file papers resembling in all respects those in the case of Coleman. There is, therefore, no entry in the book, of a naturalization for which there are no proper oaths, declarations and renunciations. If any certificates were ever put into the hands of any person, not based on any actual proceeding in the court, they were certificates as to which both the entry in the book and the filed oaths, etc., were wholly wanting. The fact that there is no record in the court of any order directing the establishment and keeping of the volumes containing entries of naturalizations between 1858 and 1874 is of no consequence. The very keeping of them for so long a period is equivalent to an order that they be kept; and the absence of any order or practice, during that period, as to any other form of order of admission or record of admission, shows that what was kept and done is to be regarded as a record and as the record. The form of record in use before 1859, and that in use since 1873, cannot in this collateral proceeding be regarded as any better or more satisfactory form of record or order than that used during the period between 1858 and 1874.

§ 371. *How far docket entries are admissible as record evidence. Cases cited.*

No case is cited where what is found of record and on file in the case of Coleman has been held to be not a sufficient record or order of admission. In *Spratt v. Spratt*, 4 Pet., 393 (§§ 359-363, *supra*), the naturalization was held to be good. This was the case, also, in *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420, and in *The Acorn*, 2 Abb., 434, and in *Ritchie v. Putnam*, 13 Wend., 524, and in *McCarthy v. Marsh*, 5 N. Y., 263. There are decisions that the docket entries of a court are not admissible without laying a foundation therefor by

showing why a copy of the record is not produced. Such was the case in *Ferguson v. Harwood*, 7 Cranch, 408, and in *Levering v. Dayton*, 4 Wash., 698. But where docket entries stand in the place of any other record, and are regarded by the court which makes them as the record, they receive from other courts the same consideration, as a record, which is accorded to them by the court which permits them to stand in the place of any other record, provided there is no express provision of law prescribing any other record. In *Philadelphia, etc., R. Co. v. Howard*, 13 How., 307, a copy of the docket entries of a court in a suit were produced, to prove the pendency of the suit. It was objected that a formal record ought to have been shown. It appeared that the docket entries and files of the court stood in place of the record. The supreme court says: "When a formal record is not required by law, those entries which are permitted to stand in place of it are admissible in evidence." It then cites with approval the case of *Regina v. Yeoveley*, 8 Ad. & Ell., 806, where it was held that the minute book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and it also cites with approval the kindred cases of *Arundell v. White*, 14 East, 216; *Jones v. Randall, Cowp.*, 17, and *Commonwealth v. Bolkom*, 3 Pick., 281.

In *Washington, etc., Steam Packet Co. v. Sickles*, 24 How., 333, the plaintiffs, contending that a prior verdict and judgment in their favor against the defendants estopped the defendants as to material questions in the cause, offered, as evidence of such verdict and judgment, docket entries thereof in a court of the District of Columbia. The defendants objected that the docket entries were simply memoranda or minutes from which a record of a verdict and judgment were to be made. The supreme court says: "It appears that, in this district, as in Maryland, the docket stands in the place, or perhaps is, the record, and receives here all the consideration that is yielded to the record in other states. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. *Bateler v. State*, 8 G. & J., 381; *Ruggles v. Alexander*, 2 Rawle, 232." These decisions are conclusive of the present question. The statute, in requiring the proceedings to which it refers to be "recorded by the clerk of the court," required no other record, in respect to *Coleman*, than that which was made, either as respects the order of admission or any of the oaths or affidavits.

In *In re Christien*, before Judge Freedman, of the supreme court of the city of New York, October 15, 1876, persons in the exact position of *Coleman* applied to that court to have the record of the proceedings in that court, admitting them to citizenship, perfected by an entry *nunc pro tunc* of the fact of such admission in the minute book of that court. The sole ground of such application was, that the validity of the admission of the party to citizenship was disputed, on the allegation that there was no legal record of the judgment admitting him to citizenship, for the reason that the clerk of the court did not write out an entry in the minute book of the court reciting the proceedings and showing the adjudication made. This is the same point now urged here. Judge Freedman, in his decision in that case, details the practice of the supreme court from the close of 1858 to the close of 1873, in naturalization proceedings, and shows it to have been the same in all cases as in the case of *Coleman*. He held, that what was so done constituted a sufficient record, and that the want of any further or different record, and the absence of an entry in the general

minute book of the court, did not render the admission to citizenship invalid. He therefore denied the application, on the ground that no necessity existed for granting it, because there was no defect in the record which required perfection by amendment.

It is urged, by the attorney for the United States, that there is nothing to show that the book labeled on the back "Naturalization Index," and found in the office of the clerk of the superior court, was ever regarded by that court as a record, or that that court even knew of its existence; that it is as much a private, unofficial book, as the note paper in the clerk's desk is private, unofficial paper; that there is nothing to show when the entries in it were made, nor by whom they were made; that, for all that appears to the contrary, they were made up from the affidavits alone, some time after the time when the affidavits purport to have been made; that it does not appear that the book was kept even by the authority or direction of the clerk of the court; and that it may have been made up by, and have been the property of, some deputy who used it as an aid in making searches. There is no evidence tending to show that what is thus conjectured has any foundation in fact. It was open to the United States to show that the "Naturalization Index" was not regarded by the superior court as a record, or that its existence was unknown to that court, or that it was a private, unofficial book, or that the book was not kept by the authority or direction of the clerk of the court, or that it was the property of some deputy. The record in the present case contains a certificate signed by the present clerk of the superior court, and attested by the seal of that court, certifying that the copy, before set forth, of the entry in regard to Coleman, in such "Naturalization Index," "is a true extract from the record of naturalizations of this court, remaining in my office, to date," which date is November 22, 1878. When a certificate of the clerk of a court, under its seal, certifying that a book is a "record of naturalizations" of the court, is presented and accepted as evidence of the existence in the book of the original entry of which a copy is annexed to the certificate, and no evidence is produced that the signature of the clerk is forged or that the seal is not an impression from the true seal, or that the book has no existence, or that the entry is not in it, and when it appears that the book is in the office of the clerk of the court, and has on it and in it marks designating it as the property of the court, and as containing transactions of the court, and when the entry in question in it corresponds with the contents of papers on file in the office of the clerk of the court, which papers purport to be genuine, and the genuineness of which is not impeached, and which purport to have been filed on the day when the particular transaction took place, it is a proper legal conclusion that the court regarded the book as one of its records, and knew of its existence, and that it is not a private, unofficial book, and that it was kept by the authority and direction of the court and of its clerk, and that it was not the property of some deputy. So, too, it is a proper legal conclusion, on the same evidence, that the entry in the book was made at a proper time and by proper authority.

In regard to the oaths or affidavits on file in the superior court it is contended by the attorney for the United States that it is impossible to say, from the initials of the judge alone, that he ever made any decision concerning the affidavits, or, if he did, what decision he made, or that the decision was made in court; that, even though it be conceded that he examined the affidavits and proved them, and put his initials on them, as a *fiat* that they be filed, yet it does not appear that he did so when in court and acting as the court; that the

absence from the regular minutes of the court of an entry that the question of the naturalization of Coleman was before the court, without proof that the omission was accidentally made by the clerk, is evidence that, if the judge considered and passed upon the affidavits, he did so out of court; that the affidavits are *ex parte* affidavits, and not legal evidence; and that it is to be inferred from the affidavits that the affiants were not examined in court, but merely signed and swore to the affidavits. These positions are recited to show that they have been considered. The oaths or affidavits are all on one page of paper, with the title at the top: "Superior court of the city of New York. In the matter of Peter Coleman, on his application to become a citizen of the United States. Minor." Each one of them purports to be "sworn in open court." The attestation signature of each jurat is "James M. Sweeny, clerk." This is an attestation that the oath was taken in the court, in open court, in the presence of the court, when the judge holding the court was sitting as a court. As the initials on the page are the initials of a judge who was a judge of the court at the time, and competent to hold it, it is to be presumed, from such initials, in connection with the other evidence, that he did hold the court, and that he wrote his initials as an authority to the clerk to do what is found to have been done, namely, to enter the name of Coleman in the "Naturalization Index," as admitted to citizenship, with the date and the other matters found in the book kept, and as authority to file the oaths or affidavits, and as an assertion that the court held by him, and he, while holding the court, had received the application of Coleman, and acted judicially on the matters covered by the oaths or affidavits, and been satisfied by the evidence, as to the residence and character of Coleman, and had admitted him thereupon to be a citizen of the United States. As the court is to be satisfied by proof, of the existence of the necessary prerequisites to admission to citizenship, it is to be presumed, in the absence of evidence to the contrary, that Coleman and his witness deposed, on examination on oath in open court, to the several matters set forth over their respective signatures as being deposed to by them on oath, and certified by the clerk as sworn to by them in open court, and that they did so to the satisfaction of the court. None of the objections taken in respect to the affidavits are regarded as tenable.

§ 372. *An applicant for citizenship receiving a certificate is not responsible for want of form in the record.*

It therefore appears that Coleman was duly and legally admitted to citizenship; and that the legality of his admission was not invalidated by any act or omission which occurred either prior or subsequently to his admission. As he was legally admitted, it was proper for the court to give to him the certificate of citizenship which was given to him; and that certificate was not unlawfully issued or made. On this ground he is entitled to his discharge from arrest.

§ 373. *When a party is not guilty of using a certificate, knowing it to have been unlawfully issued.*

But there is another ground on which Coleman is entitled to be discharged. Even if there were such a defect in the record of the superior court as to make the certificate given to him one that was unlawfully issued or made, he was not guilty of an offense, under section 5426, unless, when he used the certificate, he knew that it was unlawfully issued or made. As it appears that he complied fully with all the conditions imposed on him as prerequisites to his admission, and that the unlawfulness, if any, was in the want of form in the record of the court, and as he received at the time from the court a certificate stating that

all the statutory requisites had been complied with, and that the court had ordered that he be admitted to be a citizen, and that he was accordingly admitted by the court to be a citizen, no court would permit a jury to convict him of using such certificate knowing that it was unlawfully issued. So manifest was this, that the moment the facts were brought to the attention of this court, on the hearing on the *habeas corpus*, it announced that Coleman would be discharged immediately, on this ground alone. Thereupon the attorney for the United States stated that he did not think the evidence disclosed sufficient guilty knowledge on the part of Coleman of the defects in the certificate of citizenship, and that he consented that he should go at large. He was accordingly released from custody, but no formal decision was made, in order that the other questions presented might be argued, considered and decided.

An order will be entered discharging Coleman from custody.

§ 374. The power of naturalization is exclusively in congress. *Chirac v. Chirac*, 2 Wheat., 269.

§ 375. After the general naturalization law passed by congress in 1790, no alien could become a citizen of the United States, or of any of the states, by complying with the naturalization laws of any of the states. *Matthew v. Rae*, 3 Cr. C. C., 699.

§ 376. Proof.—The naturalization of an alien cannot be proved by parol. *Slade v. Minor*, 2 Cr. C. C., 189.

§ 377. An authenticated copy of a record of a court, containing a petition to be admitted to citizenship, proof of residence, an oath of allegiance, and a statement that the applicant was admitted by the court to become a citizen, is admissible in proof of citizenship, although the record does not show a previous declaration. *Stark v. Chesapeake Ins. Co.*, * 7 Cr., 420. See § 338.

§ 378. The registry required by the act of 1802 must be five years before application for naturalization. Parol proof of arrival in the United States five years prior to the application is not admissible. *Anonymous*, * Pet. C. C., 457.

§ 379. An exemplified copy of the record of the naturalization of an alien in a court of competent jurisdiction is admissible to prove the citizenship of the party without preliminary proof of proceedings necessary to give the naturalizing court jurisdiction. *The Acorn*, 2 Abb., 443.

§ 380. Effect of judgment.—Proceedings to obtain naturalization are clearly judicial. A hearing is required to be had in open court, and the right can only be conferred by the judgment of the court upon satisfactory proof. It has, therefore, all the elements of a judgment. It has the character and attributes of a judgment, and is equally conclusive. The order admitting an alien to citizenship is conclusive as to the question of the requisite length of residence in the United States, and cannot be inquired into collaterally. *Ibid.* See §§ 339-341.

§ 381. A copy of the registry of births at Hamburg, in Germany, shows that Rudolph Carl Levy was born in that place on the 22d day of February, 1853. It is shown by a copy of the record of proceedings of the court of hustings of the city of Staunton, in Virginia, that Charles Levy was admitted to citizenship by that court on the 10th day of July, 1873. Assuming that the two names refer to the same person, it is held that the judgment of the court is final and conclusive, it appearing that it had jurisdiction to admit aliens, and that Charles Levy must be regarded as a citizen of the United States. *Citizenship*, * 14 Op. Att'y Gen'l, 509.

§ 382. Application; courts of record.—Upon an application by one Michael Cregg to be naturalized, it appeared that the petitioner's preliminary declaration of his intention to become naturalized, the making of which before a court of record was necessary by the act of congress of April 14, 1802 (2 Stats. at Large, 153), had been made before the police court of Lynn, Mass., the judge whereof was also clerk. The question then arose whether the police court of Lynn was competent in point of law to receive the declaration. The court, in its opinion, declared that under and by virtue of the act of 1802, as aforesaid, an alien, who wishes to become naturalized, must make his preliminary declaration to that effect before the supreme, superior, circuit or district court of some one of the states; that the terms district and circuit courts include all such courts of record as have common law jurisdiction, a seal and a clerk or prothonotary; that the police court of Lynn, in which the judge was also clerk or recording officer, was not a court having a clerk, and therefore not a court of record

within the meaning of the act. The application for naturalization was therefore denied. *Ex parte Cregg*,* 2 Curt., 93.

§ 383. It is provided by § 2165 (Rev. Stats. U. S.) that applications for naturalization must be made before "a court of record of any of the states, having common law jurisdiction, a seal and a clerk." Any city court, therefore, that is a court of record, that has a clerk and a seal, and that is clothed by statute with all the power and jurisdiction of a justice of the peace or of a county judge or county court, and which in addition is given civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed \$1,000, is a court having common law jurisdiction within the meaning of said § 2165. *United States v. Power*,* 14 Blatch., 223.

§ 384. Upon an application for naturalization filed in 1844 by the petitioner, one Thomas H. Butterworth, objection was made that the preliminary application required by the act of 1802 had been made, and the preliminary oath, as to the petitioner's wish to become a citizen, taken, before the clerk and not the judge of a district court. The court, however, in its opinion, declared the law to be that, as receiving the application and administering the oath to an alien was a mere ministerial act, it might be done by the clerk as well as by the judge or court itself, in full compliance with the spirit of the naturalization act. That besides, congress had, by act of May 26, 1824 (4 Stats. at Large, 64), provided that the first declaration under oath, "if the same has been made before the clerks of either of the courts, etc., shall be as valid as if made before the said courts respectively," and that this act of congress applied to future no less than to past cases. *Ex parte Butterworth*,* 1 Woodb. & M., 323.

§ 385. Rights of naturalized citizens.—A naturalized citizen of the United States, residing in a foreign country, is entitled to the same protection under the laws of the United States as a native of the United States would be. *Expatriation*,* 14 Op. Att'y Gen'l, 295.

§ 386. Naturalization is the act of adopting a foreigner and clothing him with all the privileges of a native citizen or subject. It *ipso facto* places the native and the adopted citizen in precisely the same relations with the government under which they live, except so far as the express and positive law of the country has made a distinction in favor of one or the other. *Right of Expatriation*,* 9 Op. Att'y Gen'l, 356.

§ 387. A native and a naturalized citizen of the United States are equally protected by our laws in their rights at home and abroad, and even in the country where the latter was born. Either of them may be taken up for a debt contracted or a crime committed by himself. The naturalized citizen owes no further allegiance to his native country. A native of Hanover, naturalized as a citizen of the United States, returning to his native country on a temporary visit, cannot be lawfully arrested, punished or detained for the non-performance of any duty, supposed to grow out of that allegiance which he has abjured and renounced. He cannot be forced into the military service of his native country and prevented from returning to the United States. If the law of Hanover forbade him to transfer his allegiance to us, then the laws of the two countries are in conflict, and the law of nations, deciding the question on principles of its own, declares the right of naturalization without the consent of the sovereign to whom allegiance is renounced. *Ibid.*

§ 388. A feme covert may be admitted to be naturalized. *Ex parte Pic*, 1 Cr. C. C., 372. See §§ 42, 53.

§ 389. Any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed to be a citizen of the United States, irrespective of the time or place of marriage or the residence of the parties. *Citizenship*,* 14 Op. Att'y Gen'l, 402.

§ 390. Under the act of congress enacted in 1855, providing that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen," it is held that the citizenship of a woman so acquired is not lost by her survival of her husband, and her subsequent marriage with an alien, but is permanent, and defeasible only as in case of other citizens. *Citizenship*,* 15 Op. Att'y Gen'l, 599.

§ 391. The act of February 10, 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of congress provide. *Kelly v. Owen*,* 7 Wall., 496.

§ 392. The terms "married," or "who shall be married," do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. *Ibid.*

§ 393. The terms "who might be lawfully naturalized under the existing laws" only limit

the application of the law to free white women. The previous naturalization act existing at the time only required that the person applying for its benefits should be a "free white person," and not an alien enemy. *Ibid.*

§ 394. Who may become citizens.— An application to be naturalized, where the applicant had resided in the United States upwards of six years; that during that time he was absent a short time upon business, but left his family in the United States, etc., was rejected by the court under the law of 1802 because the residence did not appear to be a continued residence, and the court had seen another affidavit of the same deponent inconsistent with the one offered. *Ex parte Walton*, 1 Cr. C. C., 186. See § 384.

§ 395. Applicants for naturalization in Utah territory, who, being sworn, each admitted that he had two wives, were rejected by the court, notwithstanding each testified that he was married to his second wife before the passage of the act of congress of July 1, 1862, which denounces severe penalties against those who shall be convicted of bigamy or polygamy. *In re Douglass*,* 5 West. Jur., 171.

§ 396. Upon an application for naturalization, made under the clause of the law of April 14, 1802, authorizing persons resident in the United States, before the 29th of January, 1795, to become citizens on proof of two years' residence, etc., a deposition that the deponents had known the applicant "since the year 1793, in New York, and that he was a supercargo in their employ in the year 1795, and continued till 1798," was held not to be sufficient evidence that the applicant was residing in the United States before the 29th of January, 1795. *Ex parte Tucker*, 1 Cr. C. C., 89.

§ 397. In 1805 a foreign mariner was admitted as a citizen on proof that he had resided five years in Alexandria, and that during that time he had sailed from the port of Alexandria in American vessels, as a mariner. *Ex parte Pasquall*, 1 Cr. C. C., 243.

§ 398. Upon an application to be naturalized, founded on an affidavit that the applicant came to this country in October, 1797, and continued to reside here until 1800, when he went to England, and returned in April, 1801; and in the fall of 1801 he went to England again, and returned in 1802, and had since continued to reside in Alexandria, the court refused to admit the applicant because he had not continued to reside according to the act of 1804, and had not made a previous declaration of his intent, according to the act of 1802. *Ex parte Saunderson*, 1 Cr. C. C., 219.

§ 399. By law of congress of March 27, 1816, an alien who resided in the United States before 1802 could become a citizen without proving his residence here for five years. *O'Brien v. Woody*, 4 McL., 76.

§ 400. Our treaty with the North German Confederation of February 22, 1868, declares that "Citizens of the North German Confederation, who become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States for five years, shall be held by the North German Confederation to be American citizens and shall be treated as such." It is held that a minor of Prussian birth, who, after a short residence in this country, spends nearly a year in his native country, living with his father, and holds himself out as a subject of that country and obtains its formal credentials as such when about to go to another country to learn a trade, has not resided uninterruptedly in the United States within the meaning of those words in the treaty, and hence is not entitled to the protection of the United States as against the government of North Germany, as a naturalized citizen. The recital contained in the record of the naturalization proceeding, that he had resided constantly within the United States for more than five years, is not conclusive. *Case of Moses Stern*,* 13 Op. Att'y Gen'l, 876.

§ 401. An applicant for naturalization in 1846 had deserted from a British ship of war and enlisted on board an American frigate in 1814, war then existing between the two nations. He had continued in the United States navy during the war and several years subsequently, and since that time had followed the seas constantly, sometimes in the merchant, and sometimes in the United States service, but had no residence in any part of the United States other than by such employment on board American vessels. He had filed, in 1832, his declaration of intention of becoming a citizen. It was held that he had not resided in the United States five years, and one year in the state where his application was filed, as required by the act of 1802; that he had never acquired any domicile in the United States at all; that he had not resided in the United States five years without being out of its territory, as required by the act of 1813; and that he was not entitled to be naturalized. *Anonymous*,* 4 N. Y. Leg. Obs., 98.

§ 402. Application for naturalization and citizenship, filed on the 6th of May, 1872, by one Robert Bailey, who had served four years in the United States marine corps. From the evidence it appeared that the petitioner had been born in England twenty-one years prior to May 1872; that, on the 14th of May, 1866, he enlisted in the United States marine corps, from which he had been honorably discharged four years thereafter; petitioner therefore claims to

be entitled to the rights of citizenship under and by virtue of the twenty-first section of the act of July, 1862 (12 Stats., 597), which provides: "That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States, previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid." The only point in the case is whether the phrase "armies of the United States" includes the "marine corps" of the United States, so as to give Bailey the benefit of his service in the same and discharge therefrom and entitle him to naturalization, without further proof of residence within the country, as required by the naturalization act. And the court, in its opinion, admits that the word "army," or "armies," in its unlimited and most general sense, might be taken to include all the organized and armed power of the republic, its fighting forces, whether operating on land or sea or both; but further declares that such is not the sense in which it has been used in the constitution or in any of the prior acts of congress. That the term "army or armies" has never been used by congress so as to include the navy or marines, and that there is nothing in the act of 1862, or in the circumstances which led to its passage, to warrant the conclusion that it was used therein in any other than its long established and ordinary sense, i. e., the land force, as distinguished from the navy and marines. *In re Bailey*,* 2 Saw., 200.

§ 403. Children born here, of aliens who have declared their intention of becoming citizens, are citizens of the United States. Citizenship,* 10 Op. Att'y Gen'l, 329. See § 61.

§ 404. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can become a citizen only by naturalization. The foreign-born son becomes a citizen by being himself naturalized, or by naturalization of his father during the minority of his son. *North Noonday M. Co. v. Orient M. Co.*, 6 Saw., 304.

§ 405. Children born in the United States, of alien parents who have never been naturalized, are native-born citizens of the United States, and do not require the formality of naturalization to entitle them to the rights and privileges of citizenship. Citizenship,* 10 Op. Att'y Gen'l, 328.

§ 406. Children born abroad, whose fathers were at the time of their birth citizens of the United States, and had at some time resided in the United States, are, under the provisions of the act of February 10, 1855, declared to be citizens of the United States. But if, by the laws of the country where such children are born, they are citizens of that country, it is not competent for the United States, by any legislation, to interfere with that relation; or, by undertaking to extend to them the rights of citizenship in this country, to interfere with the allegiance which they owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. Such persons, not having resided in the United States, and not apparently intending to reside here, are not entitled to passports of citizenship from the secretary of state. Citizenship—Passports,* 13 Op. Att'y Gen'l, 89.

§ 407. A. is born in the United States of a Prussian father naturalized and resident here. When about four years of age he removes with his father to Germany and continues to reside there. On attaining his majority the German government calls upon him to report for military duty. To an inquiry of our minister, his father in his behalf declines to give any assurance of intention to return to this country. Our treaty with North Germany of 1866 declares that "if a German naturalized in America renews his residence in North Germany, without intent to return to America, he shall be held to have renounced his naturalization in the United States." Two years' residence is made evidence of such an intent. *Held*, that the father became a German subject again, that his son (being yet a minor) also acquired German citizenship according to the laws of Germany, and that the son is by birth an American citizen also; and further, that the son might at his election, by returning or remaining, choose either nationality, and that, not having elected to return he is not entitled to the protection of the United States. *Steinkauler's Case*, 15 Op. Att'y Gen'l, 15.

§ 408. The first article of the convention of September 20, 1870, between the United States and the Austro-Hungarian monarchy, provides that "citizens of the United States of America, who have resided in the territories of the Austro-Hungarian monarchy uninterruptedly at least for five years, and during such residence have become naturalized citizens of the Austro-Hungarian monarchy, shall be held by the United States to be citizens of the Austro-

Hungarian monarchy and shall be treated as such." It is held that a person born in this country of Austrian parents temporarily residing here, who was taken to Austria when quite young and has resided there ever since (much longer than five years), and has at different times obtained passports from the Austrian government and traveled under its protection as an Austrian subject, is a subject of Austria notwithstanding that he has never been naturalized, in view of the fact that the law of Austria considers him an Austrian subject, and his acts manifest a consent to be a member of that nation. Case of Heinrich,* 14 Op. Att'y Gen'l, 154.

As to rights and liabilities of Citizens, see CONSTITUTION AND LAWS.

Descent of Land to Aliens, see ESTATES OF DECEDENTS.

As to rights and liabilities of Alien Enemies and Neutrals, see WAR.

See DOMICILE.

As to jurisdiction as affected by Citizenship, see COURTS.

CITY LOTS.

See CORPORATIONS.

CITY ORDINANCES.

See CORPORATIONS.

CIVIL ACTIONS.

See ACTIONS.

CIVIL RIGHTS.

See CONSTITUTION AND LAWS; CRIMES AND CRIMINAL PROCEDURE.

CIVIL WAR.

See WAR.

CLAIM AND COLOR OF TITLE.

See LIMITATIONS.

CLAIMS AGAINST FOREIGN GOVERNMENTS.

See FOREIGN GOVERNMENTS.

CLAIMS AGAINST THE GOVERNMENT.

See GOVERNMENT.

CLERGYMEN — COLLISION.

CLERGYMEN.

See CHURCHES AND BENEVOLENT ASSOCIATIONS.

CLERKS OF COURTS.

See COURTS.

CLOUD ON TITLE.

See EQUITY.

COASTING TRADE.

See MARITIME LAW; CARRIERS.

CODICIL.

See ESTATES OF DECEDENTS, sub-title WILLS.

COIN.

See MONEY.

COLLATERAL ATTACK.

See JUDGMENTS.

COLLATERAL SECURITY.

See BAILMENT, III.

COLLECTOR OF THE REVENUE.

See REVENUE.

COLLEGES.

See SCHOOLS AND COLLEGES.

COLLISION.

See MARITIME LAW.

COLONIES.

See STATES AND TERRITORIES.

COLOR OF TITLE.

See LIMITATIONS.

COMITY AND RECIPROCITY.

§ 1. **Corporations.**—The recognition of the existence of a corporation of a sister state, and the enforcement of its contracts, depend purely upon the comity of the states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. *Paul v. Virginia*, 8 Wall., 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 566.

§ 2. The courts of Ohio hold that the law of 1853, permitting railroad companies to sell their bonds or notes at such times and in such places, either within or without the state, and at such rates and for such prices as might be deemed to their advantage, extends by comity to railroad companies of other states borrowing money in Ohio. *Railroad Co. v. Bank of Ashland*, 12 Wall., 226.

§ 3. Statutes on the liability of shareholders in a corporation are not penal, and such statutes will be enforced under the rule of state comity. *Cuykendall v. Miles*, 10 Fed. R., 842.

§ 4. According to the rules of international comity foreign corporations are allowed to make contracts. And the rule will be presumed to be in force as between the states of the Union in the absence of any legislation to the contrary on the part of any particular state. *Bank of Augusta v. Earle*, 18 Pet., 519.

§ 5. **Distributing assets.**—A decree of an English court distributing assets of an estate in England is no bar to a suit by an administrator appointed in Pennsylvania to recover assets there located. The question of transmitting the assets to the foreign jurisdiction is not one of international comity. *Aspden v. Nixon*, 4 How., 467.

§ 6. **Right of alien to sue for a wrong.**—A wrong done to an alien here may be redressed in our courts, though no remedy would be afforded an American citizen in the courts of the alien's domicile. It is not competent for courts to introduce the rule of retaliation. *Taylor v. Carpenter*, 1 Woodb. & M., 1. See § 9.

§ 7. — **to sue in court of claims.**—By the proceeding known as the *petition of right* American citizens are permitted to prosecute claims against the British government, and it is held, therefore, that British subjects may sue in our court of claims. *United States v. O'Keefe*, 11 Wall., 178; *Carlisle v. United States*, 16 Wall., 147. See CITIZENS AND ALIENS.

§ 8. **Recaptures.**—By the act of congress, as well as by the general law, in case of recapture, the law of reciprocity is to be applied. If the foreign country would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. *Schooner Adeline*, 9 Cr., 244; *The Star*, 8 Wheat., 78.

§ 9. **Retaliation.**—The question of retaliation upon the subjects of another nation for its unjust proceedings against our citizens is a political and not a legal question. It is for the consideration of the government, not of its courts. *The Nereide*, 9 Cr., 388. See § 6.

§ 10. **Guardianship.**—Whilst the English and American laws require a guardianship where the property is situated, it is conceded that, in the due exercise of comity, preference would ordinarily be given to the person already clothed with the authority of guardian in the minor's own country. *Hoyt v. Sprague*, 13 Otto, 618.

See CITIZENS AND ALIENS.

As to Judicial Comity, see COURTS.

COMMERCE.

See AGENCY; BILLS AND NOTES; CARRIERS; CONSIGNOR AND CONSIGNEE; MARITIME LAW.
As to Regulation of Commerce, see CONSTITUTION AND LAWS.

COMMISSIONER IN ADMIRALTY — COMPOSITION.

COMMISSIONER IN ADMIRALTY.

See PRACTICE.

COMMISSIONER OF THE CIRCUIT COURT.

See UNITED STATES COMMISSIONERS.

COMMISSIONER OF PATENTS.

See PATENTS.

COMMISSIONING OFFICERS.

See OFFICERS.

COMMISSIONERS.

See FEES AND SALARIES.

COMMON CARRIERS.

See CARRIERS. Liability for torts, see TORTS.

COMMON LAW.

See CONSTITUTION AND LAWS.

COMPACTS BETWEEN STATES.

See STATES AND TERRITORIES.

COMPENSATION.

See FEES AND SALARIES.

COMPETENCY OF WITNESSES.

See EVIDENCE.

COMPOSITION.

See DEBTOR AND CREDITOR.

COMPOUNDING OFFENSES — CONFESSIONS.

COMPOUNDING OFFENSES.

See **CRIMES AND CRIMINAL PROCEDURE.**

COMPROMISE.

See **EVIDENCE; PAYMENT.**

COMPTROLLER OF THE CURRENCY.

See **BANKS, NATIONAL, I; GOVERNMENT.**

COMPUTATION OF TIME.

See **TIME.**

CONCEALMENT.

See **FRAUD.**

CONCESSION.

See **LAND.**

CONCURRENT JURISDICTION.

See **COURTS.**

CONDEMNATION OF LAND.

See **EMINENT DOMAIN.**

CONFEDERATE BONDS — MONEY — STATES.

See **WAR.**

CONFESSION OF JUDGMENT.

See **JUDGMENTS AND EXECUTIONS.** In Bankruptcy, see **BANKRUPTCY.**

CONFESSIONS.

See **EVIDENCE.**

CONFIRMATION.

See LAND.

CONFISCATION.

See WAR.

CONFLICT OF JURISDICTION.

See COURTS.

CONFLICT OF LAWS.

See CONSTITUTION AND LAWS; CONTRACTS.

CONFUSION OF GOODS.

§ 1. *In general.*—If a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part, of the property. Certainly not unless the goods of both owners are of the same quality and value. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive the other, and embarrasses him in obtaining his right, the effect must be the same. *The Idaho*, 3 Otto, 575. (See CARRIERS, §§ 880-887.) *The Steamboat Idaho*, 5 Ben., 238; 11 Blatch., 224.

§ 2. — *mixing cotton.*—The above rule applied to a case in which two separate lots of cotton bales were so intermingled, and the marks so changed, that it was impossible to identify any bale as belonging to either lot. And it was held that neither the person causing the confusion, nor any one claiming under him, was entitled to the possession of any bale that he could not identify. *Ibid.*

§ 3. *If spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, the government will not thereby lose its property, but may claim its fair proportion of the rectified spirits.* The only result of applying the doctrines of confusion of goods would be to forfeit the entire mixture. It cannot be claimed that the process of rectification in leaches effects such a transmutation of species as to destroy the identity of the liquor. *The Distilled Spirits*, 11 Wall., 353.

§ 4. *Proceeds of property.*—It is now established that the owner of property, which has been disposed of without his authority, can recover the proceeds, if the same can be traced, as a part of a particular fund or lot of money, or as a part of a deposit of money in bank, though mingled in such fund or deposit with other money, or into whatever form or new investment the proceeds may be carried, whether of money or property, provided that the rights of third parties have not intervened. *In re Ketchum*, 1 Fed. R., 815.

§ 5. *Logs; rights of mortgagee.*—Where logs were seized under execution against the mortgagor, and the mortgagee sued the sheriff for damages, and it was contended that the logs were not so described in the mortgage as to be capable of identification, *held*, that as the difficulty of identification was caused by the wrongful confusion by the mortgagor of the logs with other logs, the mortgagee being innocent could not suffer thereby. *Merchants' Nat. Bank v. McLaughlin*, 1 McC., 258.

§ 6. *Wheat delivered to warehouseman.*—The plaintiff in this case delivered a quantity of wheat to one W., as warehouseman, and the wheat was mixed with a quantity of other wheat in a granary. Plaintiff sued W.'s assignee in bankruptcy, alleging a conversion. *Held*, that plaintiff's wheat having been mixed and confused with that in W.'s possession, with the mutual consent of the parties, the plaintiff became tenant in common with W. of the bulk of grain produced by the mixture, and his interest therein was in proportion to the number of

bushels deposited by him; and even if the confusion were against the consent of one, the wheat, or other grain, being presumed to be of equal value, each would be entitled to his proportionate share of the mixture. *Adams v. Meyers*,* 1 Saw., 306.

§ 7. Where wheat is received in store by a warehouseman, from different owners, and mixed, the title to the mixture remains in the original owners, and each is entitled to claim his share. Should the warehouseman sell a portion of the mixture, each original owner would be entitled to claim his *pro rata*; and should he buy other wheat and mix it with the remaining portion, the title to the wheat so purchased would pass to the original owners. *Rahilly v. Wilson*,* 5 Ch. Leg. N., 217.

CONGRESS.

See GOVERNMENT.

CONNECTICUT.

See STATES AND TERRITORIES.

CONNECTICUT RESERVE.

See LAND.

CONQUERED TERRITORY.

See GOVERNMENT.

CONSIDERATION.

See BILLS AND NOTES, I; BONDS; CONTRACTS.

CONSIGNOR AND CONSIGNEE.

[See AGENT; CARRIERS.]

SUMMARY — *Transfer of title to goods*, § 1. — *Assignment of proceeds*, §§ 2, 3. — *Insolvency of consignee; sale of goods; set-off*, §§ 4-7.

§ 1. A., being indebted to B., shipped five hundred kegs of nails to C., taking a bill of lading, stating that the same were consigned for the use of B., and so notified C. *Held*, that this operated as a transfer of the legal title to B., and that his assent to the transfer would be presumed in the absence of evidence to the contrary; that the goods were not liable to be attached for a debt of A., and that C. had no lien thereon for previous advances to A. *Grove v. Brien*, §§ 8-10. See §§ 24-39.

§ 2. The assignment of the proceeds of goods consigned for sale does not vest the title to the goods in the assignee. *Tiernan v. Jackson*, §§ 11-14. See §§ 74-81.

§ 3. Where A. consigned goods to B. with instructions to hold the same subject to his order, and afterwards assigned to C. the proceeds to be derived from the sale, and B., on receipt of the goods, attached and sold them to satisfy a debt due him from A., but never did any act recognizing the appropriation made by the assignment, *held*, that there was not such privity of contract between the parties as would sustain an action by C. against B. *Ibid.* See § 88.

§ 4. The transfer by a consignee of his principal's property, either by way of security or in satisfaction of his own antecedent debt, is invalid against the principal, although the creditor believes that the factor owns the property. *Warner v. Martin*, §§ 15-21. See § 59.

§ 5. The right of set-off against a consignee whose principal is unknown does not exist in favor of one having notice of the factor's insolvency. *Ibid.*

§ 6. The authority of a factor is not capable of being delegated. *Ibid.*

§ 7. Plaintiff consigned tobacco to a factor in New York, who subsequently became embarrassed and sailed for Europe, leaving his business under the management of a clerk. Shortly before the factor's failure the clerk transferred a part of the tobacco to A., who knew of the factor's failing circumstances, but had no notice of the plaintiff's interest. A. settled for the tobacco, after his purchase, by paying his own notes which he had lent to the factor. B. was a *bona fide* purchaser of some of the tobacco from A. *Held*, that the transfer did not divest plaintiff's ownership; that A., having no title, could convey none; that A. was liable to the plaintiff for so much of the tobacco as he retained, and B. was liable for what was transferred to him. *Ibid.*

[NOTES.—See §§ 22-111.]

GROVE v. BRIEN.

(8 Howard, 429-440. 1849.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of this district, in which a bill was filed by the complainant for the purpose of enforcing the collection of a debt due from John McP. Brien, a non-resident, out of goods belonging to him within the district, in the hands of William Fowle & Sons, the consignees. It was defended by Fowle & Sons, on the ground that they had a lien upon the goods. They also set up that the property was claimed by R. Gilmor, a merchant in Baltimore. The bill was afterwards amended, making Gilmor a defendant, who answered, setting up his title to the property; and also filed a cross-bill against the complainant, Fowle & Sons, and Brien, setting forth the same title, and praying that the proceeds (the property in the meantime having been sold) might be paid over to him. The defendants put in several answers to the bill; but upon the view we have taken of the case, it is unnecessary to refer to them particularly.

The facts disclosed which it is material to notice are, that Brien, being indebted to Gilmor, on the 14th of March, 1843, shipped to Fowle & Sons five hundred kegs of nails, the property in question, for the purpose of securing such indebtedness, and took from the master of the boat the following receipt or bill of lading: "Received, March 14, 1843, of John McP. Brien, five hundred kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order." And on the same day sent a letter directed to the consignees, advising them that the goods were consigned for the use of Gilmor, and which was received about the time of the arrival of the goods. Upon these facts, the court below dismissed the original bill of complainant with costs, and decreed the proceeds of the property to Gilmor, deducting freight and charges. The case is here on an appeal by the complainant in the original bill. We are of opinion that the decree of the court below was right, and should be affirmed.

§ 8. *The delivery of goods to a carrier, and a bill of lading taken in the consignee's name, operates as a transfer.*

The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment, therefore, was not only in fact, but in judgment of law for and on his account. Gilmor was the consignor. The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A. for the use of B., the property vests in B., and the action must be brought

in his name in case of loss or damage. 3 Salk., 290; 1 Ld. Raym., 271; 3 Barn. & Ald., 382; 1 Binn., 109; Abbott on Shipp., 216 and note; Long on Sales, 293, Boston ed. If the person to whom the goods are ordered to be delivered is only an agent of the shipper, he has no property in them, and cannot maintain an action against the master for not delivering them (Abbott, 216; 1 Camp., 369), nor for damage for negligence of the carrier. 3 Barn. & Ald., 382. And if the goods are shipped at the risk of the consignor, though the freight is payable by the consignee, the property remains in the former. Abbott, 216; 1 Johns., 229. These cases, and others that might be referred to, show that the five hundred kegs of nails in the hands of Fowle & Sons were not subject to the attachment of the complainant for the liabilities of Brien, their debtor, as the title to the property had already passed to the defendant Gilmor; and, also, that Fowle & Sons had no valid lien upon them as consignees for previous advances to Brien by the delivery to the master; as they were only agents to receive the goods on commission for sale, and were advised by the bill of lading and correspondence that they were shipped for and on account of Gilmor. Though the goods were delivered by Brien to the master for consignment, they were delivered as the property of Gilmor, and, under circumstances, as we have seen, that had the effect to invest him with the title. His right, therefore, was prior in point of time to any lien that might have been acquired, either by the complainant or Fowle & Sons, in consequence of Brien's indebtedness, upon the strictest principles of law; and as to the equities, it was but a race of diligence among the several creditors of a failing debtor to see which should get the first security for their debts.

§ 9. *A creditor will be presumed to assent to a transfer made to him by his debtor to secure a pre-existing debt.*

An objection was made on the argument that there was no evidence that Gilmor had assented to the transfer of the property to him as security for his demand against Brien, until after the levy of the complainant's attachment. The original bill was amended, making him a defendant, and in his answer he sets up that the transfer was made in pursuance of a previous agreement between him and Brien, in part liquidation of his indebtedness. We are inclined to think this part of the answer is responsive to the bill, and there is no evidence in the case contradicting it in this respect. Though the bill is brief and meagre in the statement of the case which it presents, and has not incorporated in it the amendment making Gilmor a defendant, yet, from the nature of the charge against him, and ground for making him a party, it would seem necessarily to call upon him to set forth his claim to the property in dispute. But it is unnecessary to place the answer to the objection on this ground. In the absence of all evidence to the contrary, in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it. This principle was recognized and applied by this court in the case of *Tompkins v. Wheeler*, 16 Pet., 106, and had been before in *Brooks v. Marbury*, 11 Wheat., 96. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him.

§ 10. *A debtor is a competent witness upon an issue between his creditors.*

It was also objected that Brien was an incompetent witness for Gilmor, on the ground of interest; but it is apparent that he had no interest in the suit,

for in any event the property would be applied to the discharge of debts against him, and whether in favor of one or the other, was, in point of interest, a matter of indifference to him.

In any view, therefore, that can be properly taken of the case, we are of opinion the decree of the court below was right, and should be affirmed.

TIERNAN *v.* JACKSON.

(5 Peters, 580-602. 1831.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error from the circuit court for the district of Maryland, in which the defendant in error was the original plaintiff. The suit was an action for money had and received, brought under the following circumstances: The defendants, Luke Tiernan & Sons, of Baltimore, were factors of Thomas H. Fletcher, of Nashville, in the state of Tennessee. In the course of their business transactions Fletcher became indebted to them, and to another house, in which Luke Tiernan was surviving partner, in a sum of money exceeding \$9,000. On the 8th of May, 1819, Fletcher, through his agent, Jouett F. Fletcher, shipped at New Orleans eighty-one hogsheads of tobacco, on board of the brig *Struggle*, bound for Baltimore, consigned to Tiernan & Sons. The invoice and bill of lading were inclosed in a letter of advice to Tiernan & Sons, by the *Struggle*. In the invoice, it was stated that the shipment was made by order of Thomas H. Fletcher, through his agent, Jouett F. Fletcher; and in the bill of lading that it was for the account and risk of Thomas H. Fletcher, and consigned to Tiernan & Sons. The letter of advice was as follows:

“NEW ORLEANS, May 8, 1829.

“Messrs. Luke Tiernan & Sons: Gentlemen—Herewith we hand you invoice, bill of loading, eighty-one hogsheads of tobacco, for account of Thomas H. Fletcher, by order of Jouett F. Fletcher, which you will please receive, and hold subject to the order of the latter. We are yours, etc., McNeill, Fisk & Rutherford, per Jacob Knapp.”

A short time before, there had been a like shipment of tobacco on account of Thomas H. Fletcher, to Tiernan & Sons, by the schooner *Mary*. The consignment by the *Struggle* arrived on the 7th of June, 1819, some time after that by the *Mary* had been received. Previous to the arrival of either of these shipments, namely, on the 10th of April, 1819, Thomas H. Fletcher, at Nashville, wrote a letter to Tiernan & Sons, inclosing another to his creditors at Baltimore, informing them of his embarrassments, in consequence of the failure of a house at Nashville, and offering a proposition for the liquidation of their debts. The letter, among other things, stated that his cotton and tobacco at New Orleans had all been shipped, and advances had on it, and that he had received the money arising from the sales and shipments; that he held a large amount of good paper of the most unquestionable kind, the greater part of which was then due; that he offered to give paper of this description for their claims against him. He then proposed that the creditors should appoint Mr. Ephraim H. Foster, of Nashville, their agent, to negotiate the business; and added, “in all cases, such of you as hold my notes must forward them to Mr. Foster, as they must be taken up when I give him other paper.” Tiernan & Sons, on the same day they received the letter, accepted the proposition, and wrote a letter to that effect. In consequence of this arrangement, Thomas H.

Fletcher, on the 21st of May, 1819, paid to Mr. Foster in promissory notes the claims of the two houses of the Tiernans, and took receipts in full from Mr. Foster, as agent. At the time of this payment and settlement, Tiernan & Sons did not know of the consignment by the Struggle; but Mr. Charles Tiernan arrived at Nashville shortly afterwards, and expressed his satisfaction at the mode of payment. At a subsequent period, in July, 1819, this payment and settlement were rescinded by the parties and the receipts given up. But in our view of the case, it is unnecessary to trace these transactions further.

On the 21st of May, 1819, Thomas H. Fletcher, being indebted to James Jackson, of Nashville, the plaintiff, drew a bill of exchange in his favor upon Tiernan & Sons, as follows: "Nashville, May 21, 1819. \$2,400. Sixty days after sight of this my first of exchange, second unpaid, pay to the order of James Jackson \$2,400, value received. Thomas H. Fletcher. To Messrs. Luke Tiernan & Sons, Baltimore." This bill was presented and protested for non-acceptance, on the 9th of June, 1819, and was at maturity protested for non-payment. On the same day the bill was drawn, Fletcher drew the following assignment on the back of a duplicate invoice of the shipment by the Struggle: "Nashville, 21st of May, 1819. I assign to James Jackson so much of the proceeds of the sale of the tobacco alluded to in the within invoice as will amount to \$2,400; to Ingraham & Lloyd, as above, \$600; and the balance, whatever it may be, to G. G. Washington & Co.; and Messrs. Tiernan & Sons will hold the net proceeds of the within invoice subject to the order of the persons above named, as directed above. Thomas H. Fletcher." This assignment was not delivered to Mr. Jackson until the 26th of the same month, and all persons named therein were creditors of Fletcher. There are many other facts spread upon the record, but these appear to us all that are material to dispose of the question argued at the bar.

§ 11. *The assignment in parcels of the proceeds of goods consigned for sale does not pass the legal title to the goods and vest it in the assignees.*

The first question is whether the assignment so made to Jackson, on the 19th of May, passed the legal title in the tobacco, so as to make the same, or the proceeds thereof, presently the property of Jackson and the other persons named. This is a question essentially depending upon the intention of the parties to be gathered from the terms of the assignment; for whatever may be the inaccuracy of expression, or the inaptness of the words used, in a legal view, if the intention to pass the legal title can be clearly discerned, the court will give effect to it, and construe the words accordingly. Thus, if a man grant the profits of his land, it is said that the land itself passes. Co. Litt., 4; Com. Dig., Grant, E., 5. At the time when this assignment was made the tobacco was *in transitu*, and if there had been an absolute assignment of the proceeds, so that the tobacco was immediately put at the risk of the assignee, and the assignor was to have no further control over the management of it, we do not mean to say that it would not pass the legal title and property in it to the assignee. But can such an intention be gathered from the words used in this instrument? We think not. The words are: "I assign, etc., so much of the proceeds of the sale of the tobacco, etc., as will amount to twenty-four hundred dollars." The parties, then, contemplate a sale, and the assignment is to be, not of the tobacco itself presently, but of a portion of the funds arising from the sale of it at a future period. Could the assignee or assignees have countermanded the consignment to Tiernan & Sons? Or, putting aside the factor's claim of a lien, could they have demanded the property

of the factors before the sale? We think such was not the intention of the parties. The claim of Jackson was not an undivided portion of the property, but to a specific account of the proceeds arising from a sale. Suppose before sale the tobacco had been lost or destroyed, would the loss have been his or Fletcher's. We think it would have been Fletcher's. The assignees were all creditors, and there is no evidence that they took the assignment in satisfaction of their debts, or otherwise than as security therefor. And the fact that, contemporaneously, Jackson took a bill of exchange on Tiernan & Sons for the same amount, demonstrates that he did not understand the assignment as extinguishing his debt, or as operating more than as collateral security. Upon the dishonor of that bill he had a right of recourse against the drawer. In this view of the transaction, Fletcher had an immediate interest in the sale. The larger the amount of the proceeds, the further they would go to extinguish his antecedent debts. It is perfectly consistent with the terms of the instrument, that he should retain the legal title in the tobacco, and that his factors would have a right to make sale thereof, in the best manner they could, for his benefit, giving the assignees an equitable title in the proceeds of the sale. Our opinion is that, upon the terms of the assignment, it was not intended by the parties to pass the legal title in the tobacco or its proceeds; but to create an equitable title or interest only in the proceeds after sale, for the benefit of the assignees.

§ 12. *Assignees, having only an equitable title to the proceeds of goods consigned for sale, can only hold the consignee responsible upon an agreement by him to hold the proceeds for their benefit.*

Assuming, then, that an equitable title only to the proceeds of the sale, amounting to \$2,400, vested by the assignment in Jackson, still, if there has been any agreement on the part of Tiernan & Sons to hold so much of the proceeds for the benefit of Jackson, he may maintain the present action; for under such circumstances, upon the receipt of the proceeds after the sale, so much thereof would be money had and received to the use of Jackson; and it will make no difference, under such circumstances, whether Tiernan & Sons have any lien for any balance of accounts or not; for such an agreement will bind them, and amount to a waiver of their lien *pro tanto* in favor of Jackson. The question, then, is whether there are any ingredients in this case furnishing sufficient proofs of such an agreement. Such an agreement may be express or it may be implied, if the circumstances of the case, coupled with the acts of the parties, necessarily lead to such a conclusion. That there has been an express agreement on the part of Tiernan & Sons is not pretended. On the contrary, having received the shipment on the 7th of June, 1819, they attached the property by a writ of garnishment on the 8th of the same month, on their own account, as the property of Fletcher; and they dishonored the bill drawn in favor of Jackson on the succeeding day; nor did they, after the notice of the assignment, on the 15th of the same month, ever give any express assent to hold the proceeds according to the terms of it.

But it has been argued that the receipt of the consignment with the bill of lading, invoice and letter of advice amounted to an implied engagement to conform to the terms of the latter, and "to receive and hold the tobacco subject to the order of" Jouett F. Fletcher, the agent of Thomas H. Fletcher; and that, it being the case of a mere agency, it is, in contemplation of law, subject to the direct order of the latter, without the intervention of his agent. Now, assuming that a factor, upon receiving a consignment, is bound, as be-

tween himself and his principal, to conform to the orders of the latter, which cannot well be denied in point of law, the question still recurs whether that implied obligation can inure to the benefit of a third person, so as to entitle the latter, upon obtaining an order at a future period, to maintain an action against the factor, as upon an agreement in his favor. And, *a fortiori*, whether in case of a dissent or refusal contemporaneous with the receipt of the consignment, such an implied obligation can supersede the legal effect of such dissent or refusal. If an assent is to be implied from the duty of the factor in ordinary cases, may not his dissent be shown by acts rebutting the presumption? In the present case the letter of advice contains no authority to sell, but only to receive and hold the tobacco subject to the order of the party. If a power to sell be implied it must be implied from the antecedent course of business and relation of the parties, as principal and factors. The implied obligation, then, from the receipt of the consignment, is no more than the terms of it express, viz., to receive and hold the tobacco subject to order, not to pay over the proceeds to order. But waiving this consideration, how stands the general proposition in point of principle and authority? The general principle of law is, that *chores in action* are not at law assignable. But, if assigned, and the debtor promise to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independently of such promise there is no pretense that an action can be sustained. Have Tiernan & Sons, since notice of the present assignment, made any such promise to Jackson? No express promise is shown, and the acts antecedently done by Tiernan & Sons repudiate the notion of any intentional implied promise, for those acts appropriate the property to their own claims, and to meet their own lien.

§ 13. *If a party agrees to hold money or goods subject to the order of the owner, it implies a promise in favor of the holder of such order.*

But it is said that if a party agrees to hold money or goods subject to the order of the owner, it raises an implied promise to the holder of the order, upon which he may maintain an action at law. The case of *Weston v. Barker*, 12 Johns., 276, has been relied on for this purpose. But in that case the party receiving the money under the assignment made an express promise to hold the same, subject in the first place to the demands of certain specified creditors; and next, the balance subject to the order of the assignor. The court held that in such case the holder of the order subsequently drawn had a right to the money, as money had and received to his use, notwithstanding there was a counterclaim or set-off of the assignee, accruing before the assignment. The case of *Walker v. Birch*, 6 Term R., 258, is somewhat complicated in its circumstances, but it turned upon similar principles. There the agreement was express to hold the property for a particular purpose; and that, in the opinion of the court, excluded the right of the factor to assert a lien upon it for any demand due to him, which was inconsistent with that purpose. Lord Kenyon there said, the parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law to it. In the note given by the factors in that case, they acknowledged that they had received the goods for sale, and promised to pay the proceeds of them, when sold, to J. F. or his order. J. F. was the agent of the owners, and they having become bankrupt, their assignees brought an action, not for the proceeds (for the goods were not sold), but for the goods, and they recovered upon the footing of the original special contract. That case also differs from the present in one important fact,

and that is, that the suit was brought by the assignees of the bankrupt owners, and not by a holder of the order. In the case of *Mandeville v. Welch*, 5 Wheat., 277, 286, it was said by this court, that, in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands. But where the order is drawn either on a general or a particular fund for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade in the course of business between the parties as a part of their contract. The court were there speaking in a case where the suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor; and it was therefore unnecessary to consider whether the remedy, if any, for the assignee was at law or in equity.

The case of *Farmer v. Russell*, 1 Bos. & Pull., 296, so far as the point before us is concerned, asserts the principle that if A. receives money from B. to pay to C., it is money had and received for the use of the latter. In such a case it is immaterial whether the promise to pay over be express or implied; for by the very act of receipt the party holds it, not for A., but in trust for C. See, also, *Schemerhorn v. Vanderheyden*, 1 Johns., 139; *Onion v. Paul*, 1 Harr. & J., 114; *Pigott v. Thompson*, 3 Bos. & Pull., 146, 149, note. The case of *Neilson v. Blight*, 1 Johns. Cas., 205, resolved itself substantially into this: that the defendant, who was a subagent, had received the goods in question upon condition of paying to the plaintiff out of the first proceeds a certain sum due to him, according to a written contract with the agent, of which he had notice, and to which, in a letter addressed to the plaintiff, he admitted his obligation to comply, and the court held the plaintiff entitled to recover the amount in an action for money had and received. This was the case, then, either of an express promise by the subagent, or at least of an implied promise, irresistibly established, and creating a privity between the parties in a manner clear and unequivocal.

All these cases are distinguishable from the present. They are either cases where there was an express promise to hold the money subject to the order of the principal, or there was an implied promise to pay it over as it was received to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defense on account of want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person. In the case at the bar no such irresistible presumptions exist. There was, as we have seen, no express promise to hold the proceeds of the sale subject to order, and no implied promise positively and necessarily flowed from the circumstances; on the contrary, the acts of *Tiernan & Sons*, contemporaneous with the receipt of the consignment, negatived it, and the actual assignment was subsequent to those acts.

§ 14. *If a bailee of goods does not agree to hold the goods or pay their proceeds to the assignee of the owner, such assignee has no cause of action against the bailee growing out of such assignment.*

The question is certainly a nice one, and confessedly new in the circumstances of its actual presentation. On this account we were desirous of making some further researches into the authorities, and we have found two cases not cited at the bar which seem to us fully in point. The first is *Williams v.*

Everett, 14 East, 582. There K. abroad remitted certain bills to his bankers in London, directing them to pay certain sums out of the proceeds, when paid, to certain specified creditors. The bankers received the bills, and before they were paid the plaintiff (one of the specified creditors) called on the bankers and stated that he had received a letter from K., directing three hundred pounds to be paid to him out of the bills sent, and proposing to the bankers to indemnify them, if they would deliver to him one of the bills to the amount; but the bankers refused so to do, or to act upon the letter, although they admitted the receipt of it, and that the plaintiff was the person to whom the sum of three hundred pounds was directed to be appropriated. The bankers afterwards received the money on the bills, and the plaintiff brought an action for money had and received, to recover the amount of the moneys so appropriated to him. The court held that the action was not maintainable. Lord Ellenborough, in delivering the opinion of the court, said: "The question which has been argued before us is, whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by K., and bind themselves so to apply it; and whether, therefore, the amount of such bill paid to them when due did not instantly become, by operation of law, money had and received to the use of the several persons mentioned in K.'s letter as the creditors, in satisfaction of whose bills it was to be applied, and of course as to three hundred pounds of it, money had and received to the use of the plaintiff. It will be observed that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal of the creditor so to do. If, in order to constitute a privity between the plaintiffs and defendants, as to the subject of this demand, an assent express or implied be necessary, the assent can, in this case, be only an implied one, and that, too, implied against the express dissent of the parties to be charged. By the act of receiving the bill the defendants agree to hold it until paid, and its contents when paid to the use of the remitter. It is entire to the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount, when received, for the use of the remitter himself, until by some engagement entered into between themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff, under the orders which accompanied the remittance, it occurs as fit to be asked, when did it become so? It could not be so before the money was received on the bill becoming due. And at that instant suppose the defendants had been robbed of the cash or notes, in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned? Surely, the remitter, K., and not the plaintiff and his other creditors, in whose favor he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question." This language has been quoted at large from its direct application to all the circumstances of the case at bar. Here Tiernan & Sons, before the sale and receipt of the proceeds of the tobacco, refused to hold the same for the use of Jackson; and how, then, could the money, when afterwards received, be money had and received to his use? If this case be law, it is in all its governing principles like the pres-

ent. The case of *Grant v. Austen*, 3 Price, 58, is still later, and recognizes, in the fullest manner, the decision in 14 East, 582. That was the case of a remittance to bankers, with a request that they would pay certain amounts to persons specified in the letter. No dissent on the part of the bankers was shown. But the court held that, in order to constitute an appropriation of the money, or any portion of it, in favor of the persons specified, some assent on the part of the bankers must be shown, and that the circumstances of the case did not establish it. The remitter was, at the time, largely indebted to the bankers, and the account between the parties was soon after broken up. It seems to us that these authorities are founded in good sense and convenience until the parties receiving the consignment or remittance had done some act recognizing the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a privity between them, the property and proceeds remained at the risk and on the account of the remitter or owner.

In this view of the case, it is wholly immaterial to decide whether Tiernan and Sons had a lien on the proceeds or not for the balance due them, or whether the negotiations stated in the record created a disability on their part to assert it. For, even supposing that they have no available lien, that is a matter which cannot be litigated in a suit at law, where the only question is whether the plaintiff has a good right to maintain his action, whatever might be the case in a suit in equity brought by the plaintiff to enforce his equitable claims under his assignment.

The instructions given by the court decided that the assignment made to the plaintiff did, in effect, pass the legal property in the proceeds to the plaintiff so as to entitle him to maintain the present action; or that, at all events, it constituted such a special appropriation of them as would enable the plaintiff, as assignee, to maintain it. We are of opinion that the court erred upon both grounds, and that therefore the judgment ought to be reversed, and the cause be remanded to the circuit court with directions to award a *venire facias de novo*. In the mandate the errors in the bill of exceptions will be specially pointed out; but as the principles involved in them are resolved into the points before stated, they need not here be particularly commented on.

WARNER v. MARTIN.

(11 Howard, 209-238. 1850.)

APPEAL from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—We state such circumstances in this case as may be necessary for the application of our opinion to other cases of a like kind.

Martin & Franklin were manufacturers of tobacco in Richmond, Virginia. They were in the habit of shipping the articles to Charles Esenwein in New York, as their agent and factor. In April, 1841, they made the first shipment upon a new account to Esenwein, and at intervals during the summer made other consignments to him. It was their practice to draw upon Esenwein, payable in four months, for an estimated portion of the proceeds of sale; among other drafts were the following:

1841, May 27, at four months, due	September 30, for	\$900
“ June 12, “ “ “	October 15, “	700
“ July 3, “ “ “	November 6, “	300
“ July 29, “ “ “	December 2, “	850

These drafts were not paid by Esenwein. The consignments during the period when the drafts were drawn were one hundred and sixty-two half and one hundred and sixty whole boxes of tobacco. Esenwein's entry of the consignment is: "Statement of tobacco received by Charles Esenwein & Co. from Messrs. Martin & Franklin of Richmond, Virginia, to sell for their account." The business relation between them in this transaction was that of principal and factor, unaffected by any particular instructions from the principals, or by any right or power acquired by the factor beyond his general commission to sell the tobacco according to the usages of trade in the place to which it had been sent for sale.

In August, 1841, Esenwein became embarrassed and sailed for Europe. He left his business under the management of his clerk, Engelbert Caprano. On the 3d of September, Esenwein failed. Among his creditors was John A. Warner of Philadelphia. A short time before the failure, Mr. Warner, between whom and Esenwein there had been much previous dealing, went to New York. He then obtained from Caprano, the clerk, from the store of Esenwein, a quantity of tobacco, cigars and other merchandise. The proof in the case is, that the tobacco was a part of the consignments which had been made within the dates before mentioned by Martin & Franklin to Esenwein. Warner says, in his answer to the bill of the complainant, that the same was purchased by him for a full consideration and price in like manner as he had frequently purchased from Esenwein; and that he did not know that the tobacco belonged to Martin & Franklin. But he admits, "the insolvency of Esenwein was believed." In his amended answer he says, he purchased the tobacco *bona fide*, in manner as had been before stated by him. That it was paid for after the purchase by his paying and adjusting \$30,000 of his own notes, which he had loaned to Esenwein, by his paying and redeeming them. Subsequently, in three days after Esenwein's failure, Heald, Woodward & Co., of Philadelphia, bought from Warner two hundred and fifty-eight boxes of tobacco, known as Martin's tobacco. The proof in the case is, that it was a part of that which Warner had obtained from Esenwein's clerk, which had been consigned to Esenwein by Martin & Franklin, as already stated. They aver, and there is no reason or cause to doubt it, that they purchased from Warner fairly and for full value; that they had no knowledge whatever at the time that the tobacco or any part of it belonged to the complainants; nor they any reason to believe or know it. Their contract, however, with Warner, was rescinded in part. They received from him only one hundred and twenty-four boxes, instead of the two hundred and fifty-eight which had been sold to them.

From some other dealing between Heald, Woodward & Co. and Martin & Franklin, the latter have drawn an inference of an agency of the former for them in this transaction. We think there was no such agency. At the same time we will say that there was an unbecoming and apprehensive reserve in their reply to the letter of Martin & Franklin, making inquiries concerning their tobacco, which Warner had received from the clerk of Esenwein, a part of which Heald, Woodward & Co. had bought from Warner and was then in their possession. It was, however, not a concealment, from which it can be inferred that Heald, Woodward & Co. meant to commit either a legal or moral fraud upon their correspondent. It appears that they had nothing to do with the transfer of the tobacco to Warner, nor any other than a fair connection with him in the sale of it by Warner to them.

§ 15. *A sale of goods by a factor in payment of his own antecedent debt passes to his creditor, who so purchases, no title to the goods as against the principal.*

From this statement we have no doubt of the law of the case. It may be applied, too, without any imputation upon the integrity of either of the parties concerned. The defendants have misapprehended the principles which govern the rights of themselves and the plaintiff; but there is nothing in their proceedings which impairs mercantile character. They have been much mistaken, without meaning premeditated unfairness. If some temper had not been thrown into the case at first, there probably would not have been any charge of fraudulent intention. No one will be surprised from the proceedings in the cause, and the argument made upon it in this court, that its merits were lost sight of in the effort made on one side to establish fraud, and on the other to resist it. The exact questions raised by the record are, whether or not the transfer of the tobacco to Warner divested the plaintiff's ownership of it; and whether or not Warner's sale of a part of it to Heald, Woodward & Co., for a full consideration, without any knowledge upon their part of the plaintiff's interest when they bought from Warner, gave to them a property in it. Warner's account of dealings with Esenwein we believe to be true. In his answer, however, he puts his right to retain the tobacco upon a footing not applicable to it. He says he bought without knowing that Martin & Franklin had any interest in the tobacco, and that he believed Esenwein was the owner. His inference practically was, that he might therefore set off against the price his liability for the notes which he had lent to Esenwein as a debt due by Esenwein to him. This can only be done upon the principle that, where two persons equally innocent are prejudiced by the deceit of a third, the person who has put trust and confidence in the deceiver should be the loser. He discloses in his answer his knowledge of a fact which takes him out of any such relation to the plaintiff. It is his knowledge, at the time of the delivery of the tobacco to him, of the failure of Esenwein.

§ 16. *A buyer is protected against the misconduct of the factor, unless he has notice, among other things, of the insolvency of the factor.*

In all of those cases in which it has been ruled that the buyer who, at the time of the sale, knows nothing of the relation between the factor with whom he deals, and the principal by whom that factor has been employed, is protected by the law, in case of a misadventure occurring by the default of the factor, it is admitted that the risk which a principal runs, through the inadvertence or misconduct of his agent, may be avoided, by the purchaser having notice, at any time before the completion of the purchase or the delivery of the goods, of the agent's commission. Peake, 177. Among the instances which the law terms notice enough for such a purpose is the insolvency of the factor known to the buyer. *Eastcott v. Milward*, 7 Term R., 361, note; *id.*, 366. Warner says in his answer, that, at the time he made his purchase, "the insolvency of Esenwein was believed." Those are his words, and according to all that class of cases asserting the principle under which his answer puts him, such knowledge was sufficient to entitle the plaintiff to avoid the sale.

§ 17. *The clerk of a factor, in the absence from the country of his employer, cannot make a valid sale of the goods of the principal.*

Again, a transfer to him, by way of sale, by the clerk of Esenwein, of property trusted to the latter as a factor, could not pass the title or right in it from

the real owner. It made no difference that Caprano had been left to transact Esenwein's business whilst he was in Europe. A factor cannot delegate his trust to his clerk. The law upon this point is well settled. It has been repeatedly ruled. The first example in the first paragraph of Paley on Agency, upon the "execution of authority," is, if an agent be appointed to sell, he cannot depute the power to a clerk or under-agent, notwithstanding any usage of trade, unless by express assent of the principal. The utmost relaxation of the rule, *Potestas delegata non potest delegari*, in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. *Trueman v. Loder*, 11 Ad. & Ell., 589. Or where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself. *Blore v. Sutton*, 3 Meriv., 237; *Combes' Case*, 9 Coke, 75-77; *Roll. Abr.*, 330; *Palliser v. Ord*, Bunb., 166. Lord Eldon, in *Coles v. Trecothick*, 9 Ves. Jr., 236, reprobates the notion that, if an auctioneer is authorized to sell, all his clerks are, during his absence, in consequence of any such usage in that business. It was ruled by the master of the rolls in *Blore v. Sutton*, 3 Meriv., 237, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of an authorized agent, signed by his clerk and not by the agent himself, was not a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and that it was made under, the immediate direction of the authorized agent, and in the usual course of the business of his office. A factor cannot delegate his employment to another, so as to raise a privity between that other and his principal. *Solly v. Rathbone*, 2 Maule & S., 299; *Cockran v. Irlam*, id., 301. The reason of the rule in all these mercantile agencies is, that it is a trust and confidence reposed in the ability and integrity of the person authorized. An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction or the usage of trade, has not the power to employ a subagent to do the business, without the knowledge or consent of his principal. The agency is a personal trust for a ministerial purpose, and cannot be delegated; for the principal employs the agent from the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing. 2 Kent's Comm., 633. No usage of trade anywhere permits a factor to delegate to his clerk the commission trusted to himself. In this case, there was a transfer of the plaintiff's property to Warner by a clerk of their factor. He knew when it was done that he was giving their property to a creditor of his employer in payment of his debt; and both himself and the purchaser knew that Esenwein was in failing circumstances, or, as Warner expresses it, "that his insolvency was believed." It must be admitted that such a transfer passed no property in the thing transferred, and that it may be reclaimed by the owner, as well from any person to whom it has been sold by the first buyer as from himself. It is the case of property tortiously taken from the owner or his agent, without any fault of the owner, and as such cannot take away his right to it.

§ 18. *A factor cannot pledge the goods of his principal for his own debt.*

On either of the grounds already mentioned, the plaintiff would be entitled to recover from the defendants in this case. But there is a third which shall

be stated in connection with other points respecting principals and factors, which it will not be out of place to notice. A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. *Paterson v. Tash*, Str., 1178; *Maanss v. Henderson*, 1 East, 337; *Newson v. Thornton*, 6 East, 17; 2 Smith, 207; *McCombie v. Davies*, 6 East, 538; 7 East, 5; *Daubigny v. Duval*, 5 Term R., 604; 1 Maule & S., 140, 147; 2 Stark., 539; *Guichard v. Morgan*, 4 J. B. Moore, 36; 2 Brod. & B., 639; 2 Ves. Jr., 213. When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged (*Daubigny v. Duval*, 5 Term R., 604); or without any demand of such goods (6 East, 538; 12 Mod., 514); and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor (*Martini v. Coles*, 1 Maule & S., 140), unless, indeed, where the principal has held forth the agent as the principal. 6 Maule & S., 147. But a factor, who has a lien on the goods of his principal, may deliver them over to a third person as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case, the principal must tender the amount of the lien due to the factor before he can be entitled to recover back the goods so pledged. *Hartop v. Hoare*, Str., 1187; *Daubigny v. Duval*, 5 Term R., 604; 6 East, 538; 7 East, 5; 3 Chitty's Com. Law, 193. So a sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer, and the thing sold may be recovered in an action of trover. *Paley*, Principal and Agent, 109; 12 Mod., 514. Under any of these irregular transfers, courts of equity (as is now being done in this case) will compel the holder to give an account of the property he holds.

But it was said, though a factor may not pledge the merchandise of his principal as a security for his debt, he may sell to his creditor in payment of an antecedent debt. No case can be found affirming such a doctrine. It is a misconception, arising from the misapplication of correct principles to a case not belonging to any one of them. The power of the factor to make such a sale, and the right of the creditor to retain the property, has been erroneously put upon its being the usual course of business between factors to make a set-off of balances as they may exist in favor of one or the other of them against the price of subsequent purchases in their dealings. The difference between such a practice and a sale for an antecedent debt must be obvious to every one when it is stated. In the one, the mutual dealing between mercantile persons who buy and sell on their own account, and who also sell upon commission for others, is according to the well-known usage of trade. Its convenience requires that such a practice shall be permitted. But it must be remembered it is an allowance for the convenience of trade, and for a readier settlement of accounts between factors for their purchases from each other in that character. It does not, however, in any instance, bind a principal in the transfer of merchandise if there has been a departure from the usages of trade or a violation of any principle regulating the obligations and rights of principal and factor.

§ 19. *A transfer of goods in satisfaction of an antecedent debt is not a sale in the sense that a factor is empowered to sell. It is not according to the usage of trade.*

Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. *Williamson v. Berry*, 8 How., 495. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the *dation en paiement* of the civil law as it prevails in Louisiana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt.

§ 20. *Under what circumstances a factor can make a valid sale of his principal's goods.*

Courts of law and courts of equity, in a proper case before either, will look at such a transaction as one in which both principal and creditor have been deceived by the factor, so far as the deceit is concerned; but it will also be remembered, in favor of the principal, that the creditor has acquired the principal's property from his factor, with the creditor's knowledge, out of the usual course of trade, and will reinstate him in his former relation to his debtor, rather than that the creditor should be permitted to keep the property of another, who is altogether without fault, in payment of his debt. As to a factor's power to bind his principal by a disposition of his goods, the common law rule, "that, to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been either in market overt and without

knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions," or that he had not such notice as the law deems equivalent to raise that presumption. "The reason of this is clear; for unless the transaction took place *bona fide* in a market overt (in which case a peculiar rule of law in England steps in for its protection), an agent selling without express authority must, that his acts may be supported, have sold under an implied one. But an implied one thereby always empowers the person authorized to act in the usual course of his employment; consequently, if he sells in an unusual mode, he could have no implied authority to support his act, and as he had no express one, his sale of course falls to the ground." Smith's Mercantile Law, Amer. ed., 118.

The defendants are not within the compendious summary just stated. There has been a transfer of property which was consigned to a factor for sale, by his clerk, to a creditor of his employer, who knew his debtor to be in failing circumstances, just as well as the clerk himself did; and of property, too, which the clerk knew to be the property of the plaintiff, and which the creditor bargained for knowingly out of the usual course of trade. Nor should we omit to say, that Esenwein's opinion and disapproval of what had been done by his clerk with his principal's tobacco are significantly disclosed by the fact that, upon his return from Europe, he redeemed so much of it as had been assigned to Mr. Conolly by his clerk in payment of a debt, and sold and remitted the proceeds to his principals. By the common law, the transfer of the plaintiff's tobacco to Warner cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward & Co. Heald, Woodward & Co. are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them. But Warner is answerable to them for that amount, and he is replaced for the whole as a creditor of Esenwein, just as he was before the transaction occurred.

§ 21. *Statutes of New York on principal and agent and factors.*

The application of these principles of the common law to these parties, if it needed confirmation, would receive it from the statute of New York of April, 1830, for the amendment of the law relative to principals and factors or agents. The transfer to Warner was a New York transaction. The third section of that act very distinctly provides for those cases when the ownership, by the factor, of goods which he contracts to sell, shall be said to exist, to give protection to purchasers against any claim of the factor's principal. It is when he contracts for any money advanced, or for any negotiable instrument or other obligation in writing given for merchandise, upon the faith that the factor is the owner of it. The concluding words of the section are, "given by such other person upon the faith thereof." Three misconstructions of that act have been prevalent, but they have been corrected by the courts of New York. We concur with them fully. One was that the statute altered the common law, so as to give validity to a sale made by the factor for an antecedent debt due by him to the person with whom he contracts; another, that the statute gave to a purchaser protection, whether he knew or not that the goods which the factor contracted to sell him were not the factor's, and belonged to his principal; and the other, that the concluding words, "upon the faith thereof," related to the advance made upon the goods and not to the property which the factor had in

them. Similar misconceptions were prevalent, and perhaps still prevail, concerning the corresponding section in the English factor's act. Geo. IV., c. 94, 1825. The alterations of the common law, in this particular, by the English and the New York statutes, were suggested by practical and experienced merchants in both countries, to meet the exigencies of internal trade and its extension between nations. They are believed by their operation to be improvements in the law merchant. It may be owing to a misapprehension of those acts that the defendants denied to the plaintiffs their rights. Fortunately the law secures them, and the case settled now as it is may prevent other controversies like it.

We shall direct the decree of the circuit court to be affirmed; and also order a decree to be entered against the defendants that each of them shall pay to the plaintiffs the value of the tobacco which the defendants respectively retained, with interest upon the same as from the dates of the transfers of it to them.

§ 22. *Acceptance of consignment.*—If a consignee accepts a consignment, he does it on the terms prescribed by the shipper, and cannot refuse compliance with the orders which accompany it. *Lorraine v. Cartwright*, 3 Wash., 151. See § 96.

§ 23. A. consigned a ship and cargo to B., with orders to lay out the proceeds of the freight and funds received from other sources in a particular manner in the purchase of a return cargo. B. accepted the commission. *Held*, that this constituted an undertaking on his part to apply the funds received in the manner pointed out in the orders given. *Cunningham v. Bell*,* 5 Mason, 161; affirmed, *Bell v. Cunningham*, 8 Pet., 69.

§ 24. One who receives notice of a consignment to him without orders to do so is not bound to receive it on his own account because he did not reject it in the first instance when notified thereof. *Kingston v. Kincaid*, 1 Wash., 454.

§ 25. *Effect of bill of lading.*—The effect of a bill of lading is to vest in the consignee the ownership of the goods, unless the contrary appears by the bill of lading itself or by extrinsic evidence. *The Sally Magee*, 8 Wall., 451.

§ 26. It is not an objection to the vesting of the right of property in the consignee for value or whose debt it is to secure that the goods are by the agreement to be at the risk and for the account of the consignor. *United States v. Delaware Ins. Co.*, 4 Wash., 418.

§ 27. *Consignment at shipper's risk.*—When goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as the agent of the shipper, not of the consignee, and the consignor, at any time before actual delivery to the consignee, may countermand it. *The Frances*, 8 Cr., 418.

§ 28. Where A. shipped goods to B., giving him the option to sell the same either on their joint account or as the agent of A., *held* that, until B. made an election to take a joint interest, the goods remained the sole property of A. *The Venus*, 8 Cr., 253.

§ 29. *Consignment in pursuance of orders.*—Goods were purchased in pursuance of orders from an American firm and consigned to the agent of the consignor, who was an American citizen, "on account and risk of an American citizen." The shipment was made to the agent because the consignor, having information of a change in the American firm, was not advised by whom the business was to be continued. *Held*, that the property vested in the American firm at the time of the shipment. *The Merrimack*, 8 Cr., 317.

§ 30. But where all the documents relating to the shipment concurring to show property in the party who ordered the purchase are inclosed in a letter to the consignor's agent, directing him not to deliver the goods in a stated contingency, the property in the goods continues in the consignor during transportation. *Ibid*.

§ 31. Where the bill of lading runs to the agent of the consignor, but the invoice and bill of parcels is made out in the name of the party for whom the purchase was made, the shipment being expressed to be on his account, *held*, that the goods vest in him at the time of the shipment, though the agent is authorized to keep the goods back in case the purchaser has become insolvent. *Ibid*.

§ 32. Goods were purchased upon the order of an American merchant in an inland town of England and conveyed to a seaport where they were stored. The purchasing agent, becoming embarrassed, assigned the right to receive the price for the goods to his banker and thereafter the goods were placed on board a vessel consigned to the American merchant. *Held*, (1) that if the goods were conveyed to the seaport and there stored in pursuance of specific

orders from the consignee, they became his property when stored; (2) that in the absence of specific orders as to storage, if they were shipped in pursuance of the orders given by the consignee, they became his property when delivered to the master of the ship. *The Mary and Susan*,* 1 Wheat., 25.

§ 33. Where a merchant abroad, in pursuance of orders to purchase goods, sells either his own goods or purchases goods for his correspondent on his own credit, no property in the goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. *The San Jose Indiano*, 2 Gall., 268.

§ 34. Where goods were ordered of a commission merchant abroad, *held*, that putting the goods on board a vessel and transmitting a bill of lading vested the property in the consignee, though the bill of lading did not arrive, the usual precautions having been taken to insure its being received. *Low v. Andrews*, 1 Story, 88.

§ 35. — *in consequence of orders but not in compliance with.*—The consignee shipped two cargoes of goods in consequence of, but not in conformity to, the orders of the consignee, and gave the consignee the option to take both cargoes or neither. *Held*, that his acceptance of one did not vest in him the property in the other. *The Frances*, 9 Cr., 183.

§ 36. Goods shipped—some of them in conformity to orders and some of them without orders—giving the consignee the option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election is made. *The Frances*, 8 Cr., 354.

§ 37. — *without orders.*—Where it did not appear that any authority or orders were given by the consignee for the shipment, and no correspondence or course of trade between himself and the shipper was shown from which an implied authority could be inferred, *held*, that the shipment remained on the account and at the risk of the shipper. *The San Jose Indiano*, 1 Mason, 38.

§ 38. If a shipment be made without or contrary to orders it still remains at the risk of the shipper. If the shipper have general discretionary orders to ship goods, the shipment will remain at his own risk unless, at the time of shipment, by some overt, unequivocal act, he designates or appropriates the shipment to his correspondent. Until such appropriation the property is not changed. *The Francis*, 2 Gall., 391.

§ 39. *Consignee's lien.*—A consignee has a paramount lien for advances made to the consignor, who has no right to stop the goods in transit or bind the consignee by an agreement subsequently made with the carrier. *Burritt v. Rench*, 4 McL., 325.

§ 40. Where goods are consigned to a commission man for sale, he is entitled, even against an assignee of the bill of lading who has a right to the proceeds of the sale, to deduct his commissions, and the charges and insurance advanced by him. *Wolf v. Smythe*,* 7 Biss., 365.

§ 41. The lien of a consignee upon goods in his hands, shipped to him upon a particular account and under an agreement which he has not kept, does not attach to the proceeds from their sale, which are subject of set-off. *Marks v. Barker*, 1 Wash., 178.

§ 42. *Consignee has insurable interest.*—A consignee accepted a bill of exchange drawn against a consignment made to him by the drawer. *Held*, that he had an insurable interest to the amount of his lien for advances, and that no other person could maintain an action upon the policy of insurance taken out by him for his sole and exclusive benefit, unless such person established some privity between himself and the insurance company. *Bank of South Carolina v. Bicknell*, 1 Cliff., 85. See § 8.

§ 43. *Consignee's right to sue.*—A consignee by virtue of advances made to the consignor becomes *pro tanto* owner of the goods and can sue the carrier for damage to them, but cannot recover damages beyond the amount of his lien nor beyond the value of the goods in a sound state. *Burritt v. Rench*, 4 McL., 325.

§ 44. A consignee may sue in admiralty for a breach of the carrier's contract. *McKinlay v. Morrish*, 21 How., 343; *Lawrence v. Minturn*, 17 How., 100.

§ 45. Where a bill of lading was indorsed and sent to the consignee, and he, upon its receipt, made advances on the shipment, *held*, that he could sue in admiralty for a tortious collision with the vessel in which the goods were being transported by which the cargo was lost. *The Vaughan and Telegraph*, 14 Wall., 258. See § 91.

§ 46. In the case of a consignment of property the legal title vests in the consignee, but when he resorts to a court of equity to enforce his legal rights, the court will only relieve him to the extent of his equitable rights. Hence a consignee into whose possession the property had not come, it having been seized by a foreign government, was held entitled to enjoin, in the United States treasury, no more of the sum awarded as indemnity under a treaty than the amount of his expenses and commissions. *Ridgway v. Hays*, 5 Cr. C. C., 23.

§ 47. *Consignee's liability for freight.*—The right of the master of a vessel to recover freights from the consignees after delivery of the goods to them, at least to the amount due

on the charter-party, cannot be affected by stipulation between them and the charterer. *Shaw v. Thompson, Olc.*, 144.

§ 48. The acceptance of goods by the consignee with notice that the freight must be paid to the master of the vessel and not to the charterer will raise an *assumpsit* to pay the former. *Ibid.*

§ 49. The delivery to and acceptance of the cargo by the consignee is a sufficient consideration to support his promise to pay the freight. *Ruggles v. Bucknor*, 1 Paine, 358.

§ 50. Admiralty has jurisdiction of an action *in personam* for freight brought by the master of a vessel against a consignee of her cargo. *Thatcher v. McCulloh, Olc.*, 385. See § 45.

§ 51. Carrier's lien; delivery to consignee.—*Prima facie*, the delivery of a cargo to the consignee releases the carrier's lien for freight, but it may be preserved by a special agreement or by notice that the delivery is subject to the lien, but not by the mere intention of the carrier to retain his lien not communicated to the consignee. *Tan Bark Case*, 1 Brown, 151.

§ 52. Notice to consignee of arrival of goods.—A consignee whom or whose place of business the carrier is not able to find or ascertain is entitled to notice of the arrival of the goods through the mail, and if the goods depreciate before he acquires knowledge of their arrival, he can, in the absence of such notice, recover the loss from the carrier. *House v. The Schooner Lexington*,* 2 N. Y. Leg. Obs., 4. See §§ 53-55.

§ 53. Right of the consignee to inspect goods before receiving them.—Consignees of goods by vessel have no right to transport the same to their warehouse to be inspected before paying the freight. *The Eddy*, 5 Wall., 481. See § 54.

§ 54. The consignee of a ship notified a consignee of goods to pay freight as the goods were landed, and if not paid and the goods received by four o'clock of the day, such of them as had been landed would be warehoused at his expense. The consignee of the goods on several days offered to pay the freight of such of the merchandise as had been discharged, but the consignee of the ship refused to receive it or deliver the goods, demanding the freight of the whole shipment when he was only ready to deliver part of it, and from day to day warehoused the goods. When the whole shipment was landed the consignee thereof demanded its delivery, which the consignee refused, claiming the goods were subject to an additional charge for storage. A requirement was stamped on the back of the bill of lading to pay the whole freight when only a part of the shipment had been landed. *Held*, that the consignee of the goods did all he was bound to do under the notice given him; that the carrier had the right to require security for the whole freight, but not its payment before all the goods were landed, and that this was not changed by the stamp on the back of the bill of lading without showing the shipper's assent to it. *Brittan v. Barnaby*, 21 How., 527.

§ 55. Deviation; accepting cargo without objection.—A consignee, by accepting a cargo without objection, waives damages for delays and deviation on the voyage. *Thatcher v. McCulloh, Olc.*, 385. See §§ 60-63, 101.

§ 56. Consignee; liability for impost duties.—Where one became the owner by purchase of a cargo consigned to order, before its arrival from a foreign port, and as such made a verbal entry at the custom-house, in pursuance of which the proper officer permitted the cargo to be discharged, *held*, that the purchaser became the consignee and was liable for the duties. *United States v. Dodge, Deady*, 124.

§ 57. The sixty-second section of the Collection Act of 1799, ch. 123, makes the consignee of goods liable as owner for the duties thereon, but does not prevent him from passing by sale or otherwise a good title to the goods, subject only to the payment of the duties thereon. *Howland v. Harris*, 4 Mason, 497.

§ 58. Where goods are entered by the consignee as agent or trustee for the owner, the latter is not liable for the duties thereon. *Knox v. Devens*, 5 Mason, 380.

§ 59. A factor is bound to good faith and reasonable diligence. He may lawfully, and, unless his orders restrict him, must, do whatever the usage of trade requires; he cannot pledge the property of his principal for his own debt, but he may for the payment of the duties accruing on the specific goods. *Evans v. Potter*,* 2 Gall., 12. See §§ 4-7, 96, 110, 111.

§ 60. Breach of consignor's or owner's orders.—The silence of a consignor when he is informed of what has been done by the consignees amounts to an acquiescence in their conduct, if not an approval of it, and he is not thereafter at liberty to question their acts as transcending their authority. *Dunbar v. Miller*, 1 Marsh., 85. See § 1, 101.

§ 61. Where a consignee sold in disregard of instructions given by one not the consignor and not named in the bill of lading, but who was the owner, of which the consignee had notice, and the sale was not to meet advances, *held*, that the consignee was liable for damages to the owner. *Chapin v. Siger*, 4 McL., 378.

§ 62. If a factor to whom a consignment is made disobeys his orders and makes a full and candid statement of all the facts on which his judgment was exercised to his principal, and

the latter makes no objection to his conduct, this amounts to a recognition of it. *Courcier v. Ritter*, 4 Wash., 549.

§ 63. Where a consignee, who had no express orders as to the time of sale, accepted bills of exchange drawn against a consignment made to him, *held*, that he had no right to hold the property consigned after the maturity of the bills, and that he was chargeable with the amount for which it might have been sold at that date. *Potts v. Findlay*, 1 Cr. C. C., 514. See § 106.

§ 64. Duty of consignee to render an account and to remit.—If a consignee utterly refuses to render any account of his sales to the consignor, the most unfavorable presumptions which the circumstances will admit ought to be made against him. *Pope v. Barrett*, 1 Mason, 117.

§ 65. Where a consignee has refused to account or make payment, or has converted the proceeds of the sale to his own use, he is chargeable with interest from the time of a demand made upon him by the consignor. *Ibid*.

§ 66. A consignee whose country is at war with that of the consignor is not bound to remit during the war, but must do so as soon thereafter as the case will admit. *Ibid*.

§ 67. A consignee who fails to remit at the time he ought is responsible for loss occasioned by a difference in the rate of exchange. *Ibid*.

§ 68. An invoice of goods received by a consignee, retained and not objected to, and the truth of it in no manner disproved, is evidence that all the articles enumerated in it were received by the consignee. And if the consignee has rendered no account of sale, after a lapse of years, and at the trial offers no evidence to prove what part was sold, and at what prices, the presumption is that he sold at the invoice prices. *Field v. Moulson*,* 2 Wash., 155.

§ 69. Damaged cargo; authority of consignee.—Flour was consigned to the master of a vessel, and, before reaching the port of destination, he sold it, it being damaged, and in lieu thereof put on board the same number of barrels in good condition. *Held*, that he did not exceed his authority, which was that of a supercargo. *Smedley v. Yeaton*, 3 Cr. C. C., 181.

§ 70. Implied authority to warrant.—Commission merchants to whom goods are consigned for sale have an implied authority to represent the articles to be what they are marked and described to be. *Miller v. Smith*, 1 Mason, 437.

§ 71. Duty to insure; agent's promise.—The defendants, commission merchants, did not insure consignments made to them without orders, and the complainants were accustomed to give orders for insurance upon consignments which they made to the defendants when they thought it expedient. The complainants consigned to the defendants a cargo of tobacco, and an agent of the defendants promised complainants to write to defendants to effect insurance thereon, but failed to do so, and the cargo was lost. *Held*, that the defendants were not liable, because it was incumbent upon the complainants to communicate instructions to insure to the defendants, and so far as the agent was instructed to do this he was the complainants' and not the defendants' agent. *Randolph v. Ware*,* 3 Cr., 503. See §§ 42, 98.

§ 72. Must hold proceeds for principal, and not principal's agent.—A consignee who receives merchandise from the *supercargo* for sale, and who knows that the latter is an agent for others, holds the proceeds for the shipper. *Merrick v. Bernard*, 1 Wash., 479.

§ 73. Waiver by factor of personal security of principal.—By the general law a factor has the security of the person as well as a lien upon the goods of his principal for all advances made on them. But he may waive his right to resort to the person, and if he does so by an express agreement, it will be binding upon him. *Peisch v. Dickson*,* 1 Mason, 9.

§ 74. Indorsement of bill of lading.—The indorsement of the bill of lading by the consignee vests the property in the goods in the indorsee, whether the consignee be a purchaser from the consignor or his agent or factor. *Audenreid v. Randall*, 3 Cliff., 99. See §§ 2, 3.

§ 75. Where a cargo is consigned to the master for sales and returns he alone is competent to convey the title by an indorsement of the bill of lading, though the owner, subject to the power of the master to defeat the title by *bona fide* indorsement, may, by an assignment on the back of the bill of lading, or by a separate instrument, convey a title good as against every person not a *bona fide* indorsee. *D'Wolf v. Harris*, 4 Mason, 515; *Conard v. Atlantic Ins. Co.*, 1 Pet., 386.

§ 76. Where goods are consigned to a factor for sale, and he *bona fide*, for a valuable consideration, while the goods are at sea, assigns the bill of lading, the title of the assignee is good against the principal. *Walter v. Ross*, 2 Wash., 233.

§ 77. Consignor may countermand consignment.—If goods are consigned generally to a factor at the risk and for the account of the principal, the consignor may, if the factor has not *bona fide* and for a valuable consideration transferred them by an indorsement of the bill of lading, vary the destination of the goods or sell them while in transit or at any time before they come into the possession of the factor, though he is indebted to the factor. *Ryberg v. Snell*, 2 Wash., 403. See §§ 2, 3.

§ 78. A. consigned goods to B., to whom he was indebted. Before the consignment actually came into B.'s possession A. assigned the bills of lading to C. *Held*, that, as against C., B. was not entitled to have his debt from the consignor satisfied out of the proceeds of the goods. *Ryberg v. Snell*, 2 Wash., 294.

§ 79. Goods were consigned to defendant, and afterwards the consignor and owner failed and made an assignment *bona fide*. A creditor sued the defendant as trustee, and as soon thereafter as he reasonably could the assignee demanded the goods, which defendant refused. *Held*, that the assignment overreached the trustee process, and the defendant was liable to the assignee in trover. *Bholen v. Cleveland*, 5 Mason, 174.

§ 80. — may follow proceeds. — Goods were consigned to an auctioneer for sale under a *del credere* commission, who sold, taking in payment promissory notes in his own name. He failed and made an assignment, including these notes. *Held*, that the moneys received by the assignee upon the notes, less the auctioneer's commissions and charges, were recoverable by the consignor. *Thompson v. Perkins*, 3 Mason, 232.

§ 81. — right to draw against consignment. — Where a bond with sureties was given to secure advances for putting up and shipping bacon, and after the advances were made the agent of the party, who was to have the management of the business, made a consignment of meat and drew a draft against it, which the obligee in the bond accepted and paid, *held*, that the consignor had a right to draw the draft unless restrained by some contract with the sureties, and that the sureties were to be credited only with the residue of the proceeds of the consignment after meeting the draft, whether the drawer acted as principal or agent. *Turner v. Yates*, 16 How., 14.

§ 82. Consignment by several, when not joint. — Two persons made a joint shipment of cotton, one-half of which belonged to each, to a commission merchant. In the shipment the distinct interest of each was disclosed, and each gave separate and variant instructions as to his moiety, under which the factor acted throughout his agency. *Held*, that one of the consignors might sue separately for a breach of orders. *Hall v. Leigh*, * 8 Cr., 50.

§ 83. A. and B., tenants in common of a ship in a certain proportion, purchased a cargo in the same proportion for a voyage, the purchase being made and all the business of the vessel transacted by A., as agent of the owners, and consigned the same to the master with instructions, signed by both owners, to sell the cargo, purchase a return cargo and remit the balance to each in the proportion owned by them. The master consigned the return cargo to A. alone. *Held*, that A. and B. were not partners in the adventure; that though the instructions to the master were joint, each owner was to be regarded as making a separate consignment of his share, and the master had no authority to consign to A. alone; that A. had no lien for separate and distinct demands, nor could such demands be set off in an action by B. for his share. *Jackson v. Robinson*, 3 Mason, 188.

§ 84. Consignee of a ship; delivery of freight; authority. — Consignees of a ship have authority to arrange with the owners or consignees of the cargo in respect to the time and manner of its delivery. *The Grafton*, 1 Blatch., 178.

§ 85. — liability for wharfage and duties. — Consignees are liable for wharfage of vessels, under the New York statute, if an account of it is delivered to them before the departure of the vessel. *Atlantic Dry Dock Co. v. Wenberg*, 9 Ben., 464.

§ 86. A mere consignee of a vessel is not liable to an action for tonnage and light duties. *United States v. Hathaway*, 3 Mason, 324.

§ 87. — supplies; maritime lien. — A consignee at a foreign port furnishing supplies to a vessel, without having funds of his principal in his hands, is not deprived, by his character of consignee, of the ordinary maritime lien of material men. *The Eliza Jane*, 1 Spr., 152.

§ 88. The consignee of a vessel cannot advance money to the master on marine interest while the freight is in his hands unless he has been directed by the consignor to appropriate the freight to another purpose. *The Ship Lavinia v. Barclay*, 1 Wash., 49; *Henry v. The Ship John and Alice*, 1 Wash., 298. A usage for a consignee of a vessel, who is also the owner of the cargo, to charge a commission on the freight paid by himself to the captain is unreasonable and not binding. *Jelison v. Lee*, 3 Woodb. & M., 368.

§ 89. — liability for demurrage. — Respondents had provided dock room sufficient for unloading all vessels consigned to them, if they arrived when they might reasonably be expected; and, according to the usage of the port, consignees had one day after notice of the arrival of the vessel to provide a dock for unloading her. *Held*, that a delay of four days in providing a dock for a vessel which arrived six days after it was due was not unreasonable, especially in view of the fact that the arrival was but a few days after a destructive fire, by which many of the docks of the port were destroyed. *Fulton v. Blake*, 12 Am. L. Reg., 779; S. C., 5 Biss., 871.

§ 90. At a port by the custom of which the consignee of a vessel had twenty-four hours after its arrival to provide a place for its unloading, and all grain was unloaded at elevators

in the order of arrival, no elevator to unload a cargo of barley, which arrived on the 4th, could be found until the 6th. The discharge of the cargo was suspended by the proprietors of the elevator on account of its dampness, and afterwards delayed in consequence of the breaking of the machinery of the elevator. *Held*, that in the absence of a stipulation in the bill of lading the consignee was not liable for demurrage. *Weaver v. Walton*, 1 Flip., 441; 5 Ch. Leg. N., 125.

§ 91. *Miscellaneous.*—Where goods are consigned to an agent for third persons upon his principal's contract for their sale, and he wrongfully refuses to deliver the goods, the remedy is by action against the principal and not against the agent. *Bradford v. Eastburn*, 2 Wash., 219.

§ 92. A consignment was made under a special contract, the consignee giving his acceptances for the value of the goods, payable partly at sight and partly in the future, stipulating for a commission on the value of the goods, and becoming primarily liable to the consignor. *Held*, a consignment on sale, and not on a *del credere* guaranty. *In re Chamberlaines*, 14 Am. L. Reg. (N. S.), 638; 2 Hughes, 264; 12 N. B. R., 230.

§ 93. Although a consignor may reserve a special property in goods consigned, for the protection of bills which he draws against the goods, yet the cases do not go so far as to hold that he may have a special property in the bills and notes which the consignee may receive on a sale of the goods; on the bankruptcy of the consignee, such bills and notes become a part of his general assets. *Ibid.*

§ 94. An agent authorized to negotiate with a commission merchant to accept consignments of his principal's goods for sale has no authority to withdraw the goods from the custody and control of a firm to whom they have been consigned pursuant to his negotiation and turn them over to another. *Berthold v. Goldsmith*, 24 How., 536.

§ 95. The defendants consigned a ship with an outward cargo to the plaintiffs with orders for her ulterior destination. The voyage contemplated by the defendants was broken up, and plaintiffs without authority purchased a return cargo and consigned it to defendants, who objected to the purchase, but received the cargo and sold it. *Held*, (1) that defendants were liable to the plaintiffs for the proceeds of the sale in an action for money had and received; (2) that although the orders for the voyage contemplated were broken with the advice of the plaintiffs, still they were broken by the master to whom their execution was confided, and not by the plaintiffs to whom their execution was not confided; (3) that even if plaintiffs were responsible for damage sustained by breaking up the voyage, the same was not recoverable by way of counterclaim in an action for money had and received. *Willinks v. Hollingsworth*, *6 Wheat., 240.

§ 96. *Consignee contracts for fidelity and good judgment.*—A consignee impliedly contracts, when he accepts the consignment, not only for fidelity but for the exercise of a sound judgment in the management of the business. *Kingston v. Wilson*, *4 Wash., 310. See, also, §§ 5, 22.

§ 97. If he be authorized to direct the destination of the ship with a view to the best market at which the cargo can be sold, it is his duty by reasonable inquiries to find out where that market is, so as to afford his employer the benefit of it. But if the consignment be general and in the usual form, the consignee has no option to select a market other than that to which the cargo is destined. *Ibid.*

§ 98. *Insurance.*—If it be the custom of merchants having liens on goods consigned to them to make general insurances against fire and charge each owner with his proportion, the consignee is in the situation of an insurer in case of loss, without insurance, if the custom was intended for the benefit of the owner of the goods, but not if it was intended for the consignee's benefit. *Ibid.* See §§ 42, 71.

§ 99. *Del credere commission.*—If the sale was made by the consignee on credit, but ready money was paid in consideration of a deduction, the charge of a *del credere* commission is not admissible. *Ibid.*

§ 100. *Drawing against consignment.*—It seems that a consignor draws against his consignment at his peril before he is advised by the consignee of the balance due him, if the latter refuses to accept because he has not yet ascertained the balance. *Ibid.*

§ 101. *Communicating with consignor.*—It is not the duty of the consignee to communicate anything which he has the right to presume that the consignee knows, and it was held that a consignee at San Francisco might properly assume that the consignor was informed of the charges for landing and storing a cargo at that port. *Norris v. Cook*, *1 Curt., 464. See §§ 55, 60-63.

§ 102. *Obeying orders; advances.*—A factor is generally bound to obey all orders of the consignor in relation to the consignment. If, however, he has made advances or incurred liabilities on account thereof, the consignor cannot control or suspend his right to reimburse himself by a sale. *Brown v. M'Gran*, *14 Pet., 479; *Feild v. Farrington*, *10 Wall., 141.

§ 103. If, contemporaneous with the consignment and advances or liabilities, the consignor

gives particular orders which are assented to by the consignee, the latter cannot usually sell contrary to such orders to reimburse himself. *Brown v. McGran*,* 14 Pet., 479.

§ 104. In no case is a factor at liberty to sell the consignment contrary to the orders of the consignor, if the latter stands ready and offers to reimburse and discharge advances or liabilities made or incurred by the factor. *Ibid*.

§ 105. Where, contemporaneous with the consignment of goods to a commission house for sale, advances were made or liabilities incurred by it on account of the consignment, and there were no contemporaneous orders limiting or qualifying the ordinary rights of factors resulting from such circumstances, and the consignor afterwards failed in business or was believed to have failed, it was held that the consignor had no right, by orders given subsequently to the advances or liabilities, to suspend or control the sale of the consignment. *Ibid*.

§ 106. Where a consignor instructed his factor not to sell until further orders, and thereafter directed him to sell, but the factor sold before receiving the latter order, *held*, that if the sale was tortious and in violation of orders the consignor had the election to claim damages for the value of the goods either on the day of sale or the day when the sale was directed to be made. *Ibid*. See § 68.

§ 107. Discretion in selling; ratification.— Consignees of cotton wrote the consignor that they would be compelled to sell immediately to reimburse themselves for advances unless other shipments were made or cash was remitted; that they had held on thus far to meet his views, but that the declining state of the market induced them to write, and asking to hear from him on receipt of their letter, to which the consignor purposely omitted replying. The consignees did not sell until nearly ten months thereafter, during which time the market was constantly falling. *Held*, that the consignor's refusal to reply, in the absence of anything to the contrary, amounted to an assent to what his agents had done, so far as they informed him, but did not relieve them from responsibility for negligence or faithlessness in the futuro, and that the question whether the delay in selling was in the exercise of a sound discretion, good faith and reasonable diligence, should have been left to the jury. *Feild v. Farrington*,* 10 Wall., 141.

§ 108. Accepting bills.— Where a factor receives consignments and accepts bills on account thereof without any special agreement with the consignor, he is bound to apply the proceeds upon bills accepted in the order in which the same respectively become due. *Brandler v. Phillips*,* 16 Pet., 121.

§ 109. A. was a commission merchant and acted as the factor of B. in the sale of cotton, making advances thereon. A. accepted bills of exchange maturing at different dates, some of which were drawn by B. alone and some by B., with others, who were accommodation drawers, and known to be such by A. An action was brought upon a bill of the latter named class. *Held*, that if A. had funds of B. in his hands when the bill matured, he was bound to apply them to its payment, and could not hold them to meet acceptances drawn by B. alone and not then due. *Ibid*.

§ 110. Pledging goods.— Factors to whom cotton was consigned for sale, but who had no interest therein, stored the same in a cotton-press, and, as security for a loan to themselves, gave to the lender the cotton-press receipts, which stated that the cotton was deliverable to the lender. *Held*, that the transaction amounted to a pledge and not a sale, and was invalid against the consignor. *Insurance Co. v. Kiger*,* 13 Otto. 352.

§ 111. Factors stored cotton consigned to them for sale, and took receipts from the warehouseman, which declared that the cotton was deliverable to A., upon which A. made them a large loan. The consignor having recovered the cotton from the warehouseman in an action to which A. was made a party, *held*, that in the absence of fraud, or collusion with the factors, the warehouseman was not responsible to A. for the amount which he had loaned upon the receipt. *Ibid*. See AGENCY, XV, 6.

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 extraordinary pressure excuses, unless known to carrier, and not disclosed. Carriers, §§ 52, 101, 103, 104.
 presumed that contract was for transporting without unnecessary delay. Carriers, § 120.
 difficulty in procuring master and crew will not excuse. Carriers, § 120.
 twenty-four hours delay, when unreasonable; pressure immaterial. Carriers, § 121.
 death of master and freezing up of vessel not discharge of liability. Carriers, § 122.
 liability in tort and contract fully considered. Carriers, § 241.
 how far responsible when partly to blame. Carriers, §§ 483, 484.
 bill of lading or other contract unnecessary to character as carrier. Carriers, § 555.
 a. *In general*, not technically an insurer, though so called. Carriers, §§ 181, 439, 440.
 are proximately insurers. Carriers, §§ 439, 440, 444.
 duties of *connecting carriers*. See *post*, 7.
 and for careless lading; non-inspection of barge; running too fast; want of care after leak. Carriers, § 183.
 master's discretion as to entering harbor in storm. Carriers, § 449.
 cattle must be carried with regard to health and safety. Carriers, § 184.
 not liable for inherent defects or natural decay. Carriers, §§ 649, 713; nor for loss due to bad packing. *Id.*
 accountable for any loss or damage, barring recognized exceptions. Carriers, § 180.
 defined and stated. Carriers, §§ 438-440, 520.
 may be liable though usual precautions taken. Carriers, § 616.
 fully stated; bill of lading no effect on, unless it so provide. Carriers, §§ 385, 386; see § 403.
 should not be relaxed by indirection. Carriers, § 1283.
 liabilities under bill of lading; see *infra*, 4, d.
 care to be taken of coin. Carriers, § 536.
 b. *Negligence*, carrier's responsibility for; see *infra*, 3, a; see *Negligence*.
 contributory of shipper excuses carrier. Carriers, § 182.
 but liable for negligent stowage, though goods damaged when received, when damage not apportionable. Carriers, §§ 316, 482-484.
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 to provide proper vehicle, what is. Carriers, § 241, p. 140.
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 and lard, or lard oil. Carriers, § 410.
 in not ventilating rooms in which wine stored. Carriers, §§ 313, 471.
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 in carrying and stowing bleaching powders. Carriers, § 503.
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 not presumed from death of cattle on shipboard, stowed between decks. Carriers, § 549.
 in not keeping limber holes open, and want of proper dunnage. Carriers, § 656.

CARRIERS, RESPONSIBILITIES AT COMMON LAW, *Negligence*—continued.

- negligent fumigation and cleaning vessel. Carriers, § 666.
- as to collision. Carriers, § 669.
- attempt to enter harbor in dense fog. Carriers, §§ 676, 677.
- when master may follow pilot boat in thick weather; proper jettison. Carriers, § 679.
- mistaking shore light for pier light excusable. Carriers, § 680.
- wreck in harbor, crew having gone ashore, negligent. Carriers, § 699.
- negligence in pumping out vessel, damaging cargo. Carriers, § 700.
- in losing marks on package, delaying delivery. Carriers, § 888.
- in forfeiture of goods under foreign revenue laws. Carriers, § 993.
- imputation of, by exposing goods to leaking deck, considered. Carriers, § 1153.
- in running aground in a fog. Carriers, § 1164.
- proximate cause*; where negligence causes deviation causing stranding, carrier liable. Carriers, § 684.
- capture after unnecessary transshipment no excuse. Carriers, § 692.
- jettison due to prior default of carrier not upheld. Carriers, § 697.
- peril of sea concurring with leaky deck, carrier liable. Carriers, § 710.
- c. *Duties preliminary to voyage*; ship should have spare sails. Carriers, §§ 306, 434.
- liable for careless lading; leaky vessel on western river; non-inspection of barge. Carriers, § 183.
- must provide seaworthy vessel, with tackle, crew, master and mate; stowing cargo. Carriers, § 440.
- goods must be so placed as not to hurt each other; oil and carpeting. Carriers, § 454.
- must be laden under deck; parol evidence to change bill inadmissible. Carriers, §§ 456, 390, 441; see § 625.
- shipper's consent to stow on deck not presumed; local custom not readily inferred. Carriers, §§ 311, 457-62.
- if shipper consent to lading on deck, he takes risk as to excepted peril of sea. Carriers, §§ 312, 463-70.
- shipper may waive this right. Carriers, § 625.
- duty as to stowage of flour in New Orleans ports; not liable for "sweating." Carriers, §§ 315, 480.
- as to stowing it near sugar and corn. Carriers, § 480.
- liable for want of proper dunnage, to prevent taking in water. Carriers, § 482.
- liable for injury partly caused by stowing tobacco and lard near each other. Carriers, § 484, note.
- stowage of salt, and of goods near it. Carriers, § 498.
- turpentine and breadstuffs not stowed together. Carriers, § 500.
- loss of barge cargo held not due to bad loading and stowage. Carriers, § 517.
- vessel must not only be seaworthy, but have appliances suited to cargo. Carriers, § 521.
- defects of construction of ceiling, etc., stated. Carriers, § 522.
- must provide sufficient force to protect goods, even from superior force, before sailing. Carriers, § 533.
- unseaworthiness*; failure of rudder shows, when; see *supra*. Carriers, § 622.
- considered. Carriers, § 623; see §§ 128-132.
- ship must be strong enough to bear shock of sand bar, in western river. Carriers, § 624.
- liable for defective bulwarks and stanchions. Carriers, § 651.
- and for damage for leakage, caused by defective timbers. Carriers, § 652.
- negligent stowage not excused by exceptions in bill. Carriers, § 648.
- parol contract for stowage on deck admissible. Carriers, § 627.
- casks of oil may be stowed on deck, when. Carriers, § 628.
- custom for stowing on deck, admissible. Carriers, § 621.
- for carrying part of cargo on deck, reasonable. Carriers, § 630.
- facts held not to show bad stowage. Carriers, § 1153.
- oranges, lemons, fruit, how stowed. Carriers, § 631.
- salt and arsenic, how stowed. Carriers, §§ 632, 1171.
- bleaching powder not placed near cloth, dyewoods, iron, etc. Carriers, § 633.
- kerosene oil, stowage, when a new article of commerce. Carriers, § 634.
- cutch, melting and evaporation, when carrier not liable. Carriers, § 635.
- coal, coal oil and paper stock, how stowed. Carriers, § 637.
- brittle ware, stowage without support, negligent. Carriers, § 642.
- soap, carrier held not liable for improper stowage. Carriers, § 645.
- so of wine, stowed under shipper's direction. Carriers, § 646.
- must not change vessel. Carriers, § 1163.
- must furnish safe vehicles. Carriers, § 1270.
- proper dunnage necessary. Carriers, §§ 638, 640.
- coal is not dunnage, but cargo. Carriers, § 641.
- d. *Duties on voyage*; not liable for leakage, evaporation, or natural decay. Carriers, §§ 409, 419.
- must carry under deck, unless excused by bill of lading or custom. Carriers, §§ 390, 441.
- liable for breakage of champagne due to lack of ventilation. Carriers, §§ 318, 471.

CARRIERS, RESPONSIBILITIES AT COMMON LAW, *Duties on voyage*—continued.

- must not carry nuts, properly marked, in hold, where "sweating" occurs. Carriers, §§ 814, 474.
- liable for so carrying goods of different shippers that they injure each other. Carriers, §§ 502, 508.
- must not carelessly expose vessel to tempest by sailing in thick weather. Carriers, § 507.
- must exercise great care in passing bridges. Carriers, § 508.
- after damage by a peril of the sea, carrier liable for further damage by not pumping. Carriers, §§ 837, 538, 540.
- option as to entering port in storm upheld. Carriers, §§ 338, 438-50.
- liability for grounding due to ignorance of difficulties of river. Carriers, § 672.
- master's duties in fog. Carriers, § 673.
- navigation in low water. Carriers, § 674.
- must carry all proper sail. Carriers, § 684.
- care as to cargo of perishable nature. Carriers, § 691.
- discretion of master in extreme emergency favorably regarded. Carriers, §§ 694; see § 696.
- wreck in harbor, master having permitted crew to go ashore, negligent. Carriers, § 699.
- prevention of dampness when vessel lays up during winter. Carriers, § 701.
- master must know revenue and navigation laws of country he trades with. Carriers, §§ 716, 783, 993.
- liable for forfeiture of goods by revenue law. Carriers, § 993.
- deviation or delay*, not allowed except in specified cases. Carriers, § 425; see §§ 515, 441, 617.
- defined; how far allowed by usage. Carriers, § 515.
- is in master's discretion, in gales; so as to entering port. Carriers, §§ 838, 438-50, 618.
- on western rivers, principles of maritime law do not strictly apply. Carriers, § 619.
- permitted to assist distressed vessel; but not to save property. Carriers, § 620.
- delay due to sailing with sick or incompetent crew no excuse. Carriers, § 621.
- as to delay in commencing voyage, see *supra*. Carriers, §§ 120-122.
- deviation waived by acceptance of cargo. Carriers, § 987.
- custom to touch at Havana, when. Carriers, § 988.
- repairing vessel*, must be done if voyage can be completed; otherwise, goods transhipped. Carriers, § 437.
- duty when goods not perishable. Carriers, § 442.
- damage by sand bar must be repaired or effects avoided. Carriers, §§ 513, 514.
- fairly done, and cargo attempted to be preserved, upheld. Carriers, § 689.
- duty after vessel stranded*; duties not varied or lessened; still an insurer. Carriers, § 445.
- master held grossly negligent. Carriers, § 450.
- liable for avoidable robbery or theft in lying off vessel. Carriers, § 535.
- held liable for leaving stranded vessel. Carriers, §§ 338, 450.
- duty when vessel wrecked or injured*; liable for theft, when. Carriers, § 535.
- cargo must be protected against threatened dangers from water. Carriers, § 540.
- when towage chargeable *pro rata* to cargo. Carriers, § 685; see *Jettison*.
- when master may sell cargo. Carriers, §§ 688, 695.
- jettison, and sale of cargo, upheld. Carriers, § 690.
- if capsized at wharf, sale without owner's direction not necessary. Carriers, § 693.
- jettison rendered necessary by fault of carrier not upheld. Carriers, § 697.
- master should either sell or reship perishable goods. Carriers, § 933.
- carrier must account for goods sold. Carriers, § 934.
- on sale, master must make best possible. Carriers, § 1088.
- peremptory sale when owner might be consulted, a conversion. Carriers, § 1176.
- transhipment*, must be made if vessel disabled. Carriers, §§ 435, 442.
- after unnecessary, capture no excuse. Carriers, § 692.
- when voyage interrupted, master should tranship. Carriers, § 698.
- perishable goods should be sold or reshipped. Carriers, § 933.
- duty to procure pilot*; if loss occurs by not getting pilot, carrier liable. Carriers, § 683.
- e. *Act of God*; not that swell causing damage is created by steamers. Carriers, § 9.
- death of master and freezing up of vessel no excuse. Carriers, § 122.
- sudden and extraordinary flood excuses, unless negligence contributes. Carriers, §§ 123, 140.
- must be proximate cause of loss. Carriers, § 142.
- failure to carry on agreed train is remote. Carriers, § 143.
- ordinary diligence to avert loss, enough. Carriers, § 149.
- if carrier's negligence concur, he is liable. Carriers, §§ 126, 150, 417.
- storms; vessel must be reasonably sufficient to withstand. Carriers, §§ 128, 156.
- springing leak in harbor, unseaworthiness presumed. Carriers, § 157.

CARRIERS, RESPONSIBILITIES AT COMMON LAW, *Act of God*—continued.

- perils of river navigation, requisites in building vessel. Carriers, §§ 131, 132, 163-165.
- barge must be able to withstand shock of sand bar, etc. Carriers, § 166.
- case of putting back on account of storms considered. Carriers, § 434.
- must tranship if prevented from completing voyage. Carriers, § 435.
- must repair and complete voyage if possible. Carriers, § 437.
- " dangers of navigation " defined. Carriers, §§ 447, 522, p. 304.
- loss by jettison, when goods stowed on deck. Carriers, § 455.
- as to " perils of the sea," excepted in bills of lading, see Carriers, 4, d; *Construction and Interpretation*.
- epidemic among horses delaying delivery. Carriers, §§ 758, 922.
- f. *Acts of public enemies*; due diligence necessary; Indian country is unusually hazardous. Carriers, §§ 125, 144-146.
- ordinary diligence in averting loss, enough. Carriers, § 149.
- if carrier's negligence concurs, he is liable. Carriers, §§ 128, 150, 417.
- deviating from course. Carriers, § 150.
- otherwise if it ceases to operate before loss. Carriers, § 151.
- carrier is a bailee where civil war prevents performance of contract. Carriers, § 127.
- unnecessary transshipment followed by capture. Carriers, §§ 133, 167, 168.
- usage for transshipping must be uniform and general. Carriers, § 168.
- effect of proclamation of 1861. Carriers, § 153.
- robbery by pirates a peril of the sea. Carriers, § 533.
- capture no excuse if occurring after unnecessary transshipment. Carriers, § 692.
- embargo does not end contract; goods must be carried after it ceases. Carriers, § 943.
- g. *Acts of consignee or consignor*; shipper not required to disclose kind, quality or value, but not pack so as to deceive. Carriers, §§ 56, 57.
- negligence of shipper contributing to injury excuses carrier. Carriers, § 182.
- so of deterioration of goods by shipper's fault. Carriers, § 302.
- 3a. *LIABILITY TO THIRD PERSONS*. See *supra*, 3.
- carrier not chargeable with knowledge of dangerous character of packages free from suspicion. Carriers, §§ 134, 169.
- explosion of nitro-glycerine, carrier not liable to its lessor. Carriers, §§ 169-176.
- must appear that carrier knew character of article. Carriers, § 185.
- carrier of mastic, then a new article of commerce, not liable for injury done other goods. Carriers, §§ 135, 177-179.
- negligence*; carrier liable for; when a question of circumstances. Carriers, § 174.
- liable for so lading goods that they will damage each other. Carriers, §§ 309, 454.
- and see generally, *supra*, *Duties preliminary to voyage*.
- restrained from carrying goods in furtherance of infringement of patent. Carriers, § 1187.
4. *RESPONSIBILITY AS SPECIALLY MODIFIED*.
- a. *By legislation*; act of March 3, 1851, construed. Carriers, §§ 186, 189-194, 196, 443.
- " inland navigation," in such act, does not include Great Lakes. Carriers, § 189; see § 443.
- cause of passage of such act. Carriers, §§ 187, 193, 195.
- under it, carrier not liable for negligence of officers or mariners causing fire. Carriers, § 196.
- under it, liability may be *increased* by special contract. Carriers, § 197.
- case of collision discussed. Carriers, § 200.
- so where fire followed collision. Carriers, § 201.
- owner still liable to extent of ship and freight for conduct of employees, and without limit for personal negligence. Carriers, § 202.
- negligence of part owner alone, effect of. Carriers, § 203.
- fire on wharf after landing not included. Carriers, § 204.
- shipper of coin not taking receipt bears loss before vessel starts. Carriers, § 205.
- whether violation of another act affects liability for loss by excepted casualty? Carriers, § 206.
- act of August 30, 1852, limiting number of passengers; *quære*, whether extends to inland rivers. Carriers, § 206.
- act of July 25, 1866, as to stowing combustibles, construed. Carriers, § 209.
- Maine statute restricts liability of ship-owner to interest in ship and freight. Carriers, § 210.
- Illinois statute prohibiting special contract limitations construed. Carriers, § 211.
- orders of secretary of war held not to excuse duty to carry, when. Carriers, § 995.
- b. *By special contract*; when liability may be *extended* by special contract. Carriers, § 197.
- " perils of sea," " perils of navigation," in bill of lading, do not include negligent fire. Carriers, § 198.
- Illinois act prohibiting such modifications construed. Carriers, § 211.
- act of 1851 permits special extension of carrier's liability; express terms therefor necessary. Carriers, §§ 188, 195-199, 212.

- CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By special contract* — continued.**
 policy of allowing such modification fully considered. Carriers, §§ 1330, 1382-83.
 not inferred from prior usage applied to general terms of bill of lading. Carriers, § 212.
 contract between expressman and carrier does not affect real owner. Carriers, § 220.
 mere published notice or his sole act cannot exonerate carrier. Carriers, §§ 224-226.
 verbal renewal of written contract makes a parol contract. Carriers, § 220.
 liability may be modified by. Carriers, § 225.
 burden is on carrier to show. Carriers, § 227.
 when contract shown, burden shifts, to show negligence. Carriers, § 220.
 that no risk is assumed does not amount to stipulation for less than ordinary care.
 Carriers, §§ 228, 237.
 nor against failure to provide proper vehicle. *Id.*; see § 241.
 nor against other tort. Carriers, § 241.
 what amounts to negligence, not covered by contract. Carriers, §§ 230, 238.
 common law liability may be restricted by special contract. Carriers, § 243.
 but not below that of bailee for hire. Carriers, §§ 244-48, 1389-90.
 misconduct or negligence of carrier or servants cannot be stipulated against. Carriers, §§ 263-277.
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 notice to such effect a contract; assent not necessary. Carriers, § 279.
 rule commented on; cases reviewed. Carriers, §§ 254-56.
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 may prescribe short time for asserting claim against it. Carriers, §§ 259-62.
 unsigned notice on back of receipt does not amount to. Carriers, §§ 263, 1281.
 cases reviewed. Carriers, § 1282.
 carrier must show clear language and mutual assent. Carriers, § 266.
 terms must be specific and certain. Carriers, § 487.
 contract construed not to cover loss by fire. Carriers, § 267.
 against loss by fire, liable for negligence. Carriers, §§ 268, 270, 271; what amounts to. Carriers, § 272.
 against delay, cannot be absolute. Carriers, § 269.
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 provisions of receipt not assented to, not binding. Carriers, § 276.
 to tow a boat at owner's risk, calls for ordinary care. Carriers, § 277.
 burden on carrier to show loss by excepted cause. Carriers, § 417.
 stamp on bill of lading exempting liability for breakage, etc., held not assented to, nor specific. Carriers, § 488.
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 whether may become bailee by; public may become private carrier by. Carriers, §§ 1389-90.
 whether gross and ordinary negligence should be distinguished as to power to limit liability. Carriers, § 1396.
- c. *By usage or custom*; whether custom can divest duty to carry money. Carriers, § 74.**
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 usage cannot make bill negotiable. Carriers, § 356.
 usage may affect question of assent to special conditions by owner. Carriers, § 283.
 may be waived by parties; cannot vary positive contract. Carriers, § 284.
 under bill of lading goods must be carried under deck unless usage different. Carriers, § 390.
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 cannot modify contract in bill of lading; true office of. Carriers, §§ 451, 452.
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 no custom as to stowing wheat in New Orleans ports. Carriers, § 476.
 as to stowage, may follow well known usage unless shipper otherwise directs. Carriers, § 479.
 to carry bleaching powders and soda ash in same vessel. Carriers, § 501, p. 282.
 on western rivers, justifies detaching one tow-boat to be laden, leaving others at safer place. Carriers, §§ 330, 516.
 cannot control bill of lading, as against innocent holder. Carriers, § 590.
 for carrying goods on deck. Carriers, § 629.
 for carrying certain portion on deck, reasonable. Carriers, § 630.
 to vary words "after four lay-days" in bill of lading, held insufficient. Carriers, §§ 753, 918.
 to stop at Havana on certain voyages. Carriers, § 988.
 bill of lading not controlled by as to delivery contrary to its terms. Carriers, § 1301.
- d. *By bill of lading; carriage thereunder*, perils of sea, what. Carriers, § 9.**
 special contract enlarging liability not inferred from general terms in bill. Carriers, § 212.

CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading* — continued.

- special contract therein limits liability. Carriers, § 286.
 carrier excused only by stipulated exceptions; must use diligence to avert loss. Carriers, § 436.
 stated exceptions in bill cannot exempt from liability for negligence. Carriers, § 518.
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 goods must be carried by vessel agreed on, or carrier strictly liable. Carriers, § 557.
 after loss, master cannot create liability by. Carriers, § 558.
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 must determine contract, in absence of charter-party. Carriers, § 563.
 is a maritime contract, within admiralty jurisdiction. Carriers, § 564.
 carrier by water bound to give; sum to be paid not essential part of. Carriers, § 611.
delivery as affected by bill of lading, see *infra*, 5, r.
 delivery of goods to ship under prior bill of lading, good. Carriers, § 884.
 must be examined as a whole, and effect given to all its provisions. Carriers, § 1285.
nature of bill of lading; nature of stated; is not negotiable. Carriers, §§ 287, 344.
 is a receipt and a contract; is invalid if no goods received. Carriers, §§ 344, 389, 594.
 is an evidence of title. Carriers, §§ 855, 881.
 general doctrines stated; nature and effect; definition, etc. Carriers, §§ 296, 885-92.
 where several bills make holders tenants in common of goods. Carriers, §§ 399-401.
 a maritime contract, if for sea transportation. Carriers, § 528.
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 certain freight bill held a bill of lading; but of sale not interpreted as. Carriers, §§ 561, 562.
execution and delivery of bill; parties; signed by shipping agent, or by carrier, does not bind latter if no goods received. Carriers, § 845.
quære, whether carrier estopped as to *bona fide* holder. Carriers, § 846.
 delivery without goods by agent beyond scope of authority does not bind master. Carriers, §§ 847, 848.
 whether delivery by agent of corporation distinguishable. Carriers, § 349.
 wrongful omission of master to sign bill, and not learning names of consignees, no effect on liability. Carriers, §§ 343, 553.
 certain instrument held a freight bill. Carriers, § 561.
 freight agent cannot bind railroad by giving bill for goods not received. Carriers, §§ 290, 350-353.
 master cannot bind ship-owner by issuing *third* bill of lading in blank. Carriers, §§ 292, 366.
 nor free cargo from lien for freight by. Carriers, § 1094.
 is general agent of owner to sign. Carriers, § 304.
 delivery to shipper's drayman of bill repudiated by shipper, not a delivery. Carriers, § 566.
forgery, by increasing statement of shipment, carrier not liable though blank left in bill. Carriers, §§ 293, 367, 370.
 cases on negotiable paper reviewed. Carriers, § 368.
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 signing bill for goods not received, master not authorized to do so. Carriers, § 397.
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 when two bills signed, holders are tenants in common of goods. Carriers, §§ 399-401.
 acceptance of bill binds carrier. Carriers, § 524.
 implies knowledge of terms. Carriers, §§ 342, 524.
 signed by "W. T. N. & Co., Ag'ts," not varied as to party by parol. Carriers, § 561.
 brokers employed in foreign shipment not authorized to stipulate limited liability. Carriers, § 567.
 master cannot sign valid bills for goods not put on board. Carriers, § 570.
 falsely made out for excessive amount, good only for amount put on. Carriers, § 571.
 signed by master, good, though "master" not appended to signature. Carriers, § 574.
 A. may control goods when bill made to his use. Carriers, § 589.
 when master may sign to shipper though otherwise instructed. Carriers, § 592.
 amount of freight not a necessary part of. Carriers, § 611.
duties of shipper; as to preparing lard and lard oil for shipment. Carriers, §§ 498-10.
 as to putting up bristles. Carriers, §§ 303, 413-15.
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 must see that goods are of such character and condition to bear ordinary voyage. Carriers, §§ 520, 499-501.

- CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading*—continued.**
- rights of carrier*; master having made bills, goods not laden, cannot appropriate goods afterwards laden to particular bill. Carriers, § 401.
 - duties of carrier*; fully stated. Carriers, §§ 296, 385-92. See *supra*, 3.
 - must carry goods below deck, unless bill or custom to contrary. Carriers, § 390.
 - duty as to carrying lard. Carriers, § 410.
 - and cotton thread. Carriers, § 418.
 - does not warrant sufficiency of vessel to carry when goods laden on deck. Carriers, § 470.
 - must ventilate rooms, if necessary to save goods. Carriers, §§ 313, 471.
 - master's duty to note protest after accident; effect of failure. Carriers, § 505.
 - effect of bill on common law duty*; does not extend it to that of maker of negotiable paper. Carriers, § 352.
 - cases reviewed, bill not negotiable. Carriers, §§ 355, 358, 361.
 - usage as to bill cannot enlarge. Carriers, § 356.
 - no effect on such duty unless so specially provided. Carriers, §§ 385, 386.
 - "dangers and accidents of sea and navigation," what. Carriers, § 416-18.
 - as to carriage of goods on deck, by agreement. Carriers, §§ 468-70.
 - carrier liable for breakage of wine to be stowed in deck room, due to non-ventilation. Carriers, §§ 313, 471.
 - exception as to loss by fire covers incendiary fire by mob. Carriers, §§ 384, 524-526.
 - if departed from, carrier an insurer. Carriers, § 556.
 - liability commences with receipt of goods, though bill express later date. Carriers, § 614.
 - exception of liability for "breakage," how far operative. Carriers, § 644.
 - transfer of bill; negotiability*; it is not negotiable. Carriers, §§ 287, 344, 355; see *infra*.
 - carries right of action for breach of contract of affreightment. Carriers, § 362.
 - is *quasi* negotiable. Carriers, §§ 295, 377-84.
 - statute declaring them negotiable does not put on footing of notes. Carriers, §§ 377, 378.
 - signing "under protest" notice to indorsee. Carriers, § 575.
 - indorsement for value carries title to goods. Carriers, § 576.
 - mere delivery and indorsement not enough; must be acceptance; anything showing intent good. Carriers, § 578.
 - shipper, if owner, may transfer title to goods by assignment on bill, or separate instrument. Carriers, § 579.
 - sent to purchaser as a "liquidation of accounts," within Illinois statute. Carriers, § 580.
 - transfers property as against consignee, unless in his possession. Carriers, § 582.
 - may be surrendered to drawee of time draft, when. Carriers, § 584.
 - by indorsement or discounting draft, passes shipper's rights. Carriers, § 585.
 - A. may control the goods when bill made to B. for his use. Carriers, § 589.
 - rights and remedies of holder*; is entitled to receive goods. Carriers, § 344.
 - may bring action for breach of contract to carry. Carriers, § 362.
 - libel for non-delivery of goods never received not maintainable. Carriers, §§ 287, 344, 345, 372.
 - when holders of different bills tenants in common. Carriers, §§ 399-401.
 - may sue for non-delivery of goods shipped. Carriers, § 463.
 - apparent ownership of bill conclusive on no one but *bona fide* purchaser. Carriers, § 583.
 - when must surrender bill on requiring acceptance of draft. Carriers, § 585.
 - one discounting draft may hold goods as security. Carriers, § 586.
 - assignee for creditors may hold bill of lading indorsed to him as against them, when. Carriers, § 591.
 - bona fide holder; quære* as to estoppel in favor of. Carriers, § 348.
 - no remedy if no goods actually delivered. Carriers, §§ 289, 344, 355.
 - no estoppel for act of agent issuing bill beyond authority. Carriers, §§ 357-60.
 - bill not negotiable; only *quasi* negotiable; suspicious circumstances defeat title. Carriers, §§ 295, 377-84.
 - holder of stolen bill no title. Carriers, § 390.
 - indorsement passes title of goods to. Carriers, § 578.
 - one may be, though bill neither indorsed nor delivered. Carriers, § 577.
 - and one who gets separate assignment, assignor retaining bill. Carriers, § 583.
 - has a lien on goods; consignee cannot disregard it. Carriers, § 587.
 - usage as to delivery between consignor and consignee cannot control terms of bill as to innocent holder. Carriers, § 590.
 - discharge of one of the bills no effect as to *bona fide* advance on the other. Carriers, § 593.
 - inadmissible to dispute recitals of bill as to condition of goods; otherwise as to immediate parties. Carriers, § 603.

CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading* — continued.

- bona fide holder*; right of, protected, though vessel intercepted by revenue officers. Carriers, § 994.
- usage cannot justify delivery to other person than. Carriers, § 1037.
- holder of bill signed by master "under protest" must pay higher freight stipulated by charter-party. Carriers, § 1066.
- consignee entitled to deduct commissions, charges and insurance. Carriers, § 1067.
- is owner of goods as to equities between seller and buyer thereof. Carriers, §§ 1124, 1144-45.
- duty of holder*; must ascertain truth of statements in. Carriers, § 353.
- forgery or theft of bill*; holder, *bona fide* or otherwise, cannot recover. Carriers, §§ 293, 367-71, 380.
- stolen bill passes no title to negligent subsequent holder. Carriers, § 383.
- estoppel by*; question considered. Carriers, §§ 346, 358.
- none when agent making and delivering bill acts beyond power. Carriers, § 358.
- when goods not on board, bill may operate by. Carriers, § 359.
- none by master signing bill if goods not laden. Carriers, § 397.
- otherwise if goods afterwards laden. Carriers, § 399.
- evidence as to bill*; explainable by parol in its character of a receipt. Carriers, §§ 294, 363.
- goods must be carried *under deck*, if bill silent. Carriers, § 390.
- unless usage otherwise. Carriers, § 390.
- bill not varied by parol. Carriers, §§ 311, 456.
- presumptions and burden of proof as to condition of goods described as shipped in "good order." Carriers, §§ 301, 410-12.
- such statement *prima facie* evidence; carrier may show latent cause of loss. Carriers, § 408.
- how far admissible to show usage. Carriers, § 391.
- proper mode of proving; burden of proof as to condition of shipment on shipper, when. Carriers, §§ 413-15.
- if external covering damaged at delivery, burden on carrier. Carriers, § 415.
- burden of proof*, on carrier to show excepted loss, or disprove liability for breakage. Carriers, §§ 318, 485, 513, 539, 702.
- though bill exempt liability for breakage. Carriers, § 485.
- and to show excepted contingency. Carriers, §§ 494, 1165.
- shifted to shipper by showing proper ship and stowage. Carriers, §§ 323, 504, 505.
- no presumption of negligence arises from fact of loss. Carriers, § 510.
- otherwise if accident inconsistent with use of due care. Carriers, § 511.
- on shipper showing excepted loss, burden shifts to shipper. Carriers, §§ 525, 596.
- application of rule as to burden of proof. Carriers, § 542.
- to show loss by inscrutable agency, must negative all other causes. Carriers, § 545.
- if liability doubtful, proof of excepted peril relieves him. Carriers, § 339.
- failure to deliver, or delivery in damaged state, burden on carrier. Carriers, § 546.
- otherwise of delivery of sick horse; presumption that sickness due to natural cause. Carriers, § 547.
- negligence not presumed from death of cattle on shipboard. Carriers, § 549.
- on carrier to show mutual assent to carriage on deck. Carriers, § 550.
- on shipper to show bill in his possession not really delivered. Carriers, § 565.
- when goods recited in good condition, burden on carrier to show excepted loss. Carriers, § 595.
- must show affirmatively that damaged goods were so received. Carriers, § 600.
- presumption of damage against carrier, when. Carriers, § 602.
- on shipper to show that quantity recited in bill not received. Carriers, § 609.
- on shipper to show negligence in connection with excepted risk. Carriers, §§ 653, 654.
- on carrier to show excepted risk, though "weight, contents and value unknown." Carriers, § 704.
- shipper must show actual damage if bill states that "contents unknown." Carriers, § 708.
- and deficiency in delivery, when bill states "weight and contents unknown." Carriers, § 1116.
- shifting burden*, from carrier to shipper, how accomplished. Carriers, §§ 539, 599.
- if cause of loss left doubtful, carrier liable. Carriers, § 706.

CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading*—continued.

evidenece as to bill; burden of proof, shifting burden, by showing latent defect in cask, showing leakage. Carriers, § 707.

by proving that wine casks were inferior in quality and leakage unusual. Carriers, § 709.

not by proving peril of sea concurring with defective deck. Carriers, § 710.

by recitals of bill agreeing with unpacked condition. Carriers, § 711; see § 704.

when fire excepted, by showing loss by fire. Carriers, § 712.

by showing severe storm sufficient to cause damage. Carriers, § 714.

must show loss due to chemical cause by experts, when. Carriers, § 715.

what sufficient to show negligence of carrier as to excepted risk. Carriers, § 659.

recital of bill of good condition of much weight as to goods easily inspected. Carriers, § 597.

acceptance of bill by carrier imports knowledge of terms. Carriers, §§ 842, 524.

parol evidence, to vary or explain bill as a receipt, admissible. Carriers, §§ 294, 868.

of prior contradictory conversations, not shown. Carriers, § 588.

distinct verbal contract to carry but one kind of freight not merged by bill. Carriers, 569.

disputable as to genuineness, authenticity and truthfulness. Carriers, § 572.

unauthorized person cannot sanction carrier's departure from terms of. Carriers, § 578.

drayman unauthorized. Carriers, § 578.

is a *receipt* as to all matters descriptive of cargo. Carriers, § 594; so as to amount, § 1034.

so as to admissions of good condition, which are only *prima facie*. Carriers, § 598.

not admissible against innocent holder. Carriers, §§ 603, 801.

but mistake as to quantity may be shown. Carriers, §§ 604, 607.

bill conclusive unless fraud or mistake shown, as to articles shipped. Carriers, 606.

not varied by proof of prior conversations. Carriers, § 825.

bill merges all prior negotiations. Carriers, § 869.

may be contradicted by general owner, he not being a party. Carriers, § 1190.

not varied so far as a contract; admissible that goods received by different ship than that expressed. Carriers, §§ 294, 875, 573.

inadmissible to change expressed carrier by. Carriers, § 561.

recital of quantity not varied, if it is agreed to make good any deficiency. Carriers, § 605.

as to stowage, inadmissible. Carriers, §§ 392, 456.

admissible as to quantity of goods. Carriers, §§ 297, 393-396.

"receipt" in bill includes quantity, quality, condition, marks, numbers. Carriers, §§ 297, 393-396.

between original parties, condition of goods shown. Carriers, § 475.

presumptions; cargo presumed in good condition. Carriers, § 655.

of fitness for transportation and proper packing by shipper; when rebutted by condition after delivery. Carriers, § 703; see §§ 1162-66, 1130.

from recital of good condition in bill. Carriers, §§ 705, 711.

as to condition of goods when received; recited as shipped in "good order." Carriers, §§ 801, 410-412.

construction of bill; exceptions; statement that goods shipped "in good order," matters visible and open to inspection are meant. Carriers, §§ 301, 402-407.

statement that "weight and contents unknown" admits nothing latent. Carriers, §§ 303, 413-23.

so of recitals of good condition, value and contents unknown. Carriers, § 608.

what included in "receipt" contained in. Carriers, §§ 298, 393-396.

"dangers and accidents of sea and navigation," what. Carriers, §§ 416-18, 523, 853.

"dangers of navigation" defined. Carriers, §§ 9, 447, 853.

leakage of oil casks improperly coopered not within "dangers of the sea," when no storms met. Carriers, § 453.

proper jettison such a danger. Carriers, §§ 811, 458, 467.

otherwise when goods stowed on deck. Carriers, §§ 455, 459.

"perils of sea," exception of applied where goods agreed to be carried on deck. Carriers, § 463.

damage easily avoided by proper stowage, not. Carriers, §§ 814, 472-474. and "dangers of navigation," equivalent to "perils of the sea." Carriers, § 477.

CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading*—continued.

- construction of bill*; “*perils of sea*,” dampness or sweating, not, when. Carriers, § 478.
- damage by water shipped in rough weather, is. Carriers, § 495.
- so as to seams and leakage in bad weather. Carriers, § 496.
- shallowness of entrances to lake harbors, is. Carriers, § 509.
- dampness or sweating is, when. Carriers, §§ 328, 419; damage to skins by, Carriers, § 638; as to soda. Carriers, § 639.
- so of delays from adverse winds. Carriers, §§ 329, 421.
- swell of passing steamer may be. Carriers, § 9.
- do not include fire. Carriers, § 198.
- depredations by passengers or crew on short allowance, not. Carriers, §§ 335, 527-31.
- theft or robbery from vessel lying off shore, not, especially when master remiss. Carriers, §§ 336, 533.
- otherwise of piratical robbery. Carriers, § 533.
- blowing of vessel is. Carriers, § 653.
- on sea and rivers, what. Carriers, § 659.
- explosion of steam boiler not. Carriers, § 660.
- peril of river does not include fire. Carriers, § 661.
- damage by vermin, not. Carriers, § 664.
- ship-owner not liable for loss by collision at sea. Carriers, § 668.
- facts showing negligence. Carriers, § 669.
- damage by wetting barley on account of heavy seas, within. Carriers, § 670.
- grounding during perilous exposure within. Carriers, § 671.
- hidden and unknown river obstructions covered by. Carriers, § 675.
- imprudent attempt to enter harbor in fog; improper jettison. Carriers, § 676.
- master may follow pilot boat in thick weather. Carriers, § 679.
- when mistaking shore light for pier light is attributed to. Carriers, § 680.
- when running on sand bar excusable. Carriers, § 682.
- when storm within, not violent enough to dismast vessel. Carriers, § 687.
- jettison is, unless due to prior fault of carrier. Carriers, § 697.
- running aground in a fog not, necessarily. Carriers, § 1164.
- exception as to fire covers incendiary fire by mob. Carriers, §§ 334, 524-526.
- exception as to “breakage” considered. Carriers, §§ 644, 1018.
- exceptions as to “package, leakage, breakage and perils of sea” considered. Carriers, § 647.
- exception of liability for goods “properly stowed,” liable for bad stowage. Carriers, § 648.
- provision for wetting oil construed. Carriers, § 650.
- exception as to rust held to cover damage to tin by sea water. Carriers, § 656.
- “unavoidable dangers of the river,” what; when known sand bar not. Carriers, §§ 327, 513.
- provision held to justify cutting bales of cork for stowage. Carriers, § 610.
- bill granting “privileges of lighting and reshipping” construed. Carriers, §§ 612-13.
- “privilege of reshipping” what. Carriers, §§ 757, 918-21.
- bill implies receipt of goods in sound condition when their delivery in good order is expressed. Carriers, § 601.
- exception as to rust of iron does not exempt from negligent rusting. Carriers, §§ 332, 518, 519.
- “leakage, breakage and rust” held not to cause loss. Carriers, § 523.
- giving right of reshipment to shipper does not give such right to consignee. Carriers, § 1054.
- master may waive objection to by consignee. Carriers, § 1055.
- when fire excepted, negligence not inferred from fire from unknown cause. Carriers, § 662; but see § 665.
- carrier must use reasonable diligence. Carriers, § 663.
- exception as to damage done by rats construed. Carriers, § 665.
- carrier must bring himself clearly within the exception. Carriers, § 681.
- when common law rules as to carriers inapplicable to construction of charter-party, etc. Carriers, § 686.
- of demurrage clause in bill. Carriers, § 818.
- of provision for increase of freight by each bridge. Carriers, § 819.
- as to manner of delivery, “dangers of seas” and “act of God.” Carriers, §§ 734, 735, 853, 855.
- provisions affecting rule that carrier must deliver to proper person. Carriers, § 878.
- for demurrage to commence twenty-four hours after arrival and notice. Carriers, §§ 756, 918.
- for delivery from ship’s deck construed. Carriers, § 1013.
- demurrage “after four lay-days” construed. Carriers, §§ 753, 918.
- “after three days,” explained. Carriers, §§ 755, 915-17.
- giving option to consignee to unload cargo or not. Carriers, § 1111.

CARRIERS, RESPONSIBILITY AS SPECIALLY MODIFIED, *By bill of lading* — continued.

construction of bill; exception of fire applied to connecting carriers. Carriers, §§ 1250, 1286-87.

applied to case of negligence of express company's agents. Carriers, §§ 1495-99.

e. *By notice*; see *supra*, b.

notice alone cannot limit liability. Carriers, §§ 224-226.

requiring shipper to state value or character of goods brought to shipper's notice, valid. Carriers, § 258.

unsigned, on back of receipt *per se* inoperative. Carriers, § 263.

so on back of bill of lading. Carriers, § 264.

baggage company relieved by handing owner of jewelry or merchandise in trunk a notice. Carriers, § 265.

must be by mutual assent. Carriers, §§ 268-266.

steam-tug master cannot limit liability by. Carriers, § 273.

liability may be limited to specific sum by mere notice. Carriers, § 279.

stamp on bill of lading inoperative. Carriers, § 498.

f. *By limitation of time for asserting claim*; ninety days good. Carriers, §§ 258-62.

shorter periods held good. Carriers, § 261.

notice of claim before removing property cannot be required. Carriers, § 275.

contract for, does not restrict owner's right of inspection after removal. Carriers, § 282.

g. *Illegality*, as affecting carriers' contracts, see *Sunday; Fast Day*.

4a. RIGHTS OF SHIPPERS AND CONSIGNEES.

lien on vessel, by owner of cargo for its injury. Carriers, § 84.

attaches on delivery to lighter, on vessel to be laden. Carriers, §§ 91, 92.

contract without delivery does not create; nor signing bill of lading in blank. Carriers, § 97.

description and nature of; belongs exclusively to admiralty. Carriers, § 161.

for safe custody, due transport and right delivery. Carriers, § 428.

every valid contract by master gives. Carriers, § 457.

claims marshaled according to preference, if ship cannot discharge all. Carriers, § 462.

vessel liable on undertaking of bill of lading as to goods received. Carriers, § 529.

none when no delivery on board. Carriers, § 570.

and on cargo, reciprocal. Carriers, §§ 969, 970.

as to *lien of carrier*, see *infra*, 10.

for negligence as to goods on pier not fully delivered. Carriers, § 1024.

and it seems for those fully delivered, as to which carrier is bailee. Carriers, §§ 1024, 1043.

when cargo unlawfully jettisoned. Carriers, § 1093.

shipper may proceed *in rem* for. Carriers, § 1113.

immaterial by whom vessel hired; *lien for breach of contract*. Carriers, § 1189.

exists only by contracts made by master in that capacity. Carriers, § 1191.

ship must be employed as common carrier. Carriers, § 1192.

right against vessel when goods damaged and owners insolvent. Carriers, § 1208.

waiver or loss of, by acceptance of goods at intermediate point. Carriers, §§ 781, 990-92.

by delay of ten months to enforce. Carriers, § 992.

lien on goods, consignees have paramount, for advances; consignor cannot stop in transit. Carriers, § 1112.

consignment vests property in consignee, in general. Carriers, § 463.

consignee may have reasonable time to ascertain condition of cargo before acceptance. Carriers, § 802.

carrier must account for goods sold after disaster. Carriers, § 934.

not obliged to pay freight when voyage lost, nor for goods sold at intermediate point.

See 12, *infra*.

right to notice of arrival, see *infra*, 5, g.

right of inspection, see *infra* 5, l.

right to delivery, see *infra*, 5, d, i, l.

right as holder of bill of lading, see *supra*, 4, d.

rights and privileges as to shipping and lading, see *supra*, 2, a, b.

consignee entitled to deduct commissions, charges and insurance as against *bona fide* holder of bill. Carriers, § 1067.

charterer of vessel not bound to pay freight but only sum agreed on; may contract with another to load vessel. Carriers, § 1068.

carrier must not change vessel. Carriers, § 1163.

carrier cannot dispute title of bailor, but may deliver to true owner, when. Carriers, § 1182.

general average; owner of cargo has lien on ship for unlawful jettison. Carriers, § 1093.

rights against ship-owners; shipper may proceed against, when. Carriers, § 1114.

right of set-off; see *infra*, 6.

4b. LIABILITY OF CARRIER TO PENALTY FOR VIOLATION OF STATUTES.

under act of August 30, 1852. Carriers, § 207.

for penalty for transporting empty barrels with uncanceled stamps. Carriers, § 208.

CARRIERS—continued.

5. DELIVERY BY CARRIER; TERMINATION OF RESPONSIBILITY, ETC.

- as to compensation, see 10, *infra*.
- delivery by lighterman; complete when goods on ship's hoisting tackle. Carriers, § 93.
- master must give consignee due notice of. Carriers, § 552.
- compensation essential to relation of carrier. Carriers, § 14.
- damages and demurrage, see *infra*, 6, b.
- duties of delivery and to pay freight mutual and concurrent. Carriers, §§ 776, 981-983.
- ends peculiar responsibility as carrier, when a bailee; see *infra*, m.
- liability on delivery of resin in New York. Carriers, § 1017.
- a. *Termination of responsibility in general*; insurance without payment does not. Carriers, § 162.
 - by delivery on wharf and such notice to consignee as to afford time to take possession. Carriers, §§ 719, 803-805.
 - usage may vary rule; so of special contract. Carriers, § 803.
 - see *supra*, 8, e, f, g.
 - embargo does not end voyage; latter completed after it ceases. Carriers, § 943.
 - reception and sale by consignee not a waiver of injury, but strong evidence that none existed. Carriers, § 984.
 - orders of secretary of war in 1863 held not to excuse duty to carry. Carriers, § 935.
 - refusal to receive goods does not excuse prior default. Carriers, § 1007.
- b. *What amounts to delivery*; placing on wharf and notifying consignee. Carriers, §§ 803-805, 836.
 - same after consignee declines to designate place of landing. Carriers, § 830.
 - opportunity to inspect and remove goods essential, when. Carriers, § 852.
 - provision that landing on wharf to be a delivery, construed. Carriers, §§ 735, 853, 855.
 - not, to land on wharf, in a storm, when. Carriers, §§ 734, 851-853.
 - validity of tender to consignee. Carriers, §§ 777, 802, 824.
 - storing goods without notice to consignee, not. Carriers, § 1006.
 - a landing on the dock after notice, is; subsequent fire falls on owner. Carriers, § 1009.
 - promiscuous piling without separation, not. Carriers, § 1022.
- c. *Time of delivery*; on public fast day, on wharf, not received by consignee, good. Carriers, §§ 717, 787, 796, 844, 1252.
 - commenced, may be completed on fast day. Carriers, §§ 797, 844.
 - apprehension of storm does not compel to cease unloading; reasonable discretion justified. Carriers, § 809.
 - what hours suitable. Carriers, § 846.
 - carrier liable for delay, caused by negligent loss of marks on package. Carriers, §§ 888, 889.
 - carrier's lien and demurrage for delay of consignee to take away goods, see *infra*, 6, b.
 - consignee must receive within reasonable time; not charged for ordinary delays. Carriers, §§ 749, 903.
 - grain vessels on great lakes must take their turn at elevators. Carriers, §§ 750, 898-900, 904-906.
 - detention at elevator not presumed to inculcate consignee. Carriers, § 906.
 - vessel must take turn, when ample dock room provided. Carriers, § 911.
 - must be within reasonable time. Carriers, § 920.
 - delay not excused by "privilege of reshipping" in bill of lading. Carriers, § 919.
 - except by custom allowing delay at falls of the Ohio. Carriers, §§ 757, 921.
 - when bill silent, consignee bound only to receive in usual manner. Carriers, § 1008.
 - when master cannot on taking turn, when other dock provided. Carriers, § 1033.
- d. *To whom delivery made*; generally to consignee; rule relaxed. Carriers, § 84.
 - railroad cannot discriminate against long established stockyard by requiring delivery to new yard. Carriers, § 87.
 - injunction lies. Carriers, §§ 88, 89.
 - to customs officers, not a valid delivery. Carriers, § 785.
 - bill of lading delivered to shipper, and not that to carrier, controls as to person to whom delivery to be made. Carriers, §§ 739, 859.
 - indorsee entitled to delivery; other delivery wrongful. Carriers, §§ 860, 861.
 - no excuse that indorsee unknown; carrier must make diligent inquiry. Carriers, § 862.
 - delay in presenting bill no excuse for misdelivery. Carriers, § 863.
 - how, when master is consignee. Carriers, § 1105.
 - when carrier knows consignor to be owner, delivery cannot be made to order of consignee at place of shipment. Carriers, §§ 740, 865-88.
 - otherwise of shipper an agent; cases holding any delivery to consignee good, distinguished. Carriers, §§ 867, 868.
 - must be made to proper person at peril of carrier. Carriers, §§ 741, 872.
 - carrier liable for negligent misdelivery though goods not properly marked or entered. Carriers, § 876.
 - and for delivery to wrong person by mistake. Carriers, §§ 877, 1038.

- CARRIERS, DELIVERY BY CARRIER, *To whom delivery made* — continued.**
 otherwise where bill of lading contracts for transfer of risk as each package placed on wharf. Carriers, § 878.
 usage cannot excuse; holder for value of bill entitled to goods. Carriers, § 1037.
 bill of lading unnecessary. Carriers, § 1039.
 creditor of charterer no right as against holder advancing money. Carriers, §§ 1040, 1042.
 voluntary delivery to one without title, or who claims none, wrongful. Carriers, § 1184.
 levying officer the proper person, as against defendant consignee. Carriers, § 1044.
 may be made to true owner, as in bailment; legal proceedings or shipper's fraud unnecessary. Carriers, §§ 743, 880-883, 1182-83.
 must be personal. Carriers, § 998.
 master may act as shipper's agent as to delivery and sale. Carriers, § 1030.
- e. *Place of delivery*;** consignee not required to take delivery at depot or rival warehouse, when he provides side tracks, etc., therefor. Carriers, §§ 34-37.
see Usage, infra, q.
 carrier by water may deliver on wharf; is a carrier only from port to port. Carriers, § 789.
 not bound to deliver at warehouse. Carriers, § 851.
 at quarantine grounds during quarantine season. Carriers, § 800.
 may be at usual or suitable wharf; wharf most convenient to shipper, when. Carriers, §§ 816-17.
 provision for increase of freight by each bridge passed does not justify landing at distant wharf. Carriers, § 819.
 at private wharf, when. Carriers, §§ 724, 823.
 at suitable place, on consignee's refusal to fix place. Carriers, § 725.
 distinction between foreign and coasting trade. Carriers, § 826; *see* § 807.
 uniform usage affects. Carriers, § 827.
suitable wharf, what is; who to determine. Carriers, § 832.
 master must choose one usual and reasonably fit. Carriers, §§ 727, 841.
 must deliver at port contracted for. Carriers, § 1026.
 indorsement on bill by charterer as to consignee's changing place, held inoperative. Carriers, § 1031.
 at elevator, by course of trade; carrier must await turn. Carriers, §§ 731, 848-850.
- f. *Manner of delivery*;** proper method of landing hemp on wharf. Carriers, § 808.
 proper agents for unloading cargo. Carriers, § 810.
 special contract may vary. Carriers, §§ 811, 815.
 carrier held not liable under contract for discharging hemp. Carriers, § 812.
 held liable for part left on wharf and damaged. Carriers, § 818.
 in different parcels, consignee cannot require. Carriers, §§ 725, 828.
 negligence in overloading wharf actionable. Carriers, §§ 737, 837-88.
 must discharge with proper care, especially at wharf chosen against wish of consignee. Carriers, §§ 723, 842.
 temporary suspension of, does not require new notice. Carriers, § 845.
 bill of lading construed as to. Carriers, § 853.
 method of weighing grain in delivery. Carriers, § 856.
taking turn, *see supra, c.*
 if bill silent, should be according to usages of port. Carriers, § 996.
 how delivery made when consignee refuses to pay freight. Carriers, §§ 1026-27.
- g. *Notice of delivery*,** and landing on wharf, completes delivery. Carriers, §§ 803-903.
 temporary stoppage in delivery does not require a new notice. Carriers, §§ 730, 845.
 necessary to be given; carrier cannot land goods without. Carriers, §§ 845, 1005.
 if consignee no known office, must be through postoffice. Carriers, § 998.
 casual knowledge of ship's arrival by consignee will not excuse. Carriers, § 1000.
 not sufficient to moor vessel at consignee's warehouse without notice. Carriers, § 1002.
 burden of proof to show is on carrier. Carriers, § 1003.
 newspaper report of arrivals not sufficient. Carriers, § 1004.
see Usage, infra, q.
 presence of consignee at wharf to receive goods sufficient. Carriers, § 1011.
 reasonable and suitable, facts discussed. Carriers, § 1015.
- h. *How delivery excused*;** by sanitary or prohibitory laws preventing entry of port. Carriers, §§ 718, 799.
 not by improper marking and entry of goods for carriage by shipper. Carriers, § 876.
 delay excused by epidemic among horses. Carriers, §§ 758, 922.
 not by refusal of master to sign bill, when. Carriers, § 1117.
 not by death of master. Carriers, § 1118.
 nor by seizure on process against consignee, as against *bona fide* holder of bill. Carriers, §§ 1123, 1145.
 but by seizure or process against consignor, when; consignee's remedy against officer. Carriers, §§ 1123, 1156-57; *see* §§ 993-95.
 by seizure and condemnation of liquors under state law. Carriers, §§ 1129, 1160.

CARRIERS, DELIVERY BY CARRIER—continued.

- i. *Duty of carrier as to delivery*; master must know revenue and navigation laws of country of delivery. Carriers, §§ 716, 738.
liable for forfeiture caused by failure to comply with revenue laws. Carriers, § 784.
when should consult consignee as to. Carriers, § 850.
must make diligent inquiry for consignee; see *supra*, d.
payment of freight a condition precedent. Carriers, §§ 769, 950, 951.
but cannot detain goods on ship; must land on wharf for inspection. Carriers, § 973.
must separate goods, and not pile promiscuously on wharf. Carriers, § 1022.
- j. *Duty of consignee as to delivery*; on notice of unloading should co-operate with carrier. Carriers, § 847.
under bill of lading, may assume duty of receiving directly from vessel. Carriers, §§ 742, 877-79.
must take delivery within reasonable time; demurrage. Carriers, §§ 890, 891, 903.
see *infra*, b h, as to demurrage for not taking delivery.
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- k. *Rights of carrier as to delivery*; may labor on a fast or public holiday. Carriers, §§ 791, 792.
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- l. *Rights of consignee as to delivery*; entitled to reasonable time to ascertain condition of goods. Carriers, § 802.
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- m. *Bailee after delivery*; after delivery on wharf, carrier a bailee until acceptance by consignee, and must protect goods. Carriers, §§ 804, 806, 829.
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ship liable *in rem* for goods delivered, it seems. Carriers, § 1025.
- n. *Stoppage in transitu*; consignor has no right of, when. Carriers, § 1112.
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- o. *Delivery to other carrier*; see *Connecting Carriers*, post, 7.
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- p. *Alleged deficiency in delivery*; may be shown that variations in weighing and measuring frequent. Carriers, §§ 738, 856-858, 1032.
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- q. *Usage, effect of*; question of good delivery depends on established usage of the particular business. Carriers, § 788.
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CARRIERS, DELIVERY BY CARRIER, *Usage, effect of* — continued.

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by custom a carrier is a bailee after delivery on wharf, liable for negligence. Carriers, § 804.

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r. *Special contract, effect of*; may vary ordinary rule that delivery on wharf, and notice, discharges carrier. Carriers, § 803.

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s. *Negligence in delivery*; in overloading wharf, actionable. Carriers, §§ 727, 837-38.

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6. ACTIONS BY AND AGAINST CARRIERS: PLEADING AND PRACTICE; EVIDENCE; ESTOPPEL.

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for failure to carry; measure of stated; shipper entitled to have carriage by ship designated. Carriers, §§ 1163, 1168, 1169.

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b. Demurrage; clause for in bill of lading construed. Carriers, § 818.

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e. *Remedies under bills of lading*; see *supra*, 4, c.

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f. *Parties*; cashier-indorsee of bill of lading may sue personally for wrongful delivery. Carriers, §§ 864, 1195.

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g. *Pleading*; allegations of maritime tort, negligence, etc., held good. Carriers, § 241, p. 142.

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h. *Recoupment, set-off and counterclaim*; damages for negligent unloading against claim for freight, but no affirmative judgment. Carriers, §§ 780, 839, 1121.

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- i. *Defenses*; delay not, if no loss. Carriers, § 1186.
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- j. *Evidence*; holding out to public determines capacity. Carriers, § 18.
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- k. *Limitation*; carrier may prescribe short time for asserting claim against him. Carriers, §§ 259-62.
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 relation of considered. Carriers, § 1258.
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- a. *Liability to each other*; one compelled to pay loss on other's line may recover. Carriers, §§ 1252, 1291-93.
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- b. *Joint liability*, of connecting carriers; certain arrangement held not to be a partnership. Carriers, § 1261.
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- c. *Liability of receiving or contracting carrier*; what not an undertaking to carry beyond route. Carriers, § 1260.
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e. *Construction of contract of carriage*; surrounding circumstances considered. Carriers, §§ 1248, 1298.

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f. *Evidence as to connecting carriers*; presumed that carrier liable only for his own route, and delivery. Carriers, §§ 1243, 1258-61.

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g. *Rights of connecting carriers*; to recover back freights paid, from consignee when goods found damaged. Carriers, § 1314.

8. CARRIERS OF PASSENGERS.

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are not necessarily carriers of goods; holding out to public the test. Carriers, § 13.

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a. *Who are passenger carriers*; owner of sleeping car not, it seems. Carriers, § 1428.
 railroad contractors running construction trains, *status of*. Carriers, § 1480.

b. *Who are passengers*; one having drover's pass is passenger for hire. Carriers, §§ 1379, 1400.

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c. *Obligation to receive*; all persons *prima facie* to be received. Carriers, §§ 1316-17, 1343-53.

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d. *Passage tickets and fares*; purchase of by objectionable person does not destroy carrier's right to refuse carriage. Carriers, § 1353.

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CARRIERS, CARRIERS OF PASSENGERS — continued.

- e. *Legislation and usage*, as to fares and receiving passengers; custom as to number of passengers received; effect of. Carriers, § 1435.
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- f. *Special contract*; policy of relaxing liability by, considered. Carriers, §§ 1330, 1380-81.
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- g. *Carrier's right to eject passenger*; though objectionable, if well behaved, cannot be put on another vessel. Carriers, § 1431.
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- h. *Connecting passenger carriers*; contract with connecting carrier must be reasonable and *bona fide*. Carriers, § 1350.
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- i. *Liability as baggage carriers*; carrier by water liable for passenger's baggage, without a bill of lading. Carriers, § 1357.
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- j. *Liability for misconduct to passenger*; aggravated delay in allowing removal of baggage. Carriers, § 1358.
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- o. *Remedies; pleading*; when special damages need not be alleged. Carriers, § 1365.
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